QUE

CHITTY'S

ARCHBOLD'S PRACTICE

OF THE

QUEEN'S BENCH DIVISION

OF THE

High Court of Justice.

Companion Volume to Chitty's Archbold's Practice.

By the same Editor.

CHITTY'S FORMS

OF

PRACTICAL PROCEEDINGS

IN THE

QUEEN'S BENCH DIVISION

OF THE

High Court of Justice,

WITH NOTES,

CONTAINING THE STATUTES, RULES, AND CASES RELATING THERETO.

Twelfth Edition.

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ARCHBOLD'S PRACTICE

OF THE

QUEEN'S BENCH DIVISION

OF THE

High Court of Justice,

AND ON APPEAL THEREFROM TO THE COURT OF APPEAL AND HOUSE OF LORDS,

IN CIVIL PROCEEDINGS.

FOURTEENTH EDITION

BY

T. WILLES CHITTY,
Of the Inner Temple, Barrister-at-Law,

ASSISTED BY

J. ST. L. LESLIE,
Of Lincoln's Inn, Barrister-at-Law.

IN TWO VOLUMES.

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TO THE FOURTEENTH EDITION.

In this Edition, which is the first prepared by the present Editor, much of the work, including all those parts which relate to the practice introduced by the Judicature Acts and the Rules of the Supreme Court, has been entirely re-written, and such portions of the former Editions as are retained have been thoroughly revised, so as to adapt them to the present practice.

The arrangement of the work has been altered, and that adopted in the two last Editions of Chitty's Forms has been followed.

The Editor is responsible for the whole of the text. The Tables of Cases, Statutes and Rules, and the Index have been prepared by Mr. R. A. Roberts, of the Inner Temple, and the proof sheets have all been read by him. The references have been verified by Mr. Leslie, and the Editor has received much valuable assistance from him chiefly in the course of the work through the Press. He has also received much valuable information from Mr. Kemp, Mr. John M. Mitchell, S.S.C., and many other friends.

In a work such as the present it is practically impossible to avoid some errors and omissions. The Editor will be

greatly obliged to any gentleman who, on finding any error or omission, will send a note of it to him. It is only by such co-operation that a book of practice can be made to approach perfection.

The Statutes, Rules and Reported Cases down to February, 1885, have been inserted. All the contemporaneous reports have been consulted, and it is believed that no case of any practical value relating to the present practice has been omitted.

Particular attention is requested to the additions and corrections which will be found at p. cxliv, at the end of the Table of Cases.

T. W. C.

1, King's Bench Walk, Temple,
28th February, 1885.

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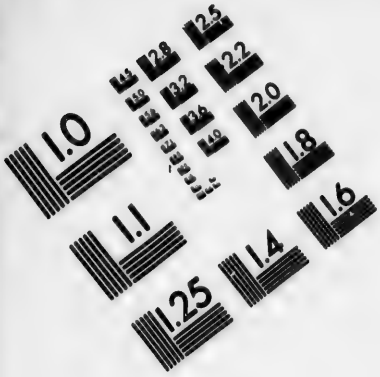

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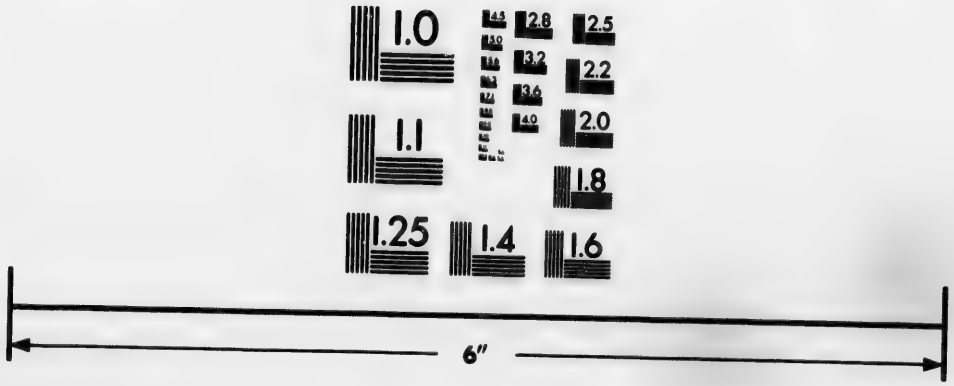

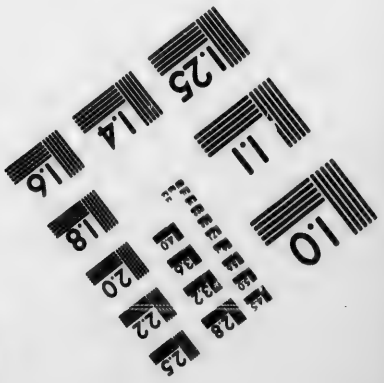

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60——*Note* (*x*), *Whincup* v. *Hughes* is also reported L. R., 6 C. P. 78. *Add*—"*Ferns* v. *Carr*, 33 W. R. 363."

94——*Note* (*t*), To the references to *London Permanent Building Society* v. *Chorley* in C. A., *add*—"13 Q. B. D. 827; 53 L. J., Q. B. 551."

115——*Note* (*u*), *add*—"*Cleather* v. *Twisden* was reversed in C. A., W. N. 1885, 1."

134——*Line* 8, *add*—"But it has since been held that where a bill is in part defective and in part regular, the solicitor may recover on the latter part. *Blake* v. *Hummell*, 51 L. T. 430."

134——*Note* (*x*), *add*—"*In re Ward*, W. N. 1885, 38."

153——*Note* (*i*), *In re Carthew* and *In re Paul* are now reported in C. A., 27 Ch. D. 485.

168——*Note* (*t*), *Jackson* v. *Smith* is now reported 53 L. J., Ch. 972.

168——*Note* (*c*), *Pearson* v. *Knutsford Estates Co.* is now reported in 13 Q. B. D. 666.

169——*Note* (*x*), *Dallow* v. *Garrold* was affirmed in C. A., and is reported 54 L. J., Q. B. 76; 33 W. R. 219; W. N. 1884, 231.

202——*Note* (*q*), *Reg.* v. *Justices of Pirehill* is now reported 13 Q. B. D. 696, and was affirmed in C. A., 14 Q. B. D. 13; 33 W. R. 205.

202——*Note* (*q*), *Add*—"See also *Sayers* v. *Collyer* (C. A.), 54 L. J., Ch. 1; 33 W. R. 91."

223——*Note* (*m*), *Bailey* v. *Bailey* was affirmed in C. A., 13 Q. B. D. 854.

242, *Note* (*g*) } *Add* reference to *Mulckern* v. *Doerks*, 53 L. J., Q. B.
251, *Note* (*d*) } 526.

244——*Line* 12, *add*—"By *Ord. II. r.* 4, 'No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the Court or a Judge.'"

244——*Note* (*m*), *add*—"Sub-rule (e) applies to an action for rent of property in this country. *Agnew* v. *Usher*, 14 Q. B. D. 78; 57 L. T. 576; *S.C.* in C. A., 51 L. T. 752; 33 W. R. 126; W. N. 1884, 231."

244——*Note* (*n*), *add*—"In *The Yorkshire Tannery Co.* v. *Eglington Chemical Co.*, *Pearson*, J., decided that there is no power under sub-rule (*g*) to direct service out of the jurisdiction unless the defendant within the jurisdiction has been served (54 L. J., Ch. 81; 33 W. R. 152; W. N. 1884, 300)."

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255——*Note* (*i*), *add*—"See *Edell* v. *Cave*, 51 L. T. 621; 33 W. R. 208, where the defendant gave an address at which he could not be found, and the appearance was struck out."

320——*Note* (*b*), *Welply* v. *Buhl*, *for*—"4 C. P. D. 80; affirmed Id. 353," *read*—"3 Q. B. D. 80; affirmed Id. 253."

328——*Note* (*n*), *Crick* v. *Hewlett* is now reported 27 Ch. D. 354; 51 L. T. 428.

351——*Lines* 31 *and* 32, *for*—"p. 248," *read*—"p. 348."

351——*Note* (*o*), *Crossland* v. *Routledge* has been overruled by the C. A. in *McIlwraith* v. *Green*, 54 L. J., Q. B. 41, which decides that the plaintiff may accept the money paid into Court and tax his costs under rule 6. *S. C.* in Div. C., 13 Q. B. D. 897.

352——*Note* (*s*), *for*—"p. 242," *read*—"p. 342."

381——*Line* 25, *add*—"Where a plaintiff claims to recover a definite sum made up of a number of items he will be compelled to give particulars; but he will not be compelled to do so where he only claims an account. *Blackie* v. *Osmaston*, C. A., 28 Ch. D. 119; 33 W. R. 158."

396——*Note* (*y*), *add*—"*Errard* v. *Gassier*, 33 W. R. 287; W. N. 1885, 1."

398——*Note* (*g*), *Tomlinson* v. *Land*, *&c. Corp.* is reported 53 L. J., Q. B. 561.

398, *Note* (*s*), *Pooley's Trustee* v. *W[illia]mson* is reported (cor. *Pearson*, J.),
399, *Note* (*g*), 28 Ch. D. 38; 53 L. J., Ch. 182; 51 L. T. 608, and was affirmed in the C. A., 28 Ch. D. 30. From this case it appears that the onus of proving that the plaintiff is insolvent lies on the defendant.

399——*Note* (*g*), *for*—"*Sam Megantic*," *read*—"*Lake Megantic*."

423——*Line* 1 *from bottom*, *add*—"The third party cannot set up a counterclaim against the plaintiff. *Eden* v. *Weardale Coal and Iron Co.*, 33 W. R. 241; 51 L. T. 726."

423——*Note* (*z*), *Callender* v. *Wallingford* is now reported 53 L. J., Q. B. 569.

436——*Note* (*n*), *Griffith* v. *Blake* is also reported 27 Ch. D. 474.

446——*Note* (*s*), *Mulckern* v. *Doerks* is also reported 51 L. T. 429.

519——*Note* (*o*), *add*—"*Foakes* v. *Webb*, 51 L. T. 625."

519——*Line* 7 *from bottom*, *add*—"But when the information cannot be given without disclosing the result of privileged reports, which the party is not bound to produce, it need not be disclosed. *London, Tilbury, &c. Rail. Co.* v. *Kirk*, 51 L. T. 600."

519——*Note* (*y*), *add*—"*London, Tilbury, &c. Rail. Co.* v. *Kirk*, 51 L. T. 600."

523——*Note* (*n*), *add*—"*Bidder* v. *Bridges*, 51 L. T. 818."

524——*Line* 18, *add*—"Under an order for vivâ voce examination in answer to interrogatories, only such answers can be required as would be a sufficient answer to the interrogatories if given on affidavit. *Litchfield* v. *Jones*, 51 L. T. 572."

578——*Line* 12, *add*—"The Court cannot give the defendant leave to give notice of trial before the expiration of the six weeks mentioned in *Ord. XXXVI. r.* 12. *Saunders* v. *Pawley*, 14 Q. B. D. 234; 33 W. R. 277; 51 L. T. 903."

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653——*Line* 33, *add*—"It would appear that if the Judge leaves a question to the jury he has no power to order judgment to be entered contrary to their finding on it. *Perkins* v. *Dangerfield*, C. A., 51 L. T. 535."

684——*Note* (*s*), *Emeny* v. *Sandes* was reversed on appeal (14 Q. B. D. 6; 51 L. T. 641; 33 W. R. 187), but the proposition in the text is not affected.

686——*Line* 3 *and note* (*q*), *add*—"*Field*, J., has in several cases since those referred to in the text held that the mere fact that the plaintiff had reasonable grounds for supposing that he would get judgment under Ord. XIV. r. 1, is not a sufficient reason for allowing costs on the High Court scale under Ord. LXV. r. 12, where less than 50*l.* is recovered in an action of contract. *Harding* v. *Cohen*, cor. *Field*, J., at Chambers, 16th February, 1885, *ex rel. Ed.*"

686——*Line* 6, *add*—"The County Court Scale of Costs will be found in the Appendix at the end of Vol. II., p. 1705."

686——*Note* (*r*), *Saywood* v. *Cross* is now reported 14 Q. B. D. 53; 54 L. J., Q. B. 17; 51 L. T. 601; 33 W. R. 135.

693——*Line* 23, *catchword, for*—"*Review of Taxation*" *read*—"*Taxation of Costs.*"

712——*Line* 17, *dele the words*—"An agreement between the parties," *and add*—"An agreement between the solicitors that the costs of shorthand notes shall be costs in the cause does not entitle a party to them without a special order. *Ashworth* v. *Outram*, C. A., 9 Ch. D. 483, at p. 486."

761——*Note* (*a*)—*Perkins* v. *Dangerfield* is now reported 51 L. T. 535.

856——*Line* 12, *for*—"whom," *read*—"which."

859——*Note* (*k*), *for*—"*Osenter*," *read*—"*Osenton.*"

894——*Note* (*c*), *for*—"33 Geo. 3, c. 28," *read*—"32 Geo. 2, c. 28."

948——*Note* (*q*), *add*—"*Treherne* v. *Dale*, C. A., 27 Ch. D. 66; 51 L. T. 553; 33 W. R. 96."

949——*Line* 19, *add*—"As to what is a sufficient statement of the grounds, see *Treherne* v. *Dale*, C. A., 27 Ch. D. 66; 51 L. T. 553; 33 W. R. 96."

981——*Line* 27, *add*—"If the appellant withdraws, and the respondent elects to continue his appeal, his cross notice will be treated as a notice of appeal, and the appellant may give a cross-notice that he intends to appeal. *The Beeswing*, 10 P. D. 18; 51 L. T. 883; 33 W. R. 319."

983——*Note* (*e*), *add*—"The case of *Rourke* v. *White Moss Colliery Co.* was commented on and explained in *Farrer* v. *Lacy*, 33 W. R. 265, from which it appears that the Court will require an appellant to give security, notwithstanding that a point is raised that was not gone into in the Court below."

984——*Line* 17, *add*—"In the absence of special circumstances, the Court will not retain in Court, pending an appeal, a fund which has been ordered to be paid out. *Bradford* v. *Young*, 28 Ch. D. 18; 51 L. T. 55[illegible]; 33 W. R. 159."

1414——*Line* 14 *at end, for*—"as on," *read*—"thus on."

PART I.

THE COURTS AND THEIR OFFICERS, ETC.

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CHAPTER I.

THE SUPREME COURT OF JUDICATURE.

THE Supreme Court of Judicature Acts(*a*), or, as they are commonly called, the Judicature Acts, have united and consolidated into one Supreme Court of Judicature in England the previously existing Superior Courts. This union and consolidation is effected by the 3rd section of the *Judicature Act*, 1873, which enacts that, "from and after the time appointed for the commencement of this Act (*b*), the several Courts hereinafter mentioned (that is to say), the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy,

(*a*) These Acts are the "Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66); the "S. C. of J. Act (Commencement) Act, 1874" (37 & 38 Vict. c. 83); the "S. C. of J. Act, 1875" (38 & 39 Vict. c. 77); the "Appellate Jurisdiction Act, 1876" (39 & 40 Vict. c. 59); the "S. C. of J. Act, 1877" (40 Vict. c. 9, Judges); the "S. C. of J. (Officers) Act, 1879" (42 & 43 Vict. c. 78); the "S. C. of J. Act, 1881" (44 & 45 Vict. c. 68); the "S. C. of J. (Funds) Act, 1883" (46 & 47 Vict. c. 29); the "S. C. of J. Act, 1884" (47 & 48 Vict. c. 61). See also "The Civil Proc. Acts Repeal Act, 1879" (42 & 43 Vict. c. 59); "The Stat. Law Revision and Civil Procedure Act, 1881" (44 & 45 Vict. c. 59); "The Stat. Law Revision Act, 1883" (46 & 47 Vict. c. 39), and "The Stat. Law Revision and Civil Proc. Act, 1883" (46 & 47 Vict. c. 49).

(*b*) The Act was originally (sect. 2) to have come into operation on the 2nd November, 1874, but this was postponed by the Act of 1874 (sect. 2) until the 1st November, 1875, when the Acts of 1873 and 1875 both came into operation and "commenced."

PART I.

shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England." So far as this section affected the London Court of Bankruptcy, it was repealed by the *Judicature Act*, 1875 (*s.* 33, and *sched.*) By the Bankruptcy Act, 1883 (46 & 47 *V. c.* 52), *s.* 93, the London Court of Bankruptcy is united to and forms part of the Supreme Court of Judicature, and the jurisdiction of the London Bankruptcy Court is transferred to the High Court.

Bankruptcy Court.

Division of the Supreme Court into High Court and Court of Appeal.

The Supreme Court so constituted is divided into two divisions, called respectively the "High Court of Justice" and the "Court of Appeal." This division is provided for by section 4 of the *Judicature Act*, 1873, which enacts that "the said Supreme Court shall consist of two permanent divisions, one of which, under the name of 'Her Majesty's High Court of Justice,' shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as is hereinafter mentioned, and the other of which, under the name of 'Her Majesty's Court of Appeal,' shall have and exercise appellate jurisdiction, with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal."

The object of the present work.

The High Court, as is more fully pointed out in the next chapter, is again subdivided, and the object of the present work is to treat of the practice and procedure in civil actions, and analogous proceedings in one of these subdivisions, called the Queen's Bench Division, and of appeals from that division to the Court of Appeal and House of Lords.

History.

It does not fall within the province of the present work to trace the history of the Courts of Judicature in this country, and, indeed, the Courts here to be treated of are so entirely the creatures of the recent statutes that there would be but little practical utility, so far as the practice and procedure is concerned, in attempting to do so.

Court of Appeal.

The High Court of Justice and its subdivision will be found treated of in the next chapter. The Court of Appeal is treated of in Chapter LXXXV.

House of Lords.

The practice of the House of Lords on appeals from the Court of Appeal will be found treated of in Chapter LXXXVI.

CHAPTER II.

THE HIGH COURT OF JUSTICE—ITS CONSTITUTION, JURISDICTION, DIVISIONS, &c.

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Constitution of High Court.

1. *Constitution.*

The Constitution of the High Court of Justice.]—The 5th section of the *Judicature Act*, 1873 (*a*), provides for the constitution of her Majesty's High Court of Justice.

The Court so constituted is commonly called the "High Court of Justice." This title is adopted in all the written proceedings of the Court. It is a superior Court of record (*b*).

The judges of the Court, and their functions, powers, &c., are treated of in the next chapter.

Jurisdiction of the High Court.

2. *Jurisdiction.*

The Jurisdiction of the High Court.]—The High Court, as we have seen (*ante*, p. 2), by sect. 4 of the *Judicature Act*, 1873, has and may exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as hereinafter mentioned. (*See post*, *Ch. CXXIX.*)

By the *Judicature Act*, 1873, *s.* 16, "The High Court of Justice shall be a superior Court of record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following; (that is to say,)

(1.) The High Court of Chancery, as a common law Court as well as a Court of equity (*c*), including the jurisdiction of the Master of the Rolls, as a judge or Master of the Court

(*a*) The 5th section is as follows:—"Her Majesty's High Court of Justice shall be constituted as follows:—The first judges thereof shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several puisne justices of the Courts of Queen's Bench and Common Pleas respectively, the several junior barons of the Court of Exchequer, and the judge of the High Court of Admiralty, except such, if any, of the aforesaid judges as shall be appointed ordinary judges of the Court of Appeal."

(*b*) Jud. Act, 1873, s. 16, supra.

(*c*) See *In re Myer's Patent*, W. N. 1882, p. 53.

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of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court;
(2.) The Court of Queen's Bench;
(3.) The Court of Common Pleas at Westminster;
(4.) The Court of Exchequer, as a Court of revenue as well as a common law Court;
(5.) The High Court of Admiralty;
(6.) The Court of Probate;
(7.) The Court for Divorce and Matrimonial Causes;
(8.) The London Court of Bankruptcy (*d*);
(9.) The Court of Common Pleas at Lancaster;
(10.) The Court of Pleas at Durham;
(11.) The Courts created by commissions of assize, of oyer and terminer, and of gaol delivery, or any of such commissions:

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said Courts, respectively, sitting in Court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law or custom, and all powers given to any such Court, or to any such judges or judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred."

This section, so far as it affected the London Court of Bankruptcy, was repealed by the *Judicature Act*, 1875 (*s.* 33 and *sched.*), but that Court is consolidated with the Supreme Court of Judicature, and its jurisdiction is transferred to the High Court of Justice by the *Bankruptcy Act*, 1883. The Court of Bankruptcy has still jurisdiction to restrain proceedings in the High Court of Justice (*e*).

Extent of jurisdiction.

The jurisdiction of the High Court extends throughout all England, the Principality of Wales, and the town of Berwick-upon-Tweed (*f*). It does not extend to Scotland or Ireland, or to any parts beyond the seas. Although the process of the Court cannot, except in certain cases hereinafter mentioned (*g*), be served or executed out of the jurisdiction, still any cause of action, except it appears causes of action affecting the title to real estates (*h*) arising out of the jurisdiction may be sued on in it, provided that service of the writ can be effected (*i*).

(*d*) Repealed by Jud. Act, 1875, s. 33. See *Nicholas* v. *Dracachis*, 45 L. J., Prob. 45. The bankruptcy jurisdiction is the subject of the Bank. Act, 1883, and is regulated by that Act.

(*e*) *Ex p. Ditton, Re Woods*, 1 Ch. D. 557; 45 L. J., B. 87 (C. A.).

(*f*) 11 Geo. 4 & 1 Will. 4, c. 70, ss. 13, 14; 1 & 2 Jac. 1, c. 28: *Mayor of Berwick* v. *Shanks*, 3 Bing. 459; 11 Moore, 372; 5 & 6 Will. 4, c. 76, s. 109.

(*g*) See post, Chapter XIII., "Service out of the Jurisdiction."

(*h*) *In re Hawthorne, Graham* v. *Massey*, 52 L. J., Ch. 750; 48 L. T. 701; 32 W. R. 147; cp. the last three cases, infra, n. (*i*).

(*i*) *Mostyn* v. *Fabrigas*, Cowp. 161; 1 Sm. L. Cas., 8th ed. 652: *Phillips* v. *Eyre*, L. R., 4 Q. B. 225; affirmed, 6 Id. 1: *Whitaker* v. *Forbes* (C. A.), 1 C. P. D. 51; 45 L. J., C. P. 140 (decided before the abolition of local venues by Ord. XXXVI. r. 1): *Buenos Ayres, &c. Rail. Co.* v. *Northern Rail. Co. of Buenos Ayres*, 2 Q. B. D. 210; 40 L. J., Q. B. 224: *Ewing* v. *Orr-Ewing*, 9 App. Cas. 34; 53 L. J., Ch. 435.

Jurisdiction not vested in High Court.

By the *Judicature Act*, 1873, *s.* 17, "There shall not be transferred to, or vested in, the said High Court of Justice by virtue of this Act:—

1. Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy.
2. Any jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster.
3. Any jurisdiction usually vested in the Lord Chancellor or in the Lords Justices of Appeal (*i*) in Chancery, or either of them, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind.
4. Any jurisdiction vested in the Lord Chancellor in relation to grants of letters patent, or the issue of commissions, or other writings, to be passed under the Great Seal of the United Kingdom.
5. Any jurisdiction exercised by the Lord Chancellor in right of, or on behalf of, her Majesty, as visitor of any college, or of any charitable or other foundation.
6. Any jurisdiction of the Master of the Rolls in relation to records in London, or elsewhere in England."

Jurisdiction—how exercised.

With regard to the exercise of the jurisdiction, the *Judicature Act*, 1873, *s.* 23, provides that "The jurisdiction by this Act transferred to the said High Court of Justice, and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts."

Special provisions are contained in sects. 24 and 25 of the *Judicature Act*, 1873, with regard to the administration of justice by the Court. The former section provides that law and equity are to be concurrently administered and effect given to equitable claims and defences. And it enacts (sub-s. 7) that "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided" (*j*).

(*i*) As to this jurisdiction, see Jud. Act, 1875, s. 7. As to the appellate jurisdiction in lunacy, see Jud. Act, 1873, s. 18, sub-s. 5.

(*j*) See per Jessel, M. R., *Salt* v. *Cooper*, 16 Ch. D. at p. 550; 50 L. J., Ch. 529; per Kelly, C. B., *Manchester, S. & L. Rail. Co.* v. *Brooks*, 2 Ex. D. at p. 246: *Hedley* v. *Bates*, 13 Ch. D. 498: *Re Gandes Freres*, 41 L. T. 503.

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Sect. 25 amends and declares the law on certain points, and enacts (sub-s. 11) that "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

It seems now to be settled that this sub-section does not apply to matters of mere practice (*k*). In any case for which the rules make no provision the former practice remains in force, so far as it is not inconsistent with the Judicature Acts and the new Rules (*l*); and where there was any difference between the former practice of the Courts of common law and equity respectively, that practice will be now adopted which is the more convenient (*m*). As regards discovery and inspection, so far as regards the rights of obtaining either and the extent of such rights, the rules of the Courts of equity prevail under this sub-section (*n*), but the practice of those Courts is no longer binding, and it seems that the Rules of the Supreme Court are alone to be considered as governing the present practice (*o*).

Abolition of jurisdiction of former Courts.

The jurisdiction of the former Courts is abolished by sect. 22 of the *Judicature Act*, 1873. That section provides for the continuance and conclusion of proceedings pending at the time when the Judicature Acts came into force, but it is not considered necessary at this distance of time to discuss this.

Jurisdiction of the former superior Courts.

In view of the transfer of jurisdiction effected by the above enactments the following observations with respect to the jurisdiction of the former superior Courts may be useful.

Court of Chancery.

The High Court of Chancery had both a common law and equitable jurisdiction. It is impossible in this place to give more than a very general outline of the jurisdiction of this Court. It had jurisdiction in the causes and matters assigned to the Chancery Division of the High Court of Justice by the 34th section of the *Judicature Act*, 1873, noticed *post*, p. 9, and in other matters. The jurisdiction exercised by the Court of Chancery might be considered in some cases as assistant to, in some concurrent with, and in others exclusive of, the jurisdiction of Courts of common law. It exercised jurisdiction in most cases of fraud, accident, mistake, account, partition, dower, and in compelling specific performance of agreements. It protected and took care of infants, and claimed an exclusive jurisdiction in most matters of trust and confidence, and wherever upon the principles of universal justice the interference of a Court of Judicature was necessary to prevent a wrong and the positive law was silent. The Lord Chancellor and Lords Justices of Appeal in Chancery had also certain jurisdiction in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind.

Queen's Bench, Com-

There were three superior Courts of common law, the Queen's

(*k*) See per Lindley, J., *Mackley* v. *Chillingworth*, 2 C. P. D. at p. 280: *La Grange* v. *McAndrew*, 4 Q. B. D. 210, per Cockburn, C. J.; per Lord Coleridge, C. J., *Schroder* v. *Clough*, 35 L. T. 850. But see per Lord Coleridge, *Parsons* v. *Tinling*, 35 L. T. 851.

(*l*) Jud. Act, 1875, s. 21; Ord. LXXII. r. 2; and see Ord. I. r. 2.

(*m*) See the cases cited post.

(*n*) *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644 (C. A.): *Allhusen* v. *Labouchere*, 3 Q. B. D. 654 (C. A.): *Bolckow* v. *Fisher*, 10 Q. B. D. 161 (C. A.).

(*o*) See *Parker* v. *Wells*, 18 Ch. D. 477 (C. A.): and *Dalrymple* v. *Leslie*, 8 Q. B. D. 7. See fully post, "Discovery."

Bench, the Common Pleas, and the Exchequer of Pleas. They had concurrent jurisdiction in all personal actions and ejectment, and had a superintendency over all inferior Courts by prohibition, if they exceeded their jurisdiction. A writ of *habeas corpus* might be moved for in either of the superior Courts, and in this way the validity of the judgment of an inferior Court might be brought in question. Their jurisdiction extended throughout all England, the Principality of Wales, and the town of Berwick-upon-Tweed (*p*). It did not extend to Scotland or Ireland, or to any parts beyond the seas. But although the process of the Courts, except in certain cases (*q*), could not be executed or have any force out of their jurisdiction, still a cause of action, if it were of a transitory nature, might be sued upon in them, notwithstanding it arose abroad (*r*).

mon Pleas, and Exchequer.

The Court of Queen's Bench was the supreme Court of Common Law in the kingdom, consisting of a chief justice and puisne justices, who were by their office the sovereign conservators of the peace, and supreme coroners of the land. This Court had exclusive jurisdiction in proceedings upon prerogative writs of *mandamus* and *quo warranto*. It had also a peculiar jurisdiction in all criminal proceedings. In fact, it was said to be the principal court of criminal jurisdiction known to the laws of England; and the judgments of inferior Courts of record (with certain exceptions), where the proceedings were according to the course established by the common law, might be reviewed by this Court by writ of error; the judgments of inferior Courts of record, where the proceedings were summary or different from the course of the common law, might be reviewed by the same Court by writ of *certiorari* (*s*).

Queen's Bench.

The Court of Common Pleas had, at the time of the passing of the *Com. Law Proc. Act*, 1860, exclusive jurisdiction in the writs of right of dower, dower *unde nihil habet* and *quare impedit* (*t*). By the 26th section of that Act, these writs were abolished, and actions to be commenced by writ of summons in the Court of Common Pleas were substituted in lieu thereof. Appeals lay to this Court against the decision of a barrister appointed to revise the list of persons entitled to vote in the election of members of Parliament. It also exercised jurisdiction in parliamentary and municipal election petitions. (31 & 32 *V. c.* 125 (*u*); 35 & 36 *V. c.* 60.)

Common Pleas.

The Court of Exchequer had exclusive jurisdiction in all matters which concerned the King's profit or revenue, as of debts or duties

Exchequer.

(*p*) See 11 G. 4 & 1 W. 4, c. 70, ss. 13, 14; 1 & 2 J. 1, c. 28: *Mayor of Berwick* v. *Shanks*, 11 Moore, 372; 3 Bing. 459; 5 & 6 W. 4, c. 76, s. 109.

(*q*) See as to writs of summons, C. L. P. Act, 1852, ss. 18, 19; and as to subpœnas, 17 & 18 V. c. 34.

(*r*) See *Mostyn* v. *Fabrigas*, Cowp. 161: *Barker* v. *Dormer*, 1 Show. 187: *Doulson* v. *Matthews*, 4 T. R. 503: *Whitaker* v. *Forbes*, 1 C. P. D. 51; 45 L. J., C. P. 140.

(*s*) As to reviewing the judgments of inferior Courts not of record by writ of false judgment, see the 13th ed. of this work. See *Overton* v. *Swettenham*, 3 Bing. N. C. 786: *Strother* v. *Hutchinson*, 4 Bing. N. C. 83. As to appeals from County Courts, see post, Vol. 2, Ch. CXXX.

(*t*) Other real and mixed actions (except ejectment) were abolished by 3 & 4 W. 4, c. 27, s. 36.

(*u*) By s. 11 of this Act, it is enacted that the trial of election petitions shall be conducted before a puisne judge of one of her Majesty's superior Courts of Common Law at Westminster or Dublin, according as the same shall have been presented to the Court at Westminster or Dublin.

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to the King, or of matters which concerned the lands, rents, franchises, hereditaments, goods and chattels of the King, unless in cases where the Legislature had otherwise provided, as where they had made the matter determinable before the commissioners of excise or justices of the peace, or where the matter involved an offence punishable by indictment. If an action were brought in either of the other courts, it was good ground for removing it into the Exchequer that any matter properly cognizable on the revenue side of that Court was drawn into question (*x*); and it seems that the Court would make an order for the removal of such a cause at any stage of the proceedings (*y*). Before 5 *V. c.* 5, the Court of Exchequer had, on the plea side of it, jurisdiction as a Court of equity; but this jurisdiction was abolished by that Act, and transferred to the Court of Chancery. It seems, however, that, notwithstanding that Act, the equity jurisdiction of the Court as a Court of revenue still remained (*z*). The procedure and practice in Crown suits in the Court of Exchequer were regulated by "The Crown Suits, &c. Act, 1865," 28 & 29 *V. c.* 104, and the rules made thereunder (*a*).

The High Court of Admiralty.

The High Court of Admiralty had jurisdiction to try all maritime causes, that is to say, causes in respect of injuries committed on the high seas, and generally, except where otherwise provided by statute, all admiralty causes must have arisen wholly upon the sea and not within the precincts of any county. 13 *R.* 2, *c.* 5; 15 *R.* 2, *c.* 3 (*b*). This Court had jurisdiction in certain matters respecting ships, in salvage cases, seamen's wages, &c. There were several statutes affecting the jurisdiction and practice of this Court, and in particular 3 & 4 *Vict. c.* 65, and the 24 & 25 *Vict. c.* 10, which extended the jurisdiction and improved the practice, and made it a Court of Record. This latter statute gave the Court jurisdiction over any claim for damages done by any ship, and in certain matters respecting ships (*c*), and their cargoes, and mortgages of ships in cases of seamen's wages, ships' disbursements and necessaries supplied for ships (*c*), and extended the Court's jurisdiction in salvage and other cases. The jurisdiction conferred by this Act might be exercised either by proceedings *in rem* or *in personam* (*d*). The method of proceeding *in rem* was peculiar to this Court, and generally it was in order to avail themselves of the advantages thus afforded that suitors resorted to it.

Her Majesty's Court of Probate.

By 20 & 21 *V. c.* 77, amended by subsequent statutes, her Majesty's Court of Probate was established. This Court had jurisdiction and authority in relation to the granting or revoking pro-

(*x*) *Cawthorne* v. *Campbell*, 1 Anst. 205, n.: *Siddon* v. *East*, 1 C. & J. 12: *Adams* v. *Freemantle*, 17 L. J., Ex. 312; 2 Ex. 453: *Att.-Gen.* v. *Hallett*, 15 M. & W. 97; 3 D. & L. 685.

(*y*) *Att.-Gen.* v. *Kingston*, 8 M. & W. 163; 1 Dowl. N. S. 358.

(*z*) *Att.-Gen.* v. *Halling*, 15 M. & W. 687. Sed vide *Att.-Gen.* v. *Corporation of London*, 8 Beav. 270; 1 H. L. 440.

(*a*) See the rules, L. R., 1 Ex. 389; 35 L. J., Ex.

(*b*) As to jurisdiction on claims of salvage and wreck, see 3 & 4 V. c. 65; 9 & 10 V. c. 99; 17 & 18 V. c. 104, ss. 460, 464, 468, 476, 492—498. As to prize of war, see Chit. Gen. Practice, 538 *a.*; 1 Doug. 594. As to booty of war, see *The Banda and Kirwee Booty*, L. R., 1 Ad. & Ecc. 109—269.

(*c*) See also 3 & 4 V. c. 65.

(*d*) Williams & Bruce's Admiralty Practice.

bates of wills and letters of administration of the effects of deceased persons, &c. CHAP. II.

"The Court for Divorce and Matrimonial Causes" was established by the 20 & 21 *V. c.* 85, which has been amended by several subsequent Acts of Parliament. This Court had jurisdiction in all causes, suits and matters matrimonial, except in respect of marriage licences, and had power to decree a dissolution of marriage, a judicial separation; to declare a marriage to be null and void; and to order a restitution of conjugal rights, &c. By the 21 & 22 *V. c.* 93, persons might apply to this Court for declarations of legitimacy, for declarations of the validity of certain marriages, and for declarations that they were natural-born subjects of the realm. Court for Divorce and Matrimonial Causes.

3. *Divisions.*

The High Court of Justice is divided into three divisions (*e*), called respectively, the Queen's Bench, the Chancery, and the Probate, Divorce and Admiralty Divisions (*f*). Divisions of the High Court.

There were originally five divisions, but two of them, viz., the Common Pleas and Exchequer, were amalgamated with the Queen's Bench Division by Order in Council dated the 16th December, 1880.

Sect. 31 of the *Judicature Act*, 1873, provides for the judges of whom each division is to consist, and for the names of the divisions. It also gives power to her Majesty, under her royal sign manual, to appoint judges to fill up any vacancies and to transfer judges from one division to another.

Sect. 32 gives her Majesty in Council power to reduce or increase the number of divisions, and to abolish certain offices connected with them. Under this provision the order abolishing the Common Pleas and Exchequer Divisions, and the Chief Justice of the former and Chief Baron of the latter division above referred to, was made.

4. *Distribution of Business.*

Distribution of Business amongst the Divisions of the High Court.]—The 33rd and 34th sections of the *Judicature Act*, 1873, provide for the distribution of business amongst the several divisions of the High Court. By sect. 33 it is enacted that— Distribution of business.

"All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several divisions and judges of the said High Court, in such manner as may from time to time be determined by any rules of Court or orders of transfer to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said divisions respectively, in the manner hereinafter provided. Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the division, or with the name of the judge, to which or to whom the same is assigned."

By the *Judicature Act*, 1873, *s.* 34, it is provided that "There

(*e*) Jud. Act, 1873, s. 31. The High Court as such never sits. See per Jessel, M. R., *In re People's Garden Co.*, 1 Ch. D. at p. 45; 45 L. J., P. 129.

(*f*) Jud. Act, 1873, s. 31.

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shall be assigned (subject as aforesaid) to the Chancery Division of the said Court:

(1.) All causes and matters pending in the Court of Chancery at the commencement of this Act:

Chancery Division.

(2.) All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from County Courts:

Statutory.

(3.) All causes and matters for any of the following purposes:

Administration. The administration of the estates of deceased persons;

Partnership. The dissolution of partnerships or the taking of partnership or other accounts;

Mortgages. The redemption or foreclosure of mortgages;

Charges. The raising of portions, or other charges on land;

Sale. The sale and distribution of the proceeds of property subject to any lien or charge;

Trusts. The execution of trusts, charitable or private;

Rectification, &c. of documents. The rectification, or setting aside, or cancellation of deeds or other written instruments;

Specific performance. The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;

Partition. The partition or sale of real estates;

Infants. The wardship of infants and the care of infants' estates.

Queen's Bench Division. There shall be assigned (subject as aforesaid) to the Queen's Bench Division of the said Court:

(1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act:

(2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction, if this Act had not passed.

Common Pleas Division (*h*). There shall be assigned (subject as aforesaid) to the Common Pleas Division of the said Court (*h*):

(1.) All causes and matters pending in the Court of Common Pleas at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, respectively, at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas at Westminster, if this Act had not passed.

Exchequer Division (*h*). There shall be assigned (subject as aforesaid) to the Exchequer Division of the said Court (*h*):

(1.) All causes and matters pending in the Court of Exchequer at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as

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(*h*) By Order in Council, dated 16th Dec., 1880, and referred to post, p. 11, these Divisions are abolished. The order provides for the transfer to the Queen's Bench Division of proceedings pending in the abolished Divisions.

a Court of revenue or as a common law Court, if this Act had not passed:

[*Bankruptcy business.*—Repealed by *Judicature Act*, 1875, *s.* 33 (*i*).]

Probate, &c. Division.

There shall be assigned (subject as aforesaid) to the Probate, Divorce and Admiralty Division of the said High Court:

(1.) All causes and matters pending in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if this Act had not passed."

As to the transfer of actions from one division to another, and as to the power of one division to retain business, though not properly belonging to it, *see post*, *Ch. XXXVII.*

Transfer of powers, &c. of Common Pleas and Exchequer Divisions to Queen's Bench Division.

The Order in Council, dated the 16th December, 1880, by which the Common Pleas and Exchequer Divisions are amalgamated with the Queen's Bench Division, provides as follows: viz.—

"That all causes, matters and other proceedings, which by or under the Supreme Court of Judicature Act, 1873, or any Act amending the same, or any rule or order made pursuant thereto, have been or are assigned to the Queen's Bench Division, the Common Pleas Division and the Exchequer Division respectively of her Majesty's High Court of Justice, be, from and after the time when this order, pursuant to the said Supreme Court of Judicature Act, 1873, shall take effect, assigned to the Queen's Bench Division, to be formed by such consolidation and union as aforesaid.

"That all proceedings which have heretofore, by any law or custom other than such Acts of Parliament, rules and orders as aforesaid, been taken or had respectively in the Queen's Bench Division, the Common Pleas Division and the Exchequer Division of the said High Court of Justice, be, from and after the time when the order shall take effect, taken and had in the Queen's Bench Division of the said High Court of Justice, to be so formed by such consolidation and union as aforesaid.

"That all powers and authorities which, by any law or custom have heretofore been exercised by the chief justice of the Common Pleas and the chief baron of the Exchequer respectively, shall, from and after the time when this order shall take effect, be capable of being exercised by the Lord Chief Justice of England, unless such exercise thereof shall be contrary or repugnant to any express provision in any Act of Parliament contained" (*j*).

Actions to be assigned by plaintiff to

Actions to be assigned by Plaintiffs to particular Division.]—By the *Judicature Act*, 1875, *s.* 11 (*k*), subject to the rules of Court and

(*i*) See the Bank. Act, 1883.

(*j*) See Jud. Act, 1881, s. 25, post, p. 13, n. (*c*).

(*k*) This section enacts that, "Subject to any rules of Court and to the provisions of the principal Act and this Act and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the Divisions of the said High Court as he may think fit, by marking the document by which the same is commenced with the name of such Division, and giving notice thereof to the proper officer of the Court: Provided that—

(1.) All interlocutory and other steps and proceedings in or before the said High Court in any cause or matter subsequent to the com-

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particular Division.

Judicature Acts, and to the power of transfer, every person by whom any cause or matter is commenced in the High Court of Justice, must assign the same to such one of the said Divisions as he may think fit, by marking the document by which the same is commenced with the name of such Division, and giving notice thereof to the proper officer of the Court. Notice of an action being assigned to a particular Division is sufficiently given by leaving with the officer a copy of the writ of summons (*R. of S. C., Ord. V. r. 9*); but all steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, must be taken (subject to the rules of Court and to the power of transfer) in the Division to which such cause or matter is for the time being attached. If a plaintiff or petitioner assign his cause or matter to a Division to which the same ought not to be assigned, the Court, or any judge of such Division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred to the Division to which the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced. All steps and proceedings taken in any such cause or matter, and all orders made therein, before any such transfer are valid.

As to the transfer of actions from one Division to another, *see post, Ch. XXXVII.*

By a notice issued out of the Chancery Registrar's Chambers, dated the 11th July, 1882, a solicitor entering for trial or setting down on motion for judgment any action commenced in the Chancery Division is required to specify on the proceedings what is the cause of action; and all actions not falling within the case specifically assigned to the Chancery Division by sect. 34, *supra*, will be transferred to the Queen's Bench Division. (See "Law Journal," 31st March, 1883, p. 177.)

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mencement thereof, shall be taken (subject to any rules of Court and to the power of transfer) in the Division of the said High Court to which such cause or matter is for the time being attached; [See *Re Lomax's Arbitration*, 42 L. T. 391] and,

(2.) If any plaintiff or petitioner shall at any time assign his cause or matter to any Division of the said High Court to which, according to the rules of Court or the provisions of the principal Act or this Act, the same ought not to be assigned, the Court, or any judge of such Division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred to the Division of the said Court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner or by any other party in any such cause or matter, and all orders made therein by the Court or any judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned; and,

(3.) Subject to rules of Court, a person commencing any cause or matter shall not assign the same to the Probate, Divorce, and Admiralty Division unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if this Act had not passed."

CHAPTER III.

THE JUDGES.

Judges, number of.

Number of Judges.]—The *Judicature Act* 1873, limited the number of puisne judges to twelve, and enacted that no new appointment should be made until the permanent number of judges of the High Court should have been reduced to that number (*s.* 5). But this provision was repealed by the Act of 1875, by which the number was left as formerly. The Supreme Court of Judicature Act, 1877 (40 *V. c.* 9), provides for the appointment of an additional judge, and regulates his position. The Supreme Court of Judicature Act, 1881 (44 & 45 *V. c.* 68), provides (sect. 5) for the appointment of another additional judge to fill the place of the Master of the Rolls, who by that Act is made a judge of the Court of Appeal only (sect. 2).

The Lord Chancellor.

The Lord Chancellor.]—The office and position of the Lord Chancellor are unaffected by the Judicature Act (*a*). He is President of the Court of Appeal and of the High Court of Justice (*b*). He is not to be deemed to be a permanent judge of the High Court (*c*), and the provisions of the 5th section of the *Judicature Act*, 1873 (*ante*, p. 3, n. (*a*)), relating to the appointment and style of the judges of the said High Court, do not apply to him (*c*).

Lord Chief Justice.

Lord Chief Justice of England.]—The Lord Chief Justice of England is President of the High Court of Justice in the absence of the Lord Chancellor (*d*). All the powers formerly vested in the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer are now vested in the Lord Chief Justice of England (*e*).

Justices of the High Court.

Justices of the High Court.]—The judges of the High Court other than the Lord Chancellor, the Lord Chief Justice, and the present president of the Probate, Divorce and Admiralty Division, are

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(*a*) Jud. Act, 1873, s. 94.
(*b*) Id. s. 5; Jud. Act, 1875, s. 6.
(*c*) Jud. Act, 1875, s. 3, *ad fin.*
(*d*) Jud. Act, 1873, s. 5.
(*e*) By the Jud. Act, 1881 (44 & 45 Vict. c. 68), s. 25, "Where by any statute any power is given to or any act is required or authorized to be done by the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer, or either of them, either solely or jointly with the Lord Chief Justice of the Queen's Bench or the Lord Chief Justice of England, and either with or without the Lord Chancellor or any judge, officer, or person, such power may henceforth be exercised and such act done by the Lord Chief Justice of England; and where by any statute the concurrence of the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer, or either of them, is required for the exercise of any power, or the performance of any act, it shall be sufficient henceforth that the Lord Chief Justice of England shall concur therein."

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styled "Justices of the High Court" (*f*). The Judicature Acts contain provisions as to their qualifications (*g*), appointment (*h*), the oaths to be taken by them on appointment (*i*), their tenure of office (*k*), precedence (*l*), salaries (*m*), pensions (*n*), and patronage (*o*). Also with regard to the appointment of judges to fill up vacancies (*p*), the transfer of judges from one division to another (*q*), and saving the rights, privileges and immunities of existing judges (*r*). It is not deemed necessary to do more than refer to these in this work.

Power, &c.

All the judges, except where the contrary is expressly provided, have equal power, authority and jurisdiction. One judge may in certain cases sit for another (*Judicature Act*, 1881, *s.* 12, and *Judicature Act*, 1884, *s.* 6, *post*, p. 18). As to the jurisdiction of a single judge, *see post*, p. 17.

The judges are addressed in the manner customary in the Courts of Common Law prior to the passing of the Judicature Acts (*s*).

No judge can be elected or sit as a member of the House of Commons (*s*).

As to the attendance of justices of the High Court on the Court of Appeal, *see App. Jur. Act*, 1876, *s.* 19, *post*, *Ch. LXXXV.*

As to the Master of the Rolls and the Lords Justices of Appeal, *see post*, *Ch. LXXXV.*

As to the judges' clerks, &c., *see post*, p. 24.

Courts, &c. to take judicial notice of signature of judges.

By 8 & 9 *V. c.* 113, *s.* 2, it is enacted, "That all Courts, judges, justices, masters in chancery, masters of Courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior Courts at Westminster, provided such signature be attached or appended to any decree, order, certificate or other judicial or official document."

(*f*) Jud. Act, 1877, *s.* 4. Amended as to any future president of the Probate, &c. Division by the Jud. Act, 1881, *s.* 8.

(*g*) Jud. Act, 1873, *s.* 8.

(*h*) Id. *s.* 5.

(*i*) Jud. Act, 1875, *s.* 5.

(*k*) Id. The 9th section of the Act of 1873 is repealed by the Act of 1875, *s.* 33.

(*l*) Jud. Act, 1875, *s.* 6. See as to the precedence of the President of the Probate, &c. Division, Jud. Act, 1881, *s.* 4; Jud. Act, 1884, *s.* 3. The 10th section of the Act of 1873 is repealed by the Act of 1875, *s.* 33.

(*m*) Jud. Act, 1873, *ss.* 13, 15.

(*n*) Id. *ss.* 14, 15.

(*o*) Id. *s.* 86.

(*p*) Id. *ss.* 7, 31, 51; Appellate Jurisdiction Act, 1876, *s.* 18; Jud. Act, 1884, *s.* 5.

(*q*) Jud. Act, 1873, *s.* 31.

(*r*) Id. *s.* 11.

(*s*) Jud. Act, 1875, *s.* 5.

CHAPTER IV.

DIVISIONAL COURTS—JURISDICTION OF A SINGLE JUDGE, ETC.

Divisional Courts.

Divisional Courts.]—Many matters are heard in Court before two or more judges. Any two or more judges sitting in Court for the purpose of hearing these matters are called a Divisional Court. The term Divisional Court must not be confused with the Division of the High Court (*a*). Several Divisional Courts composed of judges of the same division may and often do sit on the same day (*a*).

With a view to the formation of Divisional Courts the *Judicature Act*, 1873, *s.* 40, provides that "such causes and matters as are not proper to be heard by a single judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts may sit at the same time. A Divisional Court of the said High Court of Justice shall be constituted by two or three, and no more, of the judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such judges. Every judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The president of every such Divisional Court of the High Court of Justice shall be the senior judge of those present, according to the order of their precedence under this Act."

Number of judges.

The *Appellate Jurisdiction Act*, 1876, *s.* 17 (*post*, p. 16, n. (*c*)), provides that in ordinary cases a Divisional Court shall consist of two judges, and doubts having arisen as to whether more than two judges could sit, it is enacted by the Judicature Act, 1884 (47 & 48 *V. c.* 61), *s.* 4, that "a Divisional Court of the Queen's Bench Division of the High Court of Justice may at any time be constituted of more than two judges if the president of the said Division, with the concurrence of not less than two other judges thereof, shall be of opinion that it is expedient so to constitute the same."

The arrangements for holding Divisional Courts are regulated by sect. 41 of the *Judicature Act*, 1873 (*b*).

(*a*) See per Jessel, M. R., *In re People's Garden Co.*, 1 Ch. D. at p. 45.

(*b*) By that section "subject to any rules of Court, and in the meantime until such rules shall be made, all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, which, according to the practice now existing in the superior Courts of common law, would have been proper to be transacted or disposed of by the Court sitting in banc, if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more judge or judges attached to the particular Division of the said Court to which the cause or matter or of which such

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What matters, &c. must be heard before Divisional Courts.

What Matters, &c. must be heard before Divisional Courts.]—As a general rule, all proceedings may now be taken before a single judge (*c*). But certain matters and proceedings must be heard by Divisional Courts. These are defined by Rules of the Supreme Court, 1883; *Order LIX. r.* 1, which provides that, "The following proceedings and matters shall continue to be heard and determined before Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein heretofore taken before a single judge to be taken before a Divisional Court:—

(a) Proceedings on the Crown side of the Queen's Bench Division;
(b) Appeals from revising barristers, and proceedings relating to election petitions, parliamentary and municipal;
(c) Appeals under sect. 6 of the County Courts Act, 1875;
(d) Proceedings on the Revenue side of the Queen's Bench Division;

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business arises has been assigned; and it shall be the duty of every judge of such last-mentioned Division, and also of every other judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be necessary for the transaction of the business assigned to the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively; and all such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court of Justice for any other purpose authorized by this Act, and also for the proper transaction of that part of the business of the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively, which ought to be transacted by one or more judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the judges of the said High Court; and in case of difference among them, in such manner as a majority of the said judges, with the concurrence of the Lord Chief Justice of England, shall determine.

(*c*) By s. 17 of the Appellate Jurisdiction Act, 1876, it is enacted that: "On and after the 1st day of December, 1876, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a *single judge*, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place: provided nevertheless, that Divisional Courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by rules of Court to be heard by a Divisional Court; and any such Divisional Court when held shall be constituted of *two* judges of the Court and *no more*, unless the president of the Division to which such Divisional Court belongs, with the concurrence of the other judges of such Division, or a majority thereof, is of opinion that such Divisional Court should be constituted of a greater number of judges than two, in which case such Court may be constituted of such number of judges as the president, with such concurrence as aforesaid, may think expedient; nevertheless the decisions of a Divisional Court shall not be invalidated by reason of such Court being constituted of a greater number than two judges." Sect. 4 of the Jud. Act, 1884 (ante, p. 15), amends this section, and empowers more than two judges to sit as a Divisional Court.

(e) Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final;

(f) Cases stated by the railway commissioners under the Act 36 & 37 *Vict. c.* 48;

(g) Cases of habeas corpus, in which a judge directs that an order *nisi* for the writ, or the writ be made returnable before a Divisional Court;

(h) Special cases where all parties agree that the same be heard before a Divisional Court;

(i) Appeals from chambers in the Queen's Bench Division;

(j) Applications for new trials where there has been a trial with a jury."

Jurisdiction of single judge.

Jurisdiction of a single Judge.]—We have already seen that, with certain exceptions, all business may be heard before a single judge (*c*). By the *Judicature Act*, 1873, *s.* 39, "Any judge of the said High Court of Justice may, subject to any rules of Court, exercise in Court or in chambers all or any part of the jurisdiction by this Act vested in the said High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of this Act might have been heard in Court or in chambers respectively, by a single judge of any of the Courts whose jurisdiction is hereby transferred to the said High Court, or as may be directed or authorized to be so heard by any rules of Court to be hereafter made. In all such cases, any judge sitting in Court shall be deemed to constitute a Court."

See fully *post, Vol.* 2, *Ch. CXXIII.*, "*Applications at Chambers.*"

As to the power of a single judge in vacation, *see post, Ch. IX.*

—In Chambers.]—*See post, Vol.* 2, *Ch. CXXIII.*, "*Applications at Chambers.*"

Power to reserve points or cases.

Power to reserve Points for consideration of Divisional Court.]—By the *Judicature Act*, 1873, *s.* 46, "Subject to any rules of Court, any judge of the said High Court, sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case, or point in a case, to be argued before a Divisional Court; and any Divisional Court of the said High Court shall have power to hear and determine any such case or point so reserved or so directed to be argued."

By the *Judicature Act*, 1875, *s.* 22, "Whereas by section 46 of the principal Act it is enacted that 'any judge of the said High Court sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case or point in a case to be argued before a Divisional Court:' Be it hereby enacted, that nothing in the said Act, nor in any rule or order made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury

(*c*) See note (*c*), ante, p. 16.

PART I.

before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues:

Provided also, that the said right may be enforced either by motion in the High Court of Justice or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record."

In cases of urgency, &c. one judge may officiate for another.

Power for one Judge to sit for another.]—By the Judicature Act, 1881 (44 & 45 *V. c.* 68), *s.* 12, "In any case of urgency arising during the absence from illness or any other cause or during any vacancy in the office of any judge of the High Court of Justice to whom any cause or matter may have been according to the course of the said Court or of any division thereof specially assigned, it shall be lawful for any other judge of the said Court, who may consent so to do, to hear and dispose of any application for an injunction or other interlocutory order for or on behalf of the judge so absent, or in the place of the judge whose office may have so become vacant."

Absence, vacancies and insufficiency in number of judges.

By the Judicature Act, 1884 (47 & 48 *V. c.* 61), *s.* 5, "Upon the request of the Lord Chancellor it shall be lawful for any judge of any division of the High Court, who may consent so to do, to sit and act for or on behalf of any other judge of the High Court absent from illness or any other cause, or in the place of any judge whose office has become vacant, or as an additional judge of any division for the purpose of hearing any causes or matters which may be assigned to him by the Lord Chancellor, or any applications therein; and while so sitting and acting any such judge shall have all the power and authority which such other judge would have had, or which ordinarily belong to a judge of such division, as the case may be. Provided that no such additional judge shall sit and act in any Division, except with the concurrence of the respective presidents of the Division to which such judge belongs, and of the Division in which he may have been requested to sit and act as additional judge; and the assignment to such judge of any causes or matters, depending in the Division in which he shall so sit and act, shall likewise not be made except with the concurrence of the president of such last-mentioned Division."

Power of one judge to sit for another.

By the Judicature Act, 1884 (47 & 48 *V. c.* 61), *s.* 6, "Any proceeding in any cause or matter assigned to any judge of the High Court of Justice, may at any time, upon the request and on behalf of such judge be heard and disposed of by any other judge of the same Division, who may be willing to hear and dispose of the same, without any transfer: Provided that, if any party to such proceeding shall object to the same being so heard and disposed of, the same shall not be so heard and disposed of without the concurrence of the Lord Chancellor, to be signified either in writing under his hand."

Power to direct particular application to be heard by any judge.

Power to direct particular Application to be heard by any Judge.]—By *R. of S. C., Ord. XLIX. r.* 4, "A particular application in any cause or matter may by the direction of the Lord Chancellor be heard and disposed of by any judge of the High Court who shall consent so to do, to whatever Division or judge such cause or matter may have been assigned.

On death, &c. of judge who tried cause other judge may be nominated to hear application.

On Death, &c. of Judge who tried Cause, other Judge may be nominated to hear Application.]—By *R. of S. C., Ord. LIX. r. 2,* "Where, by sect. 17 of the Appellate Jurisdiction Act, 1876 (*d*), or by these Rules, any application ought to be made to, or any jurisdiction exercised by the judge by whom a cause or matter has been tried, if such judge shall die or cease to be a judge of the High Court, or if such judge shall be a judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such judge shall act in the matter, the president of the Division to which the cause or matter belongs may either by a special order in any cause or matter, or by a general order applicable to any class of causes or matters, nominate some other judge to whom such application may be made, and by whom such jurisdiction may be exercised."

Duties, &c. not incident to administration of justice in Court.

Duties, &c. not incident to Administration of Justice in Court.]— By the *Judicature Act,* 1873, *s.* 12, it is provided that, "If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any Court, whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the judges or any judge of any of such Courts, save as hereinafter mentioned, every judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a judge liable to such duty, or possessing such authority or power, before the passing of this Act. Any such duty, authority or power, imposed or conferred by any statute, law or custom, in any such case as aforesaid, upon the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if the Act had not passed."

(*d*) See ante, p. 16, n. (*c*).

CHAPTER V.

THE ROYAL COURTS OF JUSTICE, THE CENTRAL OFFICE, &c.

The Royal Courts of Justice.

PART I. THE sittings of the Courts in London and Middlesex are now held at the buildings erected under the Act of 1865, situate in the Strand, London. The correct title of these buildings is the "Royal Courts of Justice" (*a*). The business of the Central Office is carried on there.

The Central Office.

Establishment of.]—By the Judicature (Officers) Act, 1879 (42 & 43 *V. c.* 78), *s.* 4, a Central Office of the Supreme Court is established.

Offices amalgamated with Central Office.

Constitution By sect. 5, it is provided that, "There shall be concentrated in and amalgamated with the central office the following offices, namely—

The record and writ clerks' office;
The enrolment office;
The report office;
The offices of the masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, including the bills of sale office;
The offices of the associates in the Queen's Bench, Common Pleas, and Exchequer Divisions;
The Crown office of the Queen's Bench Division;
The Queen's remembrancer's office;
The office of the registrar of certificates of acknowledgments of deeds by married women;
The office of the registrar of judgments; and
Such other offices of the Supreme Court as may from time to time be amalgamated with the central office by rules of Court" (*b*).

By sect. 6, the officers of the above offices are transferred to the central office.

Control.

Control of Office.]—The central office is under the control and superintendence of masters of the Supreme Court (*c*)

(*a*) Jud. (Officers) Act, 1879, s. 28.
(*b*) See post.
(*c*) Jud. (Officers) Act, 1879, s. 7. "The central office shall be under the control and superintendence of officers called masters of the Supreme Court of Judicature. Provided that the existing [illegible] enrolments shall as long as he continues to hold that office retain his control and superintendence over the business heretofore performed in his office and over the persons for the time being employed in the performance of that business."

Clerks.]—By
the central offi
clerks, second-
manner as the
Treasury, from

Business.]—T
business of the
The officers are
perform the sam

Departments.]
departments, eac
name (*e*), viz.:—

Name of Departmen

1. Writ, appearanc
and judgment.

2. Summons and
Order.

3. Filing and Record.

(*d*) Jud. (Officers) Act,
(*e*) R. of S. C. 1883, Ord
The rule provides that "T
office shall, for the conv
spatch of business, be di
the departments specified
column of the following sc
the business of the office sh
tributed among the depar

Clerks.

Clerks.]—By sect. 13 of the above Act, "The clerks employed in the central office shall be classified as principal clerks, first-class clerks, second-class clerks, and copying clerks, or in such other manner as the Lord Chancellor, with the concurrence of the Treasury, from time to time directs."

Business.

Business.]—The business of the central offices comprise all the business of the offices amalgamated with the office (*supra*, p. 20) (*d*). The officers are interchangeable, but subject to this they are to perform the same duties as previously (*d*).

Departments.

Departments.]—The central office is divided into the following departments, each doing the business below specified opposite its name (*e*), viz.:—

Name of Department.	Business.
1. Writ, appearance, and judgment.	The sealing and issue of writs of summons for the commencement of actions. The entry in the cause book of writs of summons, appearances, and judgments. The sealing and issue of notices for service under Ord. XVI. r. 48. The receipt and filing of pleadings and notices delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ Office, except such part thereof as is transacted in the Record Department.
2. Summons and Order.	The issue of summonses in the Queen's Bench Division, and the drawing up of all Orders made either in Court or in Chambers in that Division.
3. Filing and Record.	The filing of all affidavits to be filed in the Central Office, and all depositions to be used in the Chancery Division, and such other documents as may from time to time be directed by the Masters to be filed, and the making and examination of office copies of documents filed in the Department. The custody of all deeds and documents ordered to be left with the Masters. The business heretofore performed in the Report Office under the direction and control of the Clerks of Records and Writs.

(*d*) Jud. (Officers) Act, 1879, s. 12.

(*e*) R. of S. C. 1883, Ord. LXI. r. 1. The rule provides that "The central office shall, for the convenient despatch of business, be divided into the departments specified in the first column of the following scheme, and the business of the office shall be distributed among the departments in accordance with that scheme, and shall be performed by the several officers and clerks in the said office who are now charged with the same or similar duties, and by such others as may from time to time be appointed by lawful authority for that purpose."

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Name of Department.	Business.
4. Taxing	The taxation of costs in the Queen's Bench Division, except such costs as have heretofore been taxed in the Queen's Remembrancer's Office or the Crown Office.
5. Enrolment ..	The business heretofore performed in the Enrolment Office.
6. Judgments and married women's acknowledgments.	The registry of judgments, execution, &c., and the registry of acknowledgments of deeds by married women, &c.
7. Bills of Sale ..	The registry of bills of sale and other duties connected therewith.
8. Queen's Remembrancer.	The business heretofore performed in the Queen's Remembrancer's Office.
9. Crown Office ..	The business heretofore performed in the Crown Office.
10. Associates ..	The business heretofore performed in the Associates' Offices.

Attendance of masters.

Attendance of Masters, &c.]—By *Ord. LXI. r.* 2, "It shall be the special duty of one of the masters to be present at, and control the business of, the central office, and to give the necessary directions with respect to questions of practice and procedure relating to the business thereof. The masters shall select five of their number to discharge this duty in turn, according to a rota to be fixed by themselves, and each of such masters according to his turn shall discharge such duty daily for a period of not less than one month at a time."

By *r.* 3, "A sufficient number of masters, not being less than three, shall, except in vacation, attend each day at the central office to tax costs. In vacation one master shall attend daily for that purpose. The taxing masters shall be selected according to a rota to be fixed by the masters."

CHAPTER VI.

THE OFFICERS OF THE COURTS, &c.

THE Judicature Acts, and more particularly the Judicature (Officers) Act, 1879 (42 & 43 *V. c.* 78), contain provisions relating to the officers of the Courts, central office and judges (*a*); the transfer, continuance, duties, &c. of existing officers (*b*); the appointment (*c*) of new ones, and their duties (*d*), authority (*e*), removal (*f*), salaries and pensions (*g*), and as to notices of vacancies (*h*). It is not, however, considered necessary to do more than refer to these provisions in the present work.

The *Judicature (Officers) Act*, 1879 (*s.* 14 *and sched.*), provides for the abolition at the next vacancy of the offices of Clerk of Enrolments and Clerk of Petty Bag. It also provides that on the next vacancy in the offices of Queen's Remembrancer, Registrar of Certificates of Acknowledgments of Deeds of Married Women, and Registrar of Judgments, these offices shall be filled by the senior Master of the Supreme Court.

Officers to follow appeals.

Officers to follow Appeals.]—By *R. of S. C., Ord. LX. r.* 2, "Officers attached to any Division shall follow the appeals from the same Division, and shall perform in the Court of Appeal analogous duties in reference to such appeals as the Registrars and officers of the Court of Chancery usually performed as to rehearings in the Court of Appeal in Chancery, and as the Masters and officers of the Courts of Queen's Bench, Common Pleas and Exchequer respectively performed as to appeals heard by the Court of Exchequer Chamber."

Associate.

Associate.]—Formerly there was an associate in each Division appointed by the Chief Justice and Chief Baron respectively (*i*). Each associate appointed two clerks for the discharge of his duties, subject to the approval of the Chief Justices or Chief Baron (*k*). This office is abolished by the *Judicature (Officers) Act*, 1879, *s.* 14. The duties of the associates are discharged by the Masters.

Circuit officers.

Circuit Officers.]—*See Judicature Act*, 1884, *s.* 21, *post, Ch. X.*

(*a*) Jud. Act, 1873, s. 84.
(*b*) Id. ss. 77—84, Ord. LX. r. 1; Jud. (Officers) Act, 1879, ss. 2[illegible]5.
(*c*) Jud. Act, 1884, s. 19; Jud. Act, 1873, s. 84; Jud. (Officers) Act, 1879, s. 9.
(*d*) Jud. Act, 1873, s. 84.
(*e*) Id.
(*f*) Jud. Act, 1873, s. 84; Jud. (Officers) Act, 1879, ss. 9, 18.
(*g*) Jud. (Officers) Act, 1879, ss. 15—21; Jud. Act, 1884, s. 20.
(*h*) Jud. Act, 1881, s. 21.
(*i*) See 15 & 16 V. c. 73, ss. 1 to 6, and s. 9 (all repealed by 42 & 43 V. c. 78). Not to act as barrister, solicitor, or agent. (Sect. 11.)
(*k*) 15 & 16 V. c. 73, s. 4 (repealed).

PART I.

Clerks of Assize.

Clerks of Assize.]—They act as and perform the duties of associates on different circuits. (*See also* 32 & 33 *V. c.* 89.)

Clerks to the judges.

Personal officers of future judges.

Clerks, &c. to the Judges.]—By the *Judicature Act*, 1873, *s.* 79, "Each of the judges of the High Court of Justice, and of the ordinary judges of the Court of Appeal appointed respectively after the commencement of this Act, and also such of the ordinary judges of the Court of Appeal as have no similar officers at the time of the commencement of this Act, shall have such officers as hereinafter mentioned, who shall be attached to his person as such judge, and appointed and removable by him at his pleasure, and who shall respectively receive the salaries hereinafter mentioned; (that is to say,)

Secretaries.

Principal clerks.

Junior clerks.

To the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer respectively, there shall be attached a secretary, whose salary shall be five hundred pounds per annum, a principal clerk, whose salary shall be four hundred pounds per annum, and a junior clerk, whose salary shall be two hundred pounds per annum. To each of the other judges of the High Court of Justice, and to each of the ordinary judges of the Court of Appeal, there shall be attached a principal clerk, whose salary shall be four hundred pounds per annum, and, in the case of the judges of the High Court of Justice, a junior clerk, whose salary shall be two hundred pounds per annum.

Such one or more of the officers so attached to each of the said judges, as such judge shall think fit, shall be required, while in attendance on such judge, to discharge, without further remuneration, the duties of crier in Court or on circuit, or of usher or train bearer. The duties of chamber clerks, so far as relates to business transacted in chambers by judges appointed after the commencement of this Act, shall be performed by officers of the Court in the permanent civil service of the Crown." (*See Judicature Act*, 1875, *s.* 35.)

Chamber clerks.

Pursuant to an arrangement made between the judges and the Treasury, future judges will have one clerk only. Neither judges' clerks nor any of the clerks in any of the offices of the superior Courts are to act as barristers, solicitors, or agents of solicitors. (15 & 16 *V. c.* 73, *s.* 11.)

Commissioners for taking affidavits.

Commissioners for taking Affidavits.]—By *Judicature Act*, 1873, *s.* 82, "Every person who at the commencement of this Act shall be authorized to administer oaths in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice shall be a commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal." (*See s.* 77.)

By sect. 84, all commissioners to take oaths or affidavits in the Supreme Court are now appointed by the Lord Chancellor (*l*). They are usually certificated solicitors of the Court. (*See R.* 148, *H. T.* 1853.)

(*l*) See 29 C. 2, c. 5; 11 G. 4 & 1 W. 4, c. 43, s. 4; 22 V. c. 15.

By 40 & 41 *V. c.* 25, *s.* 18, "Commissioners for taking oaths in the Supreme Court of Judicature in England shall be commissioners for taking oaths in or for the purpose of any of the Ecclesiastical Courts or jurisdictions, or matters ecclesiastical in England, or matters relating to application for notarial faculties."

The 3 & 4 *W.* 4, *c.* 42, *s.* 42, gives power to appoint commissioners in Scotland and Ireland (*m*). By 22 *V. c.* 16, *s.* 3, power is given to appoint commissioners for the Isle of Man and the Channel Islands, to administer oaths and take declarations or affirmations in the said Courts of Common Law; and such persons shall be styled "commissioners to administer oaths in Common Law for the Isle of Man," or, "for the Channel Islands" (as the case may be). By sect. 4, affidavits sworn before such commissioners are to be read and made use of in the said Courts respectively as other affidavits.

By 23 & 24 *V. c.* 127, *s.* 30, authorities to administer oaths or take acknowledgments are to be registered.

See further before whom affidavits may be sworn, *Ch. XLIV.*

Affidavits may be used in borough and local Courts of record.

By the Borough and Local Courts of Record Act, 1872 (35 & 36 *V. c.* 86), *s.* 5, "Affidavits made before any commissioner or other person appointed or authorized to take affidavits either in England or elsewhere by the Lord High Chancellor, or by any of the superior Courts, or by the judges thereof, may be used in the Court,* and the signature of any person purporting to be such commissioner, or to be a person appointed or authorized as aforesaid, need not be verified."

* *Sic.*

Any master and every first or second class clerk in the Filing and Record Department may take oaths or affidavits in the Supreme Court (*R. of S. C., Ord. LXI. r.* 5).

Commissioners for examination of witnesses.

Commissioners for the Examination of Witnesses.]—As to commissioners being appointed for this purpose, *see Ch. LIV.*

Commissioners for acknowledgments by married women.

Commissioners for Acknowledgments by Married Women.]—By the Judicature Act, 1881 (44 & 45 *V. c.* 68), *s.* 26, "And whereas under the Act of the third and fourth years of King William the Fourth, chapter seventy-four, the Lord Chief Justice of the Court of Common Pleas was empowered to appoint such proper persons as he should think fit to be perpetual commissioners for taking the acknowledgments by married women of deeds to be executed by them as in the same Act provided, and such commissioners were made removable by and at the pleasure of the said Lord Chief Justice; and by divers subsequent Acts provision was made for further and other duties to be performed by such commissioners: And whereas the present Lord Chief Justice of England was before and down to the time of his appointment to that office Lord Chief Justice of the Common Pleas, and after his appointment to be Lord Chief Justice of England no other person was appointed to be Lord Chief Justice of the Common Pleas, and that office has since

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(*m*) By this enactment, parties swearing falsely are guilty of perjury, and the mode of proceeding against them is pointed out. (See *Sharp* v. *Johnston*, 4 Dowl. 324; 2 Bing. N. C. 216; 2 Sc. 405; 1 Hodges, 298; *Wrunken* v. *Froyd*, 18 Leg. Obs. 261; *Griffin* v. *Smythe*, 8 Dowl. 490.)

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been abolished: Be it enacted and declared, that every appointment of any person to be a commissioner for taking such acknowledgments and performing such other duties as aforesaid, and every order for the removal of any person from such office of commissioner, which shall have been made by the present Lord Chief Justice of England at any time since his appointment to that office, or shall be hereafter made by the Lord Chief Justice of England for the time being, shall be and be deemed to have been valid and effectual in the law, to all intents and purposes whatsoever, in the same manner as if it had been made by a Lord Chief Justice of the Common Pleas before the abolition of that office."

Commissioners for taking bail.

Commissioners for taking Bail.]—Persons "other than common attorneys or solicitors," are appointed in every place of any importance throughout England, by commission from the chief justice and one or more of the puisne judges, for the taking of recognizances of bail, in any action depending in the superior Courts, by virtue of 4 *W. & M. c.* 4, *s.* 1.

By the Bails Act, 1869 (32 & 33 *V. c.* 38), all persons empowered to take affidavits under commissions issued under 29 *C.* 2, *c.* 5, "whether they are or are not attorneys or solicitors," may take bail in error, and on any appeal arising out of any action or civil proceeding. But by sect. 5, no attorney or solicitor shall exercise any of the powers given by that Act in any proceeding in which he is the attorney or solicitor of any of the parties to that proceeding or in which he is interested.

Crown side of Q. B., officers of.

Crown Side, Officers of.]—The statutes 6 & 7 *V. c.* 20 and 23 & 24 *V. c.* 54, which formerly regulated these offices, are repealed by the 42 & 43 *V. c.* 78 (*s.* 29 *and sched.*), *and* 44 & 45 *V. c.* 59 (*s.* 3 *and sched.*) respectively. The offices are by the 42 & 43 *V. c.* 78, *s.* 6, transferred to the central office, and are now subject to the same regulation as the other offices concentrated in that office.

Examiners of the Court.

Examiners of the Court.]—The examiners of the Court are appointed to take evidence out of Court under *Ord. XXXVII. rr.* 39 *to* 50. (*See post, Ch. LIV.*)

Keeper of the Queen's Prison.

Keeper of the Queen's Prison.]—Holloway Prison is for all purposes of law deemed and regarded as the Queen's Prison, and the Keeper of that prison is now the Keeper of the Queen's Prison. (*See* 25 & 26 *V. c.* 104; 28 *V. c. cxvii.*)

Marshals.

Marshals.]—Judges' marshals are appointed by the judges, and are paid a fixed sum of 2*l.* a day for their services. This office is not affected by the Judicature Acts. (*See Judicature Act*, 1873, *s.* 77.)

Masters of Supreme Court.

Masters.]—By the Judicature (Officers) Act, 1879 (42 & 43 *V. c.* 78), *s.* 8, "(1) The first Masters of the Supreme Court of Judicature shall be—

The existing Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions;

The existing Queen's coroner and attorney;
The existing Master of the Crown office other than the Queen's coroner and attorney;
The existing record and writ clerks; and
The existing associates in the Queen's Bench, Common Pleas, and Exchequer Divisions.

(2.) The salaries of the first Masters of the Supreme Court shall be:

(a) In the case of each existing Master of the Queen's Bench, Common Pleas, or Exchequer Divisions, the salary to which he is entitled as such master at the commencement of this Act:

(b) In the case of the existing Queen's coroner and attorney, and the existing master of the Crown office other than the Queen's coroner and attorney, the yearly sum of fifteen hundred pounds:

(c) In the case of every other Master of the Supreme Court, the salary to which he would have been entitled if he had been appointed a Master of the Queen's Bench, Common Pleas, or Exchequer Division immediately before the commencement of this Act.

(3.) A vacancy in the office of any master of the Supreme Court other than a Master being Queen's coroner and attorney or Master of the Crown office, shall not be filled until the number of Masters is reduced to eighteen."

Qualification.

By sect. 10, "A person shall not be qualified to be appointed a Master of the Supreme Court unless he is or has been a practising barrister or solicitor of five years standing, or has practised for five years as a special pleader or as a special pleader and barrister; but nothing in this section shall affect the qualification of any existing officer of the Supreme Court to be appointed to any office dealt with by this Act."

Tenure.

By sect. 11, "Every Master of the Supreme Court shall hold office during good behaviour."

Appointment, &c.

The appointment of the Masters is regulated by the *Judicature Act*, 1884, *s.* 19. By stat. 42 & 43 *V. c.* 78 (*s.* 29 *and Sched.*), the statute 7 *W.* 4 & 1 *V. c.* 30, which related to the Masters is repealed, with the exception (so far as is here material), of sects. 13 and 15, which provides that Masters, clerks, and messengers shall not act as barristers or solicitors, except in certain cases; and sect. 19, by which gratuities are forbidden to be taken under pain of dismissal.

Duties.

The Masters have the control and superintendence of the central office (42 & 43 *V. c.* 78, *s.* 7, *ante*, p. 20). Their chief duties, besides attending the Court whilst sitting in banc, and her Majesty's Court of Appeal when sitting on Appeal, from the Division to which they belong (*R. of S. C., Ord. LX. r.* 2, *ante*), are, to hold references under the *Com. Law Proc. Act*, 1854; to attend at Chambers to transact certain business which was formerly transacted by a judge (*R. of S. C., Ord. LIV. r.* 12); to inquire into and report to the Court upon charges of misconduct brought against solicitors, which are referred to the Master by the Court; to examine parties and witnesses before the trial (*Ch. LIV.*), and judgment debtors under *R. of S. C., Ord. XLV. r.* 1 (*Ch. LXXIV.*); to tax costs including costs of arbitration under the Lands Clauses Consolidation Act, 1845 (*see*

PART I.

32 & 33 *V. c.* 18). The Masters also tax the costs of inquiries before the sheriff under the Lands Clauses Consolidation Act, 1845, sect. 52 (*o*); and superintend the registration of bills of sale under the Bills of Sale Act (*p*). Other matters are constantly referred to the Masters by the Court and the Judge at chambers; and there are also many other duties imposed upon them.

By *R. of S. C., Ord. LX. r.* 3, "The office of Master of the Supreme Court of Judicature shall be deemed to be substituted for the several offices specified in the first part of the first schedule to the Supreme Court of Judicature (Officers) Act, 1879, and all enactments and documents referring to any of those offices, or to any of the persons holding them, shall, unless the context otherwise requires, be construed and have effect accordingly."

Affidavits. The Masters have authority to take oaths and affidavits in the Supreme Court. (*Ord. LXI. r.* 5.)

Hours of attendance, &c. As to when the Masters' offices are to be open, *see post, Ch. IX.*

As to attending appointments before the Master, *see post, Ch. CXXIV.*

Master of Crown Office. *Master and Assistant Master of the Crown Office.*]—*See* "*Crown Side, Officers of*," *ante, p.* 26.

Official Referees. *Official Referees.*]—*See post, Vol.* 2, *Ch. CXXXIV.*

Queen's Coroner and Attorney. *Queen's Coroner and Attorney.*]—*See* "*Crown Side of the Court of Q. B., Officers of*," *ante, p.* 26.

Queen's Prison, Keeper of. *Queen's Prison, Keeper of, &c.*]—The office of Keeper of the Queen's Prison and all other offices in the said prison were abolished by the Queen's Prison Discontinuance Act, 1862 (25 & 26 *V. c.* 104, *s.* 8); and Holloway Prison is now deemed and regarded as the Queen's Prison, and the Keeper of Holloway Prison is now the Keeper of the Queen's Prison. (28 *V. c. cxvii.*)

Tipstaffs. *Tipstaffs.*]—By the Queen's Prison Discontinuance Act, 1862 (25 & 26 *V. c.* 104), *s.* 10, "After the passing of this Act, the Lord Chancellor, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, shall severally continue to appoint the tipstaffs formerly appointed by the Warden of the Fleet Prison, to act in the Courts of Chancery, Common Pleas, and Exchequer respectively, and the Lord Chief Justice of the Court of Queen's Bench shall severally continue to appoint the tipstaffs, formerly appointed by the Marshal of the Queen's Bench Prison, to act in the Court of Queen's Bench; and the tipstaffs so appointed shall perform the same duties, so far as is consistent with the provisions of this Act, and be entitled to the same emoluments

(*o*) In taxing costs under the L. C. C. Act, 1845, the masters act not as officers of the Court but as *persona designata* by statute, consequently their taxation is not subject to review by the Court. *Owen* v. *London and North Western Railway Co.*, L. R., 3 Q. B. 59; 37 L. J., Q. B. 35. And if they refuse to tax, a mandamus lies to compel them. *Lord Fitzhardinge* v. *Birmingham and Gloucester Canal Co.*, L. R., 7 Q. B. 776; 41 L. J., Q. B. 316.

(*p*) R. of S. C., Ord. LXI. r. 25.

respectively, as the tipstaffs heretofore appointed by the said Warden and Marshal respectively." (*See* 5 & 6 *V. c.* 22, *s.* 23.)

By sect. 11 of the above Act, tipstaffs are to give security for the faithful discharge of their duties, and a penalty is imposed for disobeying instructions. (*See* 11 & 12 *V. c.* 7, *s.* 5.)

Ushers and other subordinate officers.

Ushers, Courtkeepers, Messengers, Assistants, and other subordinate Officers.]—Are appointed by the Chief Justice. The stat. 15 & 16 *V. c.* 73, *ss.* 16—21, which related to these officers, is repealed by 42 & 43 *V. c.* 78, *s.* 29 *and sched.*

Appointments to keep order, &c. in Royal Courts of Justice.

By the Judicature Act, 1881 (44 & 45 *V. c.* 68), *s.* 23, "The Lord Chancellor may from time to time, with the concurrence of the Treasury, make regulations with respect to—

"(a) The appointment, removal, payment, and duties of persons to keep order in the Royal Courts of Justice, provided that no such regulation shall affect any right of appointment enjoyed by any person at the time of the commencement of this Act, without his consent thereto:

"(b) The appointment, removal, payment, and duties of persons charged with the care and cleaning of the Royal Courts of Justice:

"(c) Any other matters necessary or incidental to the use or management of the Royal Courts of Justice. Any remuneration payable under this section shall be paid out of money voted by Parliament."

Holidays.

Holidays.]—As to vacations and holidays, *see R. of S. C., Ord. LXI. r.* 4, *Ch. IX.* As to when and at what hours the official referees are to sit, *see Vol.* 2, *Ch. CXXXIV.*

Times of attendance.

Times of Attendance.]—*See post, Ch. IX.*

Must perform their duties in person.

Miscellaneous Matters as to.]—The officers of the Courts must perform their duties in person. (*See* 15 & 16 *V. c.* 73, *s.* 30, repealed by 42 & 43 *V. c.* 73, *s.* 29 *and sched.*)

Fees.

Certain fees are taken in the Courts and offices. The Lord Chancellor, with the advice and consent of the judges of the Supreme Court, or any three of them, and with the concurrence of the Treasury, may fix and alter the fees to be taken in the Courts (*q*). These fees are generally taken by stamps which are impressed or adhesive, as the Treasury from time to time directs. (*Judicature Act*, 1875, *s.* 26.)

By *Judicature Act*, 1875, *s.* 26, *subs.* 4, "Any document which ought to bear a stamp in pursuance of this Act, or any rule or order made thereunder, shall not be received, filed, used, or admitted in evidence unless and until it is properly stamped, within the time prescribed by the rules under this section regulating the use of stamps; but if any such document is through mistake or inadvertence received, filed, or used without being properly stamped, the Lord Chancellor or the Court may, if he or it shall think fit, order that the same be stamped as in such order may be directed."

Before the statute 15 & 16 *V. c.* 73, *s.* 12, which provided that

(*q*) See *Order as to S. C. Fees*, Appendix at end of Vol. 2.

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certain officers and clerks, including the judges' clerks, were to be paid by salaries instead of fees and which is repealed by the 42 & 43 *V. c.* 78, *s.* 29 *and sched.*, where a solicitor indebted to one of the clerks in court for fees in a certain cause died, the Court, upon application, ordered them to be paid by the client out of money then remaining due by the client to the solicitor's executor (*r*). And if a client before that Act, when his business in Court was despatched, refused to pay the officer the fees that were due to him for doing his business, the Court on motion would grant an attachment against him to have him committed until he paid the fees; for, not paying the fees was a contempt of Court, and the Court was bound to protect its officers in their rights (*s*). An officer of the Court had also, before that Act, a lien on the papers in his hands until his fees were paid him (*t*). Where a plaintiff is suing *in formâ pauperis*, the officers of the Court must do their duties without any charge (*u*).

Gratuities to.

Officers of the Court are not to take gratuities under pain of dismissal and under penalty of 50*l.* (*x*). And by 7 *W.* 4 & 1 *V. c.* 30, *s.* 19, Masters, clerks, and messengers appointed by virtue of that Act, are not to take gratuities on pain of dismissal. There is a similar enactment in 6 & 7 *V. c.* 20.

Extortion by.

If an officer of the Court be guilty of extortion, or of taking an improper fee, he is subject to an indictment (*y*), or an action (*z*), or an application to the Court (*a*).

Privilege of.

These officers, before 1 & 2 *V. c.* 110, enjoyed the same privilege from arrest on mesne process that solicitors did. Even such of them as did not personally attend to the duties of their offices, but performed them by deputy, were entitled to it (*b*). But as no one can now be arrested before judgment unless he is about to leave the country, and as officers of the Court lose their privilege from arrest when they are about to do so, this privilege, practically speaking, no longer exists (*c*).

(*r*) *Waldron's case*, 2 Str. 1126: *R.* v. *Smollett*, 3 Bur. 1313.
(*s*) 1 Lil. Pr. Reg. 598.
(*t*) *Farewell* v. *Coker*, 2 P. Wms. 460: *Anon.* 2 Ves. sen. 25.
(*u*) See *Hoare* v. *Coupland*, 19 L. J., Q. B. 150.
(*x*) See 15 & 16 V. c. 73, s. 26.
(*y*) Co. Litt. 368 b. See 13 Q. B. 8: *Epsom* v. *Bathurst*, Hut. 52: *Hescott's case*, 1 Salk. 330.
(*z*) *Figgins* v. *Wyllie*, 2 W. Bl. 1187: *Woodgate* v. *Knatchbull*, 2 T. R. 148.
(*a*) *Longdill* v. *Jones*, 1 Stark. 345: *Sparrow* v. *Cooper*, 2 W. Bl. 1314; *Pater* v. *Croome*, 7 T. R. 336: *Martin* v. *Bold*, 7 Taunt. 182; 2 Marsh. 487 And see Tidd's Supp. 52, 53.
(*b*) 2 Sel. Pr. 21.
(*c*) See post, Ch. CXXVII.

CHAPTER VII.

SHERIFFS, UNDER-SHERIFFS, SHERIFFS' OFFICERS, AND SHERIFFS' FEES.

Sheriffs.

IT is not intended to treat, in this place, of the duties in general of the office of sheriff, who, for some purposes, is considered as an officer of the Court, but merely to notice some of the statutes, rules of Court, and decisions relating to that officer and his deputies. As to the duties of the office, the reader will find that subject, at least such parts of it as relate to the execution and return of writs, arranged under proper heads, in the course of the work.

For what counties.

Each county in England and Wales has a sheriff appointed for it. There are also several cities and towns which are counties of themselves, for which sheriffs are appointed, viz., the cities of Bristol, Canterbury, Chester, Exeter, Gloucester, Lincoln, Lichfield, Norwich, Worcester, and York, and the towns of Carmarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and Southampton, each of which has one sheriff appointed for it (*a*), and the city of London, which has two sheriffs appointed for it. In Middlesex there is but one sheriff, though the office is filled by two persons who are the same persons that fill the office of sheriffs of London (*b*). The city of Oxford, though not a county in itself, has a sheriff appointed for it, but nevertheless process is directed to the sheriff of the county (*c*).

Proceedings with regard to nomination of sheriffs. 24 G. 2, c. 48.

By the Judicature Act, 1881 (44 & 45 *V. c.* 68), *s.* 16, "The proceedings for the ordaining or nominating of sheriffs, directed by an Act passed in the fourteenth year of King Edward the First, intituled 'How long a Sheriff shall tarry in his Office,' and by another Act passed in the twenty-fourth year of King George the Second, intituled 'An Act for the abbreviation of Michaelmas Term' to take place at the Exchequer, shall henceforth in every year take place in the Queen's Bench Division of the High Court of Justice, at the same time and in the same manner as hath been heretofore accustomed in the Court of Exchequer."

Under-sheriffs.

The sheriff himself, personally, scarcely executes any duty; his duties are, for the most part, performed by his under-sheriff, deputy-sheriff, and officers. Every sheriff must yearly appoint a sufficient deputy (now called an under-sheriff) before he returns any writs, to receive writs and warrants to be delivered to him (23 *H.* 6, *c.* 9. *And see R. H.* 14 & 15 *C.* 2, *r.* 2, *C. P.*; *and see*

(*a*) Before 5 & 6 W. 4, c. 76, two sheriffs were appointed for the cities of Bristol, Canterbury, Chester, Coventry, Gloucester, Lincoln, Norwich, and York, and for the town of Nottingham; but, by section 61 of that Act, one sheriff only shall be elected for these cities and towns. The city of Coventry is, by 5 & 6 V. c. 110, annexed to Warwickshire, and no longer a county in itself; and process must, therefore, be directed to the sheriff of that county.

(*b*) Process directed to the sheriffs of Middlesex would be irregular. *Jackson* v. *Jackson*, 3 Dowl. 182.

(*c*) See *Grainger* v. *Taunton*, 5 Dowl. 190.

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R. M. 1654, *s.* 1, *and R. E.* 15 *C.* 2, *s.* 2, *Q. B.*). And by 3 *&* 4 *W.* 4, *c.* 99, *s.* 5, "the sheriff shall, within one calendar month next after the notification of his appointment in the London Gazette, by writing under his hand, nominate and appoint some fit and proper person to be his *under-sheriff*, and shall transmit a duplicate thereof to the clerk of the peace for the county to be by him filed, and which he is hereby required to file, among the records of his office, and for which he shall be entitled to demand and have from such under-sheriff the sum of five shillings, and no more; and such appointment and duplicate shall not be liable to any stamp duty whatever." It seems there is no objection to successive sheriffs appointing the same under-sheriffs (*d*).

Deputy-sheriff.

By 3 *&* 4 *W.* 4, *c.* 42, *s.* 20, it is enacted, "That, from and after the 1st of June, 1833, the sheriff of each county in England and Wales shall severally name a sufficient deputy, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff." Any negligence by the sheriff in omitting to appoint a deputy according to this Act would subject him to an action, if a party sustained damage thereby (*e*). A delivery of a writ to this deputy in London is a delivery to the sheriff; and in the case of a writ of *fi. fa.*, such delivery binds the goods of the defendant (*f*).

Sheriffs' officers.

The sheriff also appoints officers and bailiffs for the execution of writs directed to him; and, as a security for their due performance of their office, and to indemnify him from any loss arising from their breach of it, he takes from them a bond with sureties. These officers are in no respect officers of the Courts, and are not subject to the jurisdiction of the Court as such from their undertakings or otherwise (*g*), though for extortion they may be so, under 7 *W.* 4 *&* 1 *V. c.* 55 (*post*, p. 36). As to the liability of a sheriff for their acts, *see post*, p. 34. A sheriff should not issue blank warrants (*see R. E.* 15 *C.* 2, *Q. B.*; *R. H.* 14 *&* 15 *C.* 2, *C. P.*); nor should he issue a warrant to any of his officers to arrest or attach any person until a writ, &c., has first been delivered to him. (*See R. M.* 1654, *s.* 2.)

Blank warrants forbidden.

Special bailiffs.

The sheriff frequently, and as he may do, at the request of the party suing out the writ or his solicitor, appoints a particular person to execute it (*h*). Such person is called a special bailiff. Nice questions have arisen as to what amounts to such an appointment. Whether what is said, or written, or done, does so, seems more a question of fact than of law (*i*). The mere expression of a wish by the solicitor that a particular officer may be employed to execute the writ does not constitute the latter a special bailiff (*k*); nor does

(*d*) See *Harrison* v. *Paynter*, 6 M. & W. 387; 8 Dowl. 349.

(*e*) See *Brackenbury* v. *Laurie*, 3 Dowl. 180.

(*f*) *Harris* v. *Loyd*, 5 M. & W. 436: *Woodland* v. *Fuller*, 11 A. & E. 859: 3 P. & D. 570: see Ch. 34.

(*g*) *Brown* v. *Gerard*, 3 Dowl. 217; 1 C. M. & R. 595. See *Harding* v. *Hall*, 10 M. & W. 42.

(*h*) See *Foster* v. *Blakelock*, 5 B. & C. 328, and cases infra.

(*i*) *Ford* v. *Leche*, 1 N. & P. 737: *Balson* v. *Meggat*, 4 Dowl. 557.

(*k*) *Porter* v. *Viner*, 1 Chit. R. 613, n.: *Balson* v. *Meggat*, supra: *Doe* v. *Tyrye*, 7 Sc. 704; 7 Dowl. 636. And see *Alderson* v. *Davenport*, 1 D. & L. 966; 13 M. & W. 42: *Botten* v. *Tomlinson*, 16 L. J., C. P. 138: *Seal* v. *Hudson*, 2 B. C. Rep. 55.

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(*l*) *Wright* v. *Child*, L.
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(*o*) *De Moranda* v. *Dunk*
R. 119: *Beckford* v. *Welby*
591: *Higgins* v. *M'Adam*,
J. 1: *Pallister* v. *Pallister*,
R. 614, n.: *Porter* v. *Vi*
613: *Hamilton* v. *Dalziel*, 2
592: *Harding* v. *Holder*, 9
59; 3 Sc. N. R. 293: *S.*
Harding v. *Holden*, 2 M. &
(*p*) *Harding* v. *Holder*, su

a request to the officer not to advertise sale, or to postpone sale till a later hour (*l*). But where the plaintiff having sued out a *ca. sa.* against H., and her agent having requested the under-sheriff to direct the warrant thereon to an officer named by him, took the warrant, and himself delivered it to the officer, accompanied him to the house where H. was to be met with, and encouraged the officer to make the caption in an illegal manner: it was held, in an action against the sheriff for the escape of H., that, under the circumstances, the officer was a special bailiff (*m*).

The sheriff is not liable to the party appointing a special bailiff for the acts of that officer (*n*). And the sheriff cannot even be compelled by the party appointing the bailiff to return the writ (*o*), unless perhaps it be only for the purpose of enabling the plaintiff to issue another writ, or the like. Where the sheriff was ruled to return a writ of *fi. fa.*, the warrant upon which had, at the plaintiff's instance, been granted to a special bailiff, the Court, on discharging a rule to discharge that rule, made it a condition that plaintiff should pay the costs, and undertake to bring no action, the sheriff not having been informed of the purpose for which the return was required, viz., to enable the plaintiff to issue a *ca. sa.* (*p*).

Liability for fees.

The solicitor in an action who lodges a *fi. fa.* with a sheriff, is not, in the absence of express direction as to the bailiff by whom it is to be executed (*q*), liable to the bailiff by whom it is executed for the fees due to him (*q*).

Transfer of writs, &c. to in-coming sheriff.

By 3 & 4 *W.* 4, *c.* 99, *s.* 7, "Every sheriff of any county, city, liberty, division, town corporate, or place shall, *at the expiration of his office*, make out and deliver to the new or in-coming sheriff a true and correct list and account under his hand of all prisoners in his custody, and of all writs and other process in his hands *not wholly executed by him*, with all such particulars as shall be necessary to explain to the said in-coming sheriff the several matters intended to be transferred to him, and shall thereupon turn over and transfer to the care and custody of the said in-coming sheriff all such prisoners, writs, and process, and all records, books and matters appertaining to the said office of sheriff; and the said in-coming sheriff shall thereupon sign and give a duplicate of such

(*l*) *Wright* v. *Child*, L. R., 1 Ex. 358; 35 L. J., Ex. 209.

(*m*) *Doe* v. *Trye*, sup. And see further, as to what amounts to an appointment of a special bailiff, *Corbet* v. *Brown*, 6 Dowl. 794: *Bulson* v. *Meggat*, 4 Dowl. 557. As to who may act as a bailiff, see Ch. LXXIV.

(*n*) *Ford* v. *Leche*, 1 N. & P. 737: *Taylor* v. *Richardson*, 8 T. R. 505.

(*o*) *De Moranda* v. *Dunkin*, 4 T. R. 119: *Beckford* v. *Welby*, 2 Esp. 591: *Higgins* v. *M'Adam*, 3 Y. & J. 1: *Pallister* v. *Pallister*, 1 Chit. R. 614, n.: *Porter* v. *Viner*, Id. 613: *Hamilton* v. *Dalziel*, 2 W. Bl. 932: *Harding* v. *Holder*, 9 Dowl. 795; 3 Sc. N. R. 293: *S. C.* nom. *Harding* v. *Holden*, 2 M. & G. 914.

(*p*) *Harding* v. *Holder*, supra, et per *Tindal*, C. J.:—"Had the sheriff in this case been informed of the purpose for which it is now stated to us that the return was required, and offered an indemnity, and he had refused to return the writ, possibly he might properly have been ruled to do so."

(*q*) *Royle* v. *Busby* (C. A.), 6 Q. B. D. 171; 50 L. J., Q. B. 196: following *Maybery* v. *Mansfield*, 9 Q. B. 754: and dissenting from *Brewer* v. *Jones*, 10 Ex. 655; 24 L. J., Ex. 143. See *Newton* v. *Chambers*, 1 D. & L. 869: *Maile* v. *Mann*, 6 D. & L. 42; 2 Exch. 608: *Walbank* v. *Quarterman*, 3 C. B. 94: *Seal* v. *Hudson*, 4 D. & L. 760. B. C. See *Newman* v. *Newman*, 26 L. T. 396, 51 L. T. (Journal) 424, 425.

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list and account to the sheriff going out of office, to whom the same shall be a good and sufficient discharge of and from all the prisoners therein mentioned and transferred to the said in-coming sheriff, and the further charge of the execution of the writs, process and other matters therein contained, without any writ of discharge, or other writ whatsoever; and the said in-coming sheriff shall thereupon stand and be charged with the said prisoners, and also with the execution and care of the said writs, process and other matters contained in the said list and account as fully and effectually as if the same writs and process had been turned over by indenture and schedule; and in case any sheriff shall refuse or neglect, at the expiration of his office, to make out, sign and deliver such list and account as aforesaid, and to turn over the process aforesaid in manner aforesaid, every such sheriff so neglecting or refusing shall be liable to make such satisfaction, by damages and costs, to the party aggrieved, as he, she, or they shall sustain by such neglect or refusal" (*r*).

A *fi. fa.*, under which goods have been seized and sold, is *wholly executed*, though the sheriff has not handed over the money to the party entitled to it (*s*). The new sheriff is not liable for any neglect in the execution of a writ delivered to his predecessor (*t*), or to an attachment for not returning it, unless it has been duly transferred to him (*u*).

Return of writs.

The returns of the different writs are noticed under appropriate heads in this work.

Interpleader.

As to the proceedings by sheriffs in the case of adverse claims, *see Vol.* 2, *Ch. VIII.*

Officer not to be solicitor or bail.

As to an under-sheriff, sheriff's bailiff, or bailiff of a liberty, practising as a solicitor, *see Ch. CXXI.*; and as to sheriffs' officers, or other persons concerned in the execution of process, not being permitted to be bail, *see Ch. CXXVII.*

Sheriffs punished for misconduct by Court.

The sheriff being an officer of the Court, the Court has power to punish him by attachment if he misbehaves himself in his office (*x*). But the officers of the sheriff are not, as we have seen, the officers of the Court, nor punishable as such. (*Ante*, p. 32.) But by statute and rules of Court, the officers as well as the sheriff are, in some instances, punishable by the Court for misconduct (*y*).

Their liability for misconduct of officer.

On principles of public policy, a sheriff is liable civilly for the tortious act, default, or misconduct, whether it be wilful or inadvertent, of his under-sheriff or bailiff (*z*), in the course of the execution of their duties (*a*). Upon this principle the sheriff cannot

(*r*) See *Yaroth* v. *Hopkins*, 3 Dowl. 711.

(*s*) *Harrison* v. *Paynter*, 6 M. & W. 387; 8 Dowl. 349.

(*t*) See *Davidson* v. *Seymour*, M. & M. 34.

(*u*) *Thomas* v. *Newnam*, 2 Dowl. N. S. 33: *Holmes* v. *Elnitts*, 6 Jur. 994. See *Westby's case*, 3 Co. Rep. 72 b; Cro. Eliz. 365 (3 G. 1, c. 15, s. 8).

(*x*) See Ch. LXXIV. See *Warner* v. *Powell*, 2 Dowl. N. S. 531.

(*y*) See 7 W. 4 & 1 V. c. 55. s. 3, ante, p. 32, and R. M. 1654, s. 2.

(*z*) But the sheriff is not liable for any acts of his bailiff, committed whilst executing process issued out of the old county court: *Pitcher* v. *King*, 9 A. & E. 288; 1 P. & D. 297: *Brown* v. *Copley*, 2 D. & L. 332; 8 Sc. N. R. 350.

(*a*) *Woodgate* v. *Knatchbull*, 2 T. R. 148: *Peshall* v. *Layton*, Id. 712: *Sturmy* v. *Smith*, 11 East, 25: *Crowder* v. *Long*, 8 B. & C. 598; 3 M. & R. 17: *Willett* v. *Sparrow*, 6 Taunt. 576: *Raphael* v. *Goodman*, 8 A. & E. 565: *Scarfe* v. *Halifax*, 7 M. & W. 290, per *Parke*, B. But see *Wood* v. *Finnis*, 7 Ex. 363; 21 L. J., Ex. 138, where the bailiff took improper fees.

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(*b*) *Raphael* v. *Goodm*
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bailiff, to an assistant of
authorized by the bailiff
the money; the assistant
it over to the bailiff, and
never in fact received t
held, a good payment as

recover upon a bond obtained by the fraud of his officer (*b*). And it has been held, that the sheriff is civilly liable for whatever the bailiff improperly does under colour of the writ; and, therefore, that the sheriff is liable if the officer take a person under a *fi. fa.* (*c*). But if the act complained of be neither expressly sanctioned by the sheriff, nor impliedly committed by his authority, the sheriff is not responsible (*d*). Therefore, as it is no part of the sheriff's duty to receive payment of the amount for which a judgment debtor is in his custody, he will not be liable if his bailiff receives the amount of such debt from the debtor and misappropriates it, or neglects to pay it within a reasonable time to the creditor (*e*). If an execution creditor induce the bailiff to depart from the ordinary course of his duty, without the sheriff's knowledge (*f*), or collude with the officer (*g*), it is not competent to such execution creditor to fix the sheriff for the consequences. As to the sheriff's not being liable for the acts of a special bailiff, *see ante*, p. 33.

Evidence connecting sheriff with officer.

In an action against a sheriff for taking plaintiff's goods, proof by the officer that he took the goods under a warrant, which he produced, and which he stated he received from A. & Co., the London agents of the sheriff, and proof by the under-sheriff that A. & Co. were the London agents of the sheriff, was held sufficient to connect the sheriff with the officer (*h*). And so, where, to an action against the sheriff for carrying a party arrested by him to a tavern without his consent, defendant pleaded that he did not carry plaintiff to a tavern without his consent: it was held, on issue joined thereon, that, as the plea admitted an arrest by defendant, and as the evidence showed the arrest to have been made by the same officer who carried plaintiff to the tavern, there was no necessity for further connecting defendant with the act of the officer, by proof of the warrant (*i*). And where the first count of a declaration, in an action on the case against a sheriff, was framed upon 8 *Anne*, c. 18, *s.* 8, for seizing the goods of a tenant in execution without leaving enough to pay the landlord a year's rent then due, and of which arrear defendant had notice; and stated that defendant took the goods of T., the tenant of the plaintiff, under a

(*b*) *Raphael* v. *Goodman*, 8 A. & E. 565.

(*c*) *Smart* v. *Hutton*, 8 A. & E. 568, n.; et per *Parke*, J.:—"The officer is delegated by him to execute the writ, and the officer's acts are his: it is as if the sheriff himself delivered the party to the gaoler's custody." See *Wood* v. *Finnis*, 7 Ex. 363; 21 L. J., Exch. 138. A debtor, against whose goods a *fi. fa.* issued, paid the amount for which execution issued at the office of the bailiff who held the warrant from the sheriff to execute the writ, in the absence of the bailiff, to an assistant of the sheriff, authorized by the bailiff to receive the money: the assistant did not pay it over to the bailiff, and the sheriff never in fact received the money: held, a good payment as against the sheriff, and the writ satisfied; *Gregory* v. *Cotterell* (in error), 5 El. & Bl. 571; 25 L. J., Q. B. 33. And see *Burton* v. *Le Gros*, 34 L. J., Q. B. 91.

(*d*) *Cook* v. *Palmer*, 6 B. & C. 739: *Crowder* v. *Long*, 8 Id. 598: *Tomkinson* v. *Russell*, 9 Price, 287: *Bowden* v. *Waithman*, 5 Moore, 183: *Stuart* v. *Whittaker*, 2 C. & P. 100; R. & M. 310.

(*e*) *Wood* v. *Finnis*, supra.

(*f*) *Cook* v. *Palmer*, 6 B. & C. 739; 9 D. & R. 723: *Crowder* v. *Long*, 8 B. & C. 598; 3 M. & R. 17.

(*g*) *Raphael* v. *Goodman*, 8 A. & E. 565: *Crowder* v. *Long*, supra.

(*h*) *Shepherd* v. *Wheble*, 8 C. & P. 534—Abinger, C. B.

(*i*) *Barsham* v. *Bullock*, 10 Ad. & E. 23; 2 P. & D. 241.

PART I.

fi. fa. issued against T. at the suit of B.; this was not traversed by the pleas, and no other execution appeared: it was held, that the connection with defendant of the party who was shown to have seized the goods sufficiently appeared without producing any warrant from defendant to that party (*k*). And it has been held, that, in trover for goods against the sheriff, an affidavit made by the officer under the Interpleader Act, in respect of the same goods, is admissible to prove identity with the sheriff (*l*).

Sheriff, &c. not agent of execution creditor.

Neither the sheriff nor his officer, unless a special bailiff, can, as a general rule, be considered the agent of the execution creditor (*m*).

Sheriffs' fees; remedy for extortion.

What fees may be taken.

Sheriffs' Fees—Remedy for Extortion.]—The 7 *W.* 4 & 1 *V.* c. 55 (*n*), repeals certain Acts, and enacts by sect. 2, "That from and after the passing of this Act, it shall be lawful for sheriffs, or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees (*o*), and no more, as shall from time to time be allowed by any officer of the several Courts of law at Westminster, charged with the duty of taxing costs in such Courts, under the sanction and authority of the judges of the said Courts respectively" (*p*). The statute 29 *Eliz.* c. 4 (against extortion by sheriffs, &c.) is not repealed by this Act; the only effect of it is to exempt from the penalties of the statute of Elizabeth the cases in which the sheriff shall take no larger fees than shall be allowed by order of the judges (*q*). As this Act only relates to the regulation of fees deriving their existence from itself and the statutes repealed by it, or such as had previously been taken by custom, the sheriff's right to poundage, under 29 *Eliz.* c. 4, is altogether unaffected by this section; and therefore, where an auction was held under a writ of execution, the under-sheriff was holden to be entitled, not only to his auction fees allowed under the above Act, but also to his poundages, under 29 *Eliz.* c. 4 (*r*). As to the sheriff's poundage, and fees for executing a writ of execution, *see Ch. LXXIV.*

Extortion summarily punishable.

Sect. 3. "That any sheriff, officer, or minister acting in the execution of process directed to any sheriff or sheriffs, or engaged or concerned therein, who shall extort, demand, take, accept, or receive from any person or persons any fee or fees, gratuity or reward not allowed as aforesaid, or greater in amount than as allowed as aforesaid, such sheriff, or other his officer or minister, upon complaint

(*k*) *Reed* v. *Thoyts*, 6 M. & W. 410: *S. C.* nom. *Reid* v. *Poyntz*, 4 Dowl. 410; 9 C. & P. 515.

(*l*) *Brickell* v. *Hulse*, 7 A. & E. 454. And see *George* v. *Perring*, 4 Esp. 63.

(*m*) *Ramsey* v. *Eaton*, 10 M. & W. 22. See ante, p. 32, as to special bailiffs.

(*n*) Sects. 1 and 6 are repealed by the Stat. Law Rev. Act, 1874 (37 & 38 V. c. 35).

(*o*) A table of the fees now allowed will be found in the Appendix at the end of the 2nd vol. See *Slater* v. *Haines*, 7 M. & W. 413: *S. C.* nom. *Slater* v. *Haines*, 9 Dowl. 221: *Phillips* v. *Viscount Canterbury*, 11 M. & W. 619: *Davies* v. *Edmonds*, 13 L. J., Ex. 1.

(*p*) Before the passing of the above statute a sheriff's bailiff was not entitled to take from a party arrested a larger fee for detaining him till bail given than the 4*d.* allowed by 23 H. 6, c. 9. (*Plevin* v. *Prince*, 10 A. & E. 494.)

(*q*) *Pilkington* v. *Cooke*, 16 M. & W. 615; 17 L. J., Exch. 141; 4 D. & L. 347: *Wrightup* v. *Greenacre*, 10 Q. B. 1. And see *Usher* v. *Walters*, 4 Q. B. 558; 12 L. J., Q. B. 246.

(*r*) *Davies* v. *Griffiths*, 4 M. & W. 377; 7 Dowl. 204.

thereof made against him to any of the said Courts (*s*), and on proof being made thereof upon oath either by the examination of witnesses *vivâ voce*, or on affidavits, or on interrogatories, to the satisfaction of the Court to which the said complaint shall be made, that such sheriff, officer or minister, as the case may be, hath offended therein as aforesaid, then and in such case every such sheriff, officer or minister, as the case may be, shall be adjudged guilty of a contempt of such Court, and punished by such Court accordingly; and if any person, not being such officer or minister as aforesaid, shall assume or pretend to act as such, and shall extort, demand, take, accept or receive any fee or fees, gratuity or reward, under colour or pretext of such office, he shall, on like complaint and proof, be in that respect dealt with by the Court in like manner." Where a sheriff's officer takes more than the fees allowed under this Act, the notice of motion may call upon the sheriff to show cause why he should not return the excess, as well as upon the officer to show cause why a writ of attachment should not issue against him for his contempt in receiving the excess (*t*). Where the excess complained of was charging for remaining in possession a longer time than was necessary, and for more men than were necessary to keep possession, and the affidavits were contradictory, the Court referred the matter to the master for his report (*u*). It seems that an action for extortion can be brought against the sheriff for taking a greater fee than allowed by the Act (*x*).

Costs of complaint.

Sect. 4. "That in all cases of summary complaints as aforesaid, the Court before which such complaint shall be preferred may at its discretion award the *costs* of or occasioned by such complaint to be paid by either party to the other; such costs to be taxed by the Master of such Court: Provided always, that no such complaint shall be entertained unless made before the last day of Term (*y*) next following the act whereof complaint is made." Where a sheriff takes a greater amount of fees than by the scale made under the Act he is entitled to receive, and on taxation under a judge's order, by consent, the amount of his claim is reduced, the Court cannot compel him to pay the costs of taxation under this section, which only applies to cases where the taxation has proceeded in consequence of a complaint to the Court under the 3rd section (*z*).

Complaint to be made before last day of next term.

Fees in Lancaster and Durham.

Sect. 5. "That from and after the passing of this Act, the sheriffs of Lancashire and Durham, and their officers, shall have and be entitled to the like fees and no more upon process issuing out of the Court of Common Pleas at Lancaster and out of the Court of Pleas at Durham respectively, as from time to time shall be allowed under the authority of this Act to sheriffs upon process issuing from the superior Courts at Westminster; and that the said

(*s*) See *Curlewis* v. *Bird*, 1 Dowl. N. S. 755, per *Coleridge*, J.

(*t*) *Blake* v. *Newburn*, 5 D. & L. 601. See *Bushell* v. *Boord*, 4 D. & L. 359; 16 L. J., Q. B. 57. As to the title of the affidavit on moving for an order, see *Masters* v. *Lowther*, 21 L. J., C. P. 130; 11 C. B. 948.

(*u*) *Blake* v. *Newburn*, ubi supra. See also *Curlewis* v. *Bird*, 1 Dowl. N. S. 752.

(*x*) *Curlewis* v. *Bird*, 1 Dowl. N. S. 752: *Holmes* v. *Sparkes*, 12 C. B. 242. But see *Byrne* v. *Hutchinson*, 9 Ir. R. C. L. 75—Q. B.

(*y*) See Jud. Act, 1873, s. [illegible]. And see *College of Christ* v. *Martin*, 3 Q. B. D. 16.

(*z*) *Curlewis* v. *Bird*, supra.

PART I. Court of Common Pleas at Lancaster and Court of Pleas at Durham(*a*) respectively, or any judge thereof respectively, being also a judge of one of the superior Courts at Westminster, shall have the same powers in every particular, with respect to offences against this Act upon process issuing out of the said Court of Common Pleas at Lancaster, and Court of Pleas at Durham respectively, as are hereinbefore given to the Courts at Westminster respectively in respect of process issuing from those Courts."

(*a*) The jurisdiction of these Courts is now transferred to the High Court of Justice (see ante, p. 4).

CHAPTER VIII.

SOLICITORS AND ARTICLED CLERKS.

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SECT. 1.—*General Enactments as to Solicitors.*

BEFORE the Judicature Acts, a person appointed to act for a party in an action in a Court of common law was called an attorney (*a*). The term *solicitor*, as before those Acts commonly understood, was a person employed to conduct proceedings in Equity Courts, before the Privy Council, &c.

Transfer of jurisdiction over solicitors, &c.

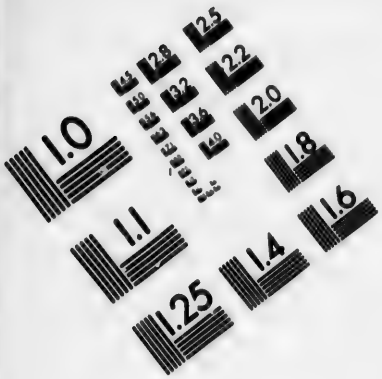
By the *Judicature Act*, 1873, *s.* 87, "From and after the commencement of this Act all persons admitted as solicitors, attorneys or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby (*b*) transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, and shall be entitled to the same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed; and all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called solicitors of the Supreme Court, and shall be admitted by the Master of the Rolls, and shall, as far as circumstances will permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed (*c*).

"Any solicitors, attorneys, or proctors to whom this section applies shall be deemed to be officers of the Supreme Court; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any Division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of her Majesty's superior Courts of law or equity might previously to the passing of this Act have exercised in respect of any solicitor or attorney admitted to practise therein."

(*a*) Co. Litt. 51 b; Com. Dig. Attorney, A.; 9 Co. 75.

(*b*) See ante, p. 3.

(*c*) By 40 & 41 V. c. 25, *s.* 17, "Any solicitor may practise in all Courts and before all persons having or exercising power, authority, or jurisdiction in matters ecclesiastical in England, and shall be deemed to be duly qualified to practise and may practise in all matters relating to applications to obtain notarial faculties, and generally shall have and may exercise all the powers and authorities and shall be entitled to all the rights and privileges and may fulfil all the functions and duties which appertain or belong to the office or profession of a proctor, whether in the provincial, diocesan, or other jurisdictions in England."



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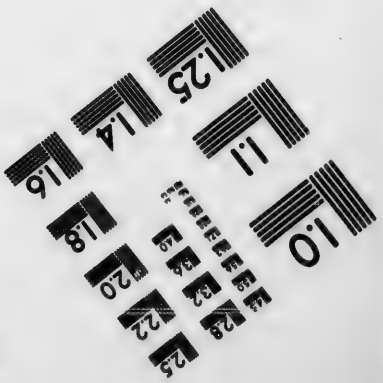

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PART I.

By the *Judicature Act*, 1875, *s.* 14, "Whereas under sect. 87 of the principal Act, solicitors and attorneys will after the commencement of that Act be called solicitors of the Supreme Court: Be it therefore enacted that—

"The registrar of attorneys and solicitors in England shall be called the registrar of solicitors, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron, or any two of them, may, from time to time, by regulation adapt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments, to the solicitors of the Supreme Court under sect. 87 of the principal Act."

By the Judicature Act, 1881 (44 & 45 *V. c.* 68), *s.* 24, "The powers which by an Act passed in the session of the sixth and seventh years of her present Majesty, intituled 'An Act for consolidating and amending several of the Laws relating to Attornies and Solicitors practising in England and Wales,' and by sect. 14 of the Supreme Court of Judicature Act, 1875, and by the Solicitors Act, 1860, and by the Solicitors Act, 1877, and by any Act amending the said Acts respectively, are vested in the Master of the Rolls jointly with the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or with any of them, or jointly with the Presidents of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court, or with any of them, shall henceforth be vested in the Master of the Rolls, with the concurrence of the Lord Chancellor and the Lord Chief Justice of England, or (in case of difference) of one of them, and anything required by the said Acts to be done to or before the said Lord Chief Justices and Lord Chief Baron, or the said Presidents jointly with the Master of the Rolls, may be done to or before the Master of the Rolls, the Lord Chancellor, and the Lord Chief Justice of England.

"Provision may be made by the Master of the Rolls, with the concurrence of the Lord Chancellor and the Lord Chief Justice of England, or (in case of difference) of one of them, for the care and custody of the Roll of Solicitors after the abolition of the office of Clerk of the Petty Bag."

Stat. 6 & 7 V. c. 73.

The statute 6 & 7 *V. c.* 73 (passed 22nd August, 1843), intituled "An Act for consolidating and amending several of the laws relating to attornies and solicitors practising in England and Wales," consolidates the statutes and laws relating to solicitors.

By sect. 1, certain Acts and parts of Acts are repealed (*d*).

To what clerks the Act not to extend.

By sect. 46, "This Act does not extend to the examination of the clerks of the Petty Bag Office or of the clerks of the Queen's coroner and attorney in the Court of Queen's Bench for the time being."

Solicitors to whom Act is not to extend.

By sect. 47, "This Act does not extend to the examination, &c. of any persons appointed to be solicitors of the Treasury, Customs, Excise, Post Office, Stamp Duties or any other branch of her Majesty's revenue, or to the solicitor of the City of London, or to

(*d*) *Hodge* v. *Bird*, 1 D. & L. 956: *Doe* v. *Jinders*, 14 L. J., Q. B. 245; 2 D. & L. 986.

the assistant of the council for the affairs of the Admiralty or Navy, or to the solicitor to the Board of Ordnance."

Interpretation clause.

By sect. 48, "In the construction of this Act, the word '*month*' shall be taken to mean a calendar month; and every word importing the *singular number* only shall extend and be applied to several persons, matters or things, as well as one person, matter or thing; and every word importing the *plural number*, shall extend and be applied to one person, matter or thing, as well as several persons, matters or things, and every word importing the *masculine gender* only shall extend and be applied to a female as well as a male; and the word '*person*' shall extend to any body politic, corporate or collegiate, municipal, civil or ecclesiastical, aggregate or sole, as well as an individual: unless in any of the cases aforesaid, it be otherwise specially provided, or there be something in the subject or context repugnant to such construction."

23 & 24 V. c. 127.

The 23 & 24 *V. c.* 127, recites 6 & 7 *V. c.* 73; 7 & 8 *V. c.* 86; and 14 & 15 *V. c.* 88.

Interpretation of terms.

By sect. 1, "In the construction of this Act, unless there be something in the subject or context repugnant to such construction, the word 'attorney' shall mean attorney of one or more of the superior Courts of law at Westminster, or of the Court of Common Pleas of the County Palatine of Lancaster, or of the Court of Pleas of the County Palatine of Durham; the word 'solicitor' shall mean solicitor of the High Court of Chancery; the word 'Registrar' shall mean Registrar of Attorneys and Solicitors; the expression 'the Roll of Attorneys and Solicitors kept by the Registrar' shall mean the Roll or Book, Rolls or Books of Attorneys and Solicitors, which by the 6 & 7 *V. c.* 73, the Registrar is required to keep; and the expression 'the Incorporated Law Society' shall mean 'the Incorporated Society of Attorneys, Solicitors, Proctors and others, not being Barristers, practising in the Courts of Law and Equity of the United Kingdom.'"

Provisions enabling other than attorneys to act.

By sect. 33, "Nothing in this Act shall extend to repeal, prejudice or affect any provision in any Act of Parliament in anywise enabling any person other than an attorney or solicitor to conduct, defend or otherwise act in relation to any suit, matter or proceeding."

Act to extend to England, &c.

By sect. 35, "This Act shall only extend to England and Wales, save as herein otherwise expressly provided."

6 & 7 V. c. 73, and this Act to be as one.

By sect. 36, "The 6 & 7 *V. c.* 73, and this Act shall be construed together as one Act."

33 & 34 V. c. 28.

The Attorneys and Solicitors Act, 1870 (33 & 34 *V. c.* 28), which chiefly relates to the remuneration of solicitors, is noticed, *post*, p. 126.

The Solicitors Act, 1877.

Short title and construction of Acts.

By 40 & 41 *V. c.* 25, *s.* 1, "This Act may be cited for all purposes as 'The Solicitors Act, 1877,' and the 6 & 7 *V. c.* 73, and the 23 & 24 *V. c.* 127, may be respectively cited for all purposes as 'The Solicitors Act, 1843,' and 'The Solicitors Act, 1860,' and this Act shall (so far as is consistent with the tenor thereof) be construed as one with the said Solicitors Acts, 1843 and 1860, and with the other enactments for the time being in force relating to solicitors."

Extent of Act.

By sect. 2, "This Act shall not extend to Scotland or Ireland."

Commencement of Act.

By sect. 3, the Act, as to certain purposes, came into operation

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on the passing thereof, and for all other purposes came into operation on the 1st day of January, 1878.

Interpretation of terms.

By sect. 4, "In this Act,—

'The Incorporated Law Society' or 'The Society' means 'The Society of Attorneys, Solicitors, Proctors and others not being Barristers practising in the Courts of Law and Equity of the United Kingdom:'

'Solicitor' means solicitor of the Supreme Court of Judicature in England:

'Preliminary examination' means an examination in general knowledge of persons becoming bound under articles of clerkship to solicitors:

'Intermediate examination' means an examination of persons bound under articles of clerkship to solicitors, in order to ascertain the progress made by such persons during their articles in acquiring the knowledge necessary for rendering them fit and capable to act as solicitors:

'Final examination' means an examination of persons applying to be admitted as solicitors, as well touching the articles and service as the fitness and capacity of such persons to act as solicitors, in all business and matters usually transacted by solicitors, and includes, where any allegation is made by the registrar of solicitors as to the moral unfitness of any such person to be an officer of the Supreme Court, an inquiry into the truth of such allegation."

Council of Incorporated Law Society may act on behalf of Society.

By sect. 19, "All rules and regulations, acts, matters and things respectively authorized or required to be made or done by the Incorporated Law Society under or in pursuance of this Act or of 'The Solicitors Act, 1843,' or of 'The Solicitors Act, 1860,' or under any orders, rules and regulations made in pursuance thereof respectively, may be made or done by the council for the time being of the society on behalf of the society."

Authentication of regulations and other documents.

By sect. 20, "All rules, regulations, certificates, notices and other documents made or issued by the Incorporated Law Society for any purpose whatever may be in writing or print, or partly in writing and partly in print, and may be signed on behalf of the society by the secretary, or by such other officer or officers of the society as may be from time to time prescribed by the council."

Construction of enactments referring to attorneys and examinations.

By sect. 21, "All enactments referring to attorneys which are in force immediately after the coming into operation of this Act shall be construed as if the expression 'solicitor of the Supreme Court' were therein substituted for the expression 'attorney,' and all enactments relating to the examinations of attorneys and solicitors which are in force immediately after the coming into operation of this Act shall be construed as relating to the examinations to be held in pursuance of this Act."

Sect. 23 repeals certain enactments and regulations.

We shall now proceed to consider the subject-matter of this Chapter in the following order:—

I. ARTICLED CLERKS.

1. *The Binding and Service—Examinations.*—Who to be bound, and in what cases, 44; to whom to be bound, 48; Preliminary examination, 48;

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8. *Striking off the Roll at their own Request*, 184.

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I. Articled Clerks.

1. *The Binding and Service—Examinations.*
2. *The Admission.*

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1. *The Binding and Service—Examinations.*

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Who to be bound, and in what Cases.]—The 6 & 7 *V. c.* 73, *s.* 2, enacts that no person shall act as a solicitor unless he has been admitted and enrolled as such.

For what time, &c.

By sect. 3, "Except as hereinafter mentioned, no person (*e*) shall, from and after the passing of this Act, be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing (*f*) to serve as clerk for and during the term of five years (*g*) to a (*h*) practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years, and also unless such person shall after (*i*) the expiration of the said term of five years have been examined and sworn in the manner hereinafter directed" (*k*).

Where persons have taken degrees at certain Universities.

By 23 & 24 *V. c.* 127, *s.* 2, "*s.* 7 of 6 & 7 *V. c.* 73, shall be repealed, and any person having taken the degree of Bachelor of Arts or Bachelor of Laws in the University of Oxford, Cambridge, Dublin, Durham, or London, or in the Queen's University in Ireland, or the degree of Bachelor of Arts, Master of Arts, Bachelor of Laws,

(*e*) To what clerks this Act does not extend, see *s.* 46, ante, p. 40.

(*f*) See *Ex p. Adams*, 4 Ch. D. 39; 46 L. J., Ch. 42.

(*g*) As to the computation of the time when, by the articles, the clerk is to serve for five years next ensuing the date thereof, see *Re Ellis*, 5 L. T., N. S. 686.

(*h*) Binding to a firm of two was held good. *In re Holland*, L. R., 7 Q. B. 297; 41 L. J., Q. B. 141.

(*i*) See 23 & 24 V. c. 127, *s.* 12, where term expires in vacation.

(*k*) The latter part of this section contains a provision enabling attorneys of the Courts of Common Pleas of the county palatine of Lancaster, and of the Court of Pleas of the county palatine of Durham, to take articled clerks. As to the jurisdiction formerly vested in these Courts being transferred to the High Court of Justice, see ante, p. 4.

or Doctor of Laws, in any of the Universities of Scotland (*l*), none of such degrees being honorary degrees, and who at any time after having taken such degree, and either before or after the passing of this Act, has been bound by and has duly served under articles of clerkship to a practising attorney or solicitor for the term of three years, and has been examined and sworn in manner directed by 6 & 7 *V. c.* 73, and by this Act, may be admitted and enrolled as an attorney or solicitor, and service for any part of the said term not exceeding one year with the London agent of such attorney or solicitor in the business, practice or employment of an attorney or solicitor, either by virtue of any stipulation in such articles, or with the permission of such attorney or solicitor, shall be and be deemed to have been good service under such articles for such part of the said term: and where any person has before the passing of this Act, and at any time after having taken such degree, been bound as aforesaid for five years, he may after having duly served three years of such term in such manner as would have been required if he had been bound for three years only, and having been examined and sworn as aforesaid, and with the consent in writing (endorsed on his articles of clerkship) of the attorney or solicitor to whom he may be bound, to the immediate determination of his articles of clerkship, be admitted and enrolled as an attorney or solicitor; and where such consent is given as aforesaid, and acted upon under this provision by the person hereby made eligible to be admitted and enrolled as aforesaid, the articles of clerkship shall be deemed to have determined as if they had determined by effluxion of time" (*m*).

Power of judges to provide for admission in certain cases after four years' service.

By 40 & 41 *V. c.* 25, *s.* 13 (*n*), "The presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any three of them (the Master of the Rolls being one), may make and from time to time alter and revoke regulations directing that any person having passed any examination held in the Universities of Oxford, Cambridge, Dublin, Durham or London, or in the Queen's University in Ireland, or in any of the universities in Scotland, or in the Owen's College, Manchester, or in any other university, college or educational institution, and specified in that behalf in such regulations, may be admitted and enrolled as a solicitor after service under articles of clerkship to a practising solicitor for the term of four years, but not so as to allow in any case a less term of service than four years."

By the Regulations of the Judges (dated 5th December, 1877), Reg. 3, "Any person who has passed the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the examination in arts for the second year at Durham, or who has passed in honours at the Entrance Exami-

(*l*) In *Ex p. Stewart*, L. R., 7 Exch. 202; 41 L. J., Exch. 76, it was held that a member of the University of Edinburgh who had not taken the degree of B.A. or M.A., &c., but had been enrolled on the general council by virtue of 21 & 22 V. c. 83, s. 6, was not entitled to the benefit of this section.

(*m*) See cases decided under former Acts. *Re Colville*, 6 Law Rec. 121: *Anon.* 2 Law Rec. 232: *Ex p. Unthank*, 2 M. & P. 453: *Ex p. Rowle*, 2 Chit. Rep. 61, post: *Ex p. Bradford*, 1 El. & El. 417; 28 L. J., Q. B. 138.

(*n*) See 23 & 24 V. c. 127, s. 5.

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nation at the University of Dublin, or the Matriculation Examination at the University of London (being placed in the first division of such Matriculation Examination), or the Legal Students' Higher Examination in the Owen's College, Manchester, may be admitted and enrolled as a solicitor after service under articles of clerkship to a practising solicitor for a term of four years."

Persons having been at the bar may be admitted after three years' service (*o*).

By 23 & 24 *V. c.* 127, *s.* 3, "Every person who has been called to the degree of Utter Barrister in England, and who, before becoming such barrister, has been bound by contract in writing to serve as a clerk for the term of five years, or who, after ceasing to be a barrister has been bound by contract in writing to serve as a clerk for the term of three years to a practising attorney or solicitor, and has in either of the said cases continued in such service for the term of three years, and during the whole of such three years served in such manner as is hereinbefore required in the case of persons who have taken degrees in the said Universities, and having been examined and sworn as aforesaid, after the expiration of such term of three years (the examination and swearing taking place, in the first-mentioned case, after the person has ceased to be a barrister), may be admitted and enrolled as an attorney or solicitor: provided always, that in the case of any such person as aforesaid, who has been bound for five years, it shall be necessary for such term to be determined with consent, as hereinbefore provided in the case of persons having taken degrees, who may have been bound for five years before the passing of this Act."

Persons having been clerks to solicitors, &c. for ten years may be admitted after three years' service.

By sect. 4, "Any person who, either before or after the passing of this Act, shall for the term of ten years have been a *bonâ fide* clerk to an attorney, solicitor, or proctor, or attorneys, solicitors, or proctors, and during that term shall have been *bonâ fide* engaged in the transaction and performance, under the direction and superintendence of such attorney, solicitor or proctor, or attorneys, solicitors, or proctors, of such matters of business as are usually transacted and performed by attorneys, solicitors (*p*), and proctors, and who shall produce to the examiners satisfactory evidence that he has faithfully, honestly, and diligently served as such clerk, and who after (*q*) the expiration of the said term of ten years has been bound by and has duly served under articles of clerkship to a practising attorney, solicitor or proctor for the term of three years, and has been examined and sworn in manner directed by 6 & 7 *V. c.* 73, and by this Act, may be admitted and enrolled as an attorney and solicitor or proctor, and service for any part of the said term not exceeding one year with the London agent of such attorney or solicitor or proctor, in the proper business, practice or employment of an attorney, solicitor, or

(*o*) As to the admission of a barrister of not less than five years' standing, see 40 & 41 V. c. 25, s. 12, post, p. 64.

(*p*) Where a boy of fourteen entered the service of a solicitor as a salaried clerk, and having served continuously for nine years, was, in ignorance of this statute, articled for five years and served for four, it was held that he was entitled to the benefit of the Act, and was allowed to pass his examination. *Re Sherry*, L. R., 3 Q. B. 164; 37 L. J., Q. B. 82.

(*q*) There may be an interval between the ten years' service and the service under articles. *Ex p. Vosper*, 33 L. J., Q. B. 113. And the service under articles may begin before the expiration of the ten years. *Re Sherry*, ubi supra.

proctor, either by virtue of any stipulation in such articles, or with the permission of such attorney, solicitor, or proctor, shall be and be deemed to have been good service under such articles for such part of the said term; and where any such person has, before the passing of this Act, been bound for five years, he may, after having duly served three years of such term in such manner as would have been required if he had been bound for three years only, and having been examined and sworn as aforesaid, and with the consent in writing (indorsed on his articles of clerkship) of the attorney, solicitor or proctor to whom he may be bound to the immediate determination of his articles of clerkship, be admitted and enrolled as an attorney and solicitor; and where such consent is given as aforesaid, and acted upon under this provision by the person hereby made eligible to be admitted and enrolled as aforesaid the articles of clerkship shall be deemed to have determined as if they had determined by effluxion of time."

Persons admitted as writers to the signet, &c.

By sect. 15, "Every person who has been admitted and enrolled as a writer to the signet, or as a solicitor in the supreme courts of Scotland, or as a procurator before any of the sheriff courts of Scotland, and who, after being so admitted and enrolled, has been bound by and has duly served under articles of clerkship in England or Wales to a practising attorney or solicitor for the term of three years, and has been examined and sworn in manner directed by 6 & 7 *V. c.* 73 and by this Act, may be admitted and enrolled as an attorney and solicitor, and service for any part of the said term not exceeding one year with the London agent of such attorney or solicitor, in the proper business, practice, or employment of an attorney or solicitor, either by virtue of any stipulation, or with the permission of such attorney or solicitor, shall be and be deemed to have been good service under such articles for such part of the said term."

Members of the Faculty of Advocates.

By 35 & 36 *V. c.* 81, *s.* 1, "Every person who has been admitted a member of the Faculty of Advocates in Scotland, and who, whether before or after the passing of this Act [10th August, 1872], has duly served under articles of clerkship in England or Wales to a practising attorney or solicitor for the term of three years and has been examined and sworn in manner directed by 6 & 7 *V. c.* 73, and the Acts amending the same, may be admitted and enrolled as an attorney and solicitor in England and Wales."

Certain official clerks excepted.

The 46th and 47th sections of 6 & 7 *V. c.* 73, *ante*, p. 40, enumerate certain official clerks and solicitors to whom that Act does not apply.

Clerk must be of proper age.

The clerk must be of a proper age, though he need not be of full age. Where he was of the age of nine years only, the Court put an end to the service (*r*). A barrister (*s*), or a surveyor of taxes, or other party holding any employment incompatible with that of a clerk to the solicitor to whom he is to be articled, is not competent to serve under articles (*t*).

(*r*) *Re Donne*, 3 Swanst. 96, n.

(*s*) *Ex p. Bateman*, 6 Q. B. 853; 14 L. J., Q. B. 89; 2 D. & L. 725: *Ex p. Cole*, 1 Dougl. 114: *Ex p. Warner*, 6 Jur. 1016.

(*t*) *Re Taylor*, 6 D. & R. 432, per *Bayley*, J.; and see cases post, p. 54.

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Where a solicitor took a turnkey of the Queen's Bench Prison as an articled clerk, evidently for the purpose of securing the business of the prisoners, the Court ordered the articles to be cancelled (*u*).

To whom to be bound.

To whom to be bound.]—By 6 & 7 *V. c.* 73, *s.* 3, *ante*, p. 44, it will be seen that the party to whom the clerk is to be bound must be a practising solicitor in England or Wales (*x*).

Solicitors may have only two clerks; must not take clerks after discontinuing practice, nor whilst clerk to another.

By 6 & 7 *V. c.* 73, *s.* 4, "No attorney or solicitor shall have more than two clerks at one and the same time, who shall be bound by such contract in writing as aforesaid to serve him as clerks; and that no attorney or solicitor shall take, have, or retain any clerk who shall be bound by contract in writing as aforesaid after such attorney or solicitor shall have discontinued or left off practising as or carrying on the business of an attorney or solicitor, nor whilst such attorney or solicitor shall be retained or employed as a writer or clerk by any other attorney or solicitor; and service by any clerk under articles to an attorney or solicitor for and during any part of the time that such attorney or solicitor shall be so employed as writer or clerk by any other attorney or solicitor, shall not be deemed or accounted as good service under such articles."

Where there are two solicitors in partnership, each may have two articled clerks (*y*). But there must be a separate binding to each; and if the binding were to the two (as it might be) (*z*), the clerk would be deemed the clerk of each, and neither could have more than one other clerk bound to him (*a*).

Disqualification of solicitor not to disqualify persons who have served them.

By 6 & 7 *V. c.* 73, *s.* 28, "And be it enacted, that no person who shall have duly served his clerkship under articles in writing, pursuant to the provisions of this Act, shall be prevented or disqualified from being admitted and enrolled as an attorney or solicitor, nor liable to be struck off the roll if admitted, by reason or in consequence of the attorney or solicitor to whom he may have been bound by such articles having been after such service struck off the roll: provided that such clerk or person be otherwise entitled to be admitted and enrolled according to the provisions hereinbefore contained."

Preliminary examinations.

Preliminary Examinations.]—As to this, *see post*, p. 64.

The Articles. Form of.

The Articles of Clerkship.]—They must be in writing. (6 & 7 *V. c.* 73, *s.* 3, *ante*, p. 44.) But no particular form is required (*b*). They

(*u*) *Frazer's case*, 1 Burr. 291.

(*x*) *Ex p. Davies*, 5 Q. B. 564; 13 L. J., Q. B. 146; 1 Dav. & Mer. 463.

(*y*) *Ex p. Bailey*, 9 B. & C. 691; 4 M. & R. 603.

(*z*) *Re Holland*, ante, p. 44, n. (*h*).

(*a*) *Ex p. Bayley*; *Re Holland*, ubi supra.

(*b*) *Ex p. Forrest*, 35 L. J., Q. B. 131. See the Forms, Chit. Forms, 4 and 6. In a case where the defendant bound himself to a London solicitor by articles for a term, and covenanted that he would not at the expiration of the term, or at any time thereafter, either solely, or jointly with, or as agent for, any other person or persons, directly or indirectly practise the business of an attorney or solicitor within the city of London, or the counties of Middlesex or Essex, nor directly nor indirectly act as such attorney or solicitor for any client or clients of the plaintiff, or any partner or partners of the plaintiff, or for any person or persons who should have been a client or clients of the plaintiff, or any partner or partners of the plaintiff, at any time during the term; it was held that the restriction was not unreasonable, and that the defen-

must be executed by both the solicitor and the clerk to be bound by them, the term of the service being reckoned only from their actual execution (*c*). Where the clerk is a minor, the articles should also be executed by his parent or guardian.

Defects in, when to be taken advantage of.

By 6 & 7 *V. c.* 73, *s.* 29, "No person who has been admitted and enrolled shall be liable to be struck off the roll for or on account of any defect in the articles of clerkship, or in the registry thereof, or in his service under such articles, or in his admission and enrolment, unless the application for striking him off the roll be made within twelve months from the time of his admission and enrolment, provided that such articles, registration, service, admission, or enrolment, be without fraud."

The term.

The Term.]—Care must be taken to make the articles for the full number of years, as otherwise they will be void, and (subject to the power of admission given by sect. 15 of the *Solicitors Act*, 1877) the service under them will not be allowed to be reckoned as part of the required period of service (*d*). In ordinary cases *five years* is the period of service required. (6 & 7 *V. c.* 73, *s.* 3, *ante*.) *Three years* is sufficient in case of persons who have taken one of the degrees at the universities mentioned in sect. 2 of the Solicitors Act, 1860 (23 & 24 *V. c.* 127, *ante*, p. 44); or who have been called to the bar (*Id. s.* 3, *ante*); or who have been *bonâ fide* clerks to solicitors or proctors for ten years, and have complied with the requirements of sect. 4 of the last-mentioned Act (*Id. s.* 4, *ante*) (*e*); or who have been admitted and enrolled as writers to the signet, or solicitors of the Supreme Court in Scotland, or as procurator before any of the sheriffs' Courts there. (*Id. s.* 15, *ante*.) It is also sufficient in the case of persons who have been admitted members of the Faculty of Advocates in Scotland. (35 & 36 *V. c.* 81, *s.* 1, *ante*.) *Four years*' service is sufficient in the case of "Any person who has passed the first public examination before moderators at Oxford, or the previous examination at Cambridge, or the examination in arts for the second year at Durham, or who has passed in honours at the entrance examination at the University of Dublin, or the matriculation examination at the University of London [being placed in the first division of such matriculation examination], or the legal students' higher examination in the Owen's College, Manchester." (*Regulations of the Judges* (*December* 5, 1877, *Reg.* 3) *under* 40 & 41 *V. c.* 25, *s.* 13.) The term may, it seems, be for a longer period than five years, determinable on the actual service for the required term (*e*).

Stamp on.

Stamp on.]—By the Stamp Act, 1870 (33 & 34 *V. c.* 97) (*f*), *s.* 3, it is enacted that after 1st January, 1871, there shall be charged the duties in the schedule specified, and no other duties.

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dant's acting for a petitioner in the London Court of Bankruptcy was a breach of the covenant. *May* v. *O'Neill*, 44 L. J., Ch. 660. See *Shepherd* v. *Neve*, 22 W. R. 725.

(*c*) *Ex p. Angel*, 4 Jur. 656: *Ex p. Anon.* 27 L. J., Q. B. 656.

(*d*) *Ex p. Jones*, 22 L. T. 306.

(*e*) *In Re Sherry*, L. R., 3 Q. B. 164.

(*f*) Cap. 99 repeals the previous Acts.

PART I.

Stamp on articles;

The schedule contains (amongst others) the following:—

"*Articles of Clerkship*, whereby any person first becomes bound to serve as a clerk in order to his admission

(1.) As an attorney or solicitor in any of her Majesty's Courts at Westminster or in Ireland, or as a proctor in the High Court of Admiralty, or any Ecclesiastical Court in England or Ireland £80

(2.) As an attorney or solicitor in any of the Courts of the counties palatine of Lancaster and Durham, or as a writer to the signet, or as a solicitor, agent or attorney in the Court of Session, Justiciary or Commission of Teinds in Scotland £60

on fresh articles.

"*Articles of Clerkship*, whereby any person having been before bound by duly stamped articles to serve as a clerk in order to his admission in any of the Courts aforesaid, and not having completed his service so as to be entitled to such admission, becomes bound afresh for the same purpose . . . . . 10*s*."

Sect. 41 enacts as to original articles of clerkship,—

(1.) "Where the same articles are a qualification for the admission of any person not only as an attorney or solicitor in any of her Majesty's Courts at Westminster, but also as an attorney or solicitor in any of the Courts of the counties palatine of Lancaster and Durham, such articles are not to be charged with more than one duty of £80.

(2.) "Where any person has become bound by duly stamped articles in order to his admission as an attorney or solicitor in any of the Courts of the counties palatine of Lancaster and Durham, such articles shall on payment of such further amount of duty as together with the amount of duty previously paid thereon will make up the sum of £80, be impressed with a stamp denoting the payment of such further duty, and shall thereupon be considered to be sufficiently stamped for the purpose of entitling such person to admission in any of the Courts at Westminster" (*g*).

Sect. 42. Relates to articles in Scotland.

Penalty on stamping articles after six months.

Sect. 43. "Save as hereinbefore provided (*h*), articles of clerkship are not to be stamped at any time after the expiration of six months from the date thereof, except upon payment of penalties as follows:—

(1.) If brought to be stamped within one year after date, £10.

(2.) If so brought after one year and within five years after date,—

For every complete year, and also for any additional part of a year elapsed since the date, £10.

(3.) In every other case, £50."

Affidavit of execution and enrolment of articles.

Affidavit of Execution and Enrolment of Articles.]—By 6 & 7 *V. c.* 73, *s.* 8, "Whenever any person shall, after the passing of this Act [22nd August, 1843], be bound by contract in writing to serve as a clerk to any attorney or solicitor as aforesaid, the attorney or solicitor (*i*) to whom such person shall be so bound as

(*g*) See *Re Myers*, 8 Q. B. 515; 15 L. J., Q. B. 209; and *Re Watson*, 11 W. R. 730, Q. B., on the old Acts.

(*h*) Sect. 15.

(*i*) See *Ex p. Lee*, 8 W. R. 541, where the solicitor died.

aforesaid shall, within six months after the date (*j*) of every such contract, make and duly swear, or cause or procure to be made and duly sworn, an affidavit or affidavits (*k*) of such attorney or solicitor having been duly admitted, and also of the actual execution of every such contract by him the said attorney or solicitor, and by the person so to be bound to serve him as a clerk as aforesaid (*l*); and in every such affidavit shall be specified the names of every such attorney or solicitor, and of every such person so bound, and their places of abode respectively, together with the day on which such contract was actually executed: and every such affidavit shall be filed within six months next after the execution (*m*) of the said contract, with and by the officer appointed or to be appointed for that purpose, as hereinafter mentioned (*n*), who shall thereupon enrol and register the said contract, and shall make and sign a memorandum of the day of filing such affidavit upon such affidavit, and also upon the said contract." It is the duty of the solicitor to enrol the articles (*o*). They should be stamped before they are enrolled (*p*).

By sect. 9, "In case such affidavit be not filed within such six months, the same may be filed by the said officer after the expiration thereof, but the service of such clerk shall be reckoned to commence and be computed from the day of filing such affidavit, unless one of the said Courts of law or equity shall otherwise order."

If not filed in six months, service to reckon from filing, unless otherwise ordered.

Under the above statutory provisions respecting the filing of the affidavit and the enrolling of the articles, the Court has power to remedy an omission to file the affidavit, &c., within the time limited. The course is to file the affidavit, &c., and apply to the Court for

When the Court will aid the party.

(*j*) *Anon.* 27 L. J., Q. B. 184.

(*k*) Chit. F., p. 8.

(*l*) See the form of affidavit, Chit. Forms. An affidavit merely stating, by way of description, that the defendant is "one of the solicitors," is insufficient: *Ex p. Fraser*, 1 New Pr. C. 450.

(*m*) Where the affidavit of due execution of articles of clerkship was filed within six months of their execution by the clerk, but not within six months of their execution by the master, it was held that it was filed in due time: *Ex p. Leggett*, 3 Jur. N. S. 1218, B. C.

(*n*) Now the Clerk of the Petty Bag Office. Reg. 28 Nov. 1877, post, p. 64. Sect. 11 of 6 & 7 V. c. 73, enacts, "That the officer so appointed or to be appointed for filing such affidavits as aforesaid, shall keep a book, wherein shall be entered the substance of every affidavit which shall be so filed as aforesaid, specifying the name and place of abode of the attorney or solicitor to whom any person shall be bound to serve as a clerk, and of the clerk or person who shall be so bound as aforesaid, and of the person making such affidavit, with the date of the articles or contract in such affidavit mentioned or referred to, and the days of swearing and filing every such affidavit respectively; and such officer shall be at liberty to take, at the time of filing every such affidavit, the sum mentioned in the second schedule to this Act annexed [5*s.*], and no more, as a recompense for his trouble in filing such affidavits and preparing and keeping such books as aforesaid; and such books shall and may be searched in office hours by any person whomsoever, without fee or reward." A party has no right to make this search more than once on the same day. *Ex p. Henning*, 9 Jur. 900. Copies of entries in the book were held to be transcripts within the general rules made in pursuance of 7 W. 4 & 1 V. c. 30, s. 6; *S. C.* 678.

Book to be kept for entering names, &c. of attorney and clerk, &c.

(*o*) *Dufaur* v. *Sigel*, 22 L. J., Ch.

(*p*) *Ex p. Williams*, 28 L. T., O. S. 339: *Re Welch*, 29 L. T., O. S. 75.

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an order that the service shall be reckoned from the date of the execution of the articles (*q*). Before making any order, the Court will require notice to be given to the Incorporated Law Society, so that they may have an opportunity of examining into the truth of the facts upon which it is founded (*r*). The application must be supported by an affidavit setting forth the facts, showing a sufficient reason or excuse for the omission. An affidavit merely stating that the omission "had arisen from inadvertence only" will not suffice (*s*). The Court will grant the order where the omission clearly arose from mistake or inadvertence, or where there is any other *bonâ fide* excuse, but certainly not where there was any improper design or object in it (*t*); they would not do so when the omission is owing to the mere disappointment of a vague hope of being able to pay in time (*u*); or the mere failure to obtain payment of a debt (*x*); though when there was a reasonable expectation that it would be paid this might suffice (*y*). Sometimes, though they may not allow the clerk the benefit of his full service under the articles, they may allow a portion of it, and compel him to serve a portion of his time over again (*z*). Where articles of clerkship to a solicitor were duly executed, but were not enrolled within the six months, being left unstamped with a view of seeing whether the health of the clerk would enable him to continue to serve under them: the Court refused to allow the term of service to count from the execution of the articles (*a*).

If the Court refuse to make an order, the clerk will then be obliged to serve the full term of years required, reckoning them from the time of the enrolment.

Objection to defect in enrolment, when to be taken.

By 6 & 7 *V. c.* 73, *s.* 29, *ante*, p. 49, a solicitor will not be liable to be struck off the roll on account of any defect in the registry of the articles, unless the application for striking him off the roll be made within twelve months from the time of his admission and enrolment, provided that such registration be without fraud.

Enrolment where articles lost or destroyed.

Enrolment where Articles lost or destroyed.]—By 2 & 3 *V. c.* 33, *s.* 9 (*b*), "In any case in which the original articles of clerkship

(*q*) See *Re Denbigh*, 1 New Pr. Cas. 210: *Ex p. Muvin*, 2 New Pr. Cas. 187: *Ex p. Cunningham*, 8 Jur. 405.

(*r*) *Ex p. Blades*, 44 L. J., C. P. 115.

(*s*) *Re Benson*, 10 Beav. 435: *Ex p. Broster*, Bail Court, cor. *Coleridge*, J., 25 April, 1850.

(*t*) *Ex p. Norton*, 26 L. J., Q. B. 24: *Ex p. Bishop*, 9 C. B., N. S. 150; 30 L. J., C. P. 48: *Ex p. Herbert*, 31 L. J., Q. B. 33; 1 B. & S. 825: *Ex p. Banyard*, L. R., 10 C. P. 638; 44 L. J., C. P. 305: *Ex p. Wilson*, 33 L. J., Q. B. 89; 4 B. & S. 889: *Ex p. Belk*, 33 L. J., Ex. 73: *Ex p. Edwards*, 32 L. J., C. P. 213: *Ex p. Breden*, 31 L. J., Q. B. 184, where the clerk went on serving, knowing that the articles were not stamped, and the Court refused to allow the service to date from the execution of the articles. *Ex p. Breden*, 12 C. B., N. S. 351; 31 L. J., C. P. 321: *Ex p. Jones*, 14 C. B., N. S. 301: *Ex p. Forrest*, 35 L. J., Q. B. 131: *Ex p. Darville*, L. R., 2 C. P. 244; 36 L. J., C. P. 133: *Ex p. Hayward*, 29 L. T. 422, where the delay arose from the clerk being misled by the words of the Stamp Act.

(*u*) *Ex p. Darville*, supra: *Ex p. Jones*, supra: *Ex p. Rolt*, 29 L. T. 885: *Ex p. Bryer*, 32 L. T. 568.

(*x*) *Ex p. Banyard*, supra: *In re Sayer*, 32 L. T. 560, Q. B.

(*y*) *In re Sayer*, L. R., 10 C. P. 569.

(*z*) *Ex p. Broster*, supra: *Ex p. Belk*, supra.

(*a*) *Re Welch*, 27 L. J., Q. B. 213. See *Re Bishop*, 3 L. T. 323: *Ex p. Tayleure*, 3 L. T. 267.

(*b*) This statute is expressly saved by stat. 6 & 7 V. c. 73, Sched. I. Pt. 2.

shall have been, or shall hereafter be, lost or destroyed, before or after payment of the duty, it shall be competent to either of her Majesty's Superior Courts at Westminster to direct the enrolment of a copy of such articles (*c*), upon being satisfied by such evidence as shall appear to the Court sufficient to prove the loss (*d*) of such original articles, the authenticity of the paper proposed for enrolment, and that the duty has been duly paid upon such articles or upon the copy thereof, to be shown by the denoting or other appropriate stamp as the case may require; and provided such Court shall be satisfied that the clerk has duly served under such articles from the time of the execution thereof, or for such time as shall appear satisfactory to the Court under the circumstances of the case."

Articles to be entered by the Registrar.

Articles to be entered by the Regis[illegible].]—By 23 & 24 *V. c.* 127, *s.* 7, "The contract or articles whereby any person shall be bound to serve as a clerk to any attorney or solicitor, and also any assignment thereof, shall, within three months after the same has or have been respectively enrolled and registered pursuant to 6 & 7 *V. c.* 73, be produced to the registrar, who shall enter the names of the parties to and the date of such contract or articles, and also of such assignment, if any, and the term of service, in a book to be kept for that purpose, and the registrar shall mark such contract or articles, and such assignment, if any, as having been so produced and entered, with the date thereof, and shall be entitled to receive a fee of five shillings for the entry of such contract or articles, and the like fee for such assignment, if any, and such book shall be open to public inspection during office hours without fee or reward; and in case such contract or articles, and such assignment, if any, be not so produced to and entered by the registrar as aforesaid within such three months as aforesaid, the service of the clerk shall be reckoned to commence from the date of such production and entry, unless upon an application, of which notice shall be given to the registrar, one of the Superior Courts of law at Westminster, or a judge thereof, or a judge of the Court of Chancery, shall otherwise order."

The service.

Clerk must be actually employed in the business;

but may be a year with a barrister or pleader;

The Service (*e*).]—By 6 & 7 *V. c.* 73, *s.* 12, "Every person who now is or hereafter shall be bound by contract in writing to serve as a clerk to any attorney or solicitor shall, during the whole time and term of service to be specified in such contract, continue and be actually employed by such attorney or solicitor in the proper business, practice or employment of an attorney or solicitor, save only and except in the cases hereinbefore mentioned."

The excepted cases referred to are provided for by sect. 6, by which it is enacted, "That any person who now is or hereafter shall be bound by contract in writing to serve as a clerk to a practising

(*c*) *Ex p. Clarke*, 3 B. & Ald. 610: *Ex p. Chapman*, 3 Dowl. 562: *Ex p. Beckenden*, 1 H. & W. 193: *Ex p. Briggs*, 3 Dowl., N. S. 94.

(*d*) *Ex p. Nash*, 6 Sc. N. R. 695; 5 M. & Gr. 696, where the articles had been stolen.

(*e*) As to the length of service required, see ante, p. 49. As to the place of "residence" of an articled clerk during the period of service, see *Ford* v. *Drew*, 5 C. P. D. 59; 49 L. J., C. P. 172.

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attorney or solicitor for the term of five years, and who shall actually and *bonâ fide* be and continue as pupil with, and as such be employed by, any practising barrister or any person *bonâ fide* practising as a certificated special pleader in England or Wales for any part of the said term not exceeding one whole year, and in addition thereto or instead thereof with the London agent of the attorney or solicitor to whom any such person shall be so bound by contract as aforesaid, for any part of the said term not exceeding one year, either by virtue of any stipulation in such contract or with the permission of such attorney or solicitor, shall be capable of being examined and sworn and admitted and enrolled as an attorney or solicitor, in the same manner as if he had served the whole of the said period of five years with the attorney or solicitor to whom he may be so bound" (*f*).

and a year with the London agent of his master.

Articled clerks not to hold other office or employment.

By 23 & 24 *V. c.* 127, *s.* 10, "No person hereafter bound by articles of clerkship to any attorney or solicitor shall, during the term of service mentioned in such articles, hold any office or engage in any employment (*g*) whatsoever other than the employment of clerk to such attorney or solicitor, and his partner or partners (if any) in the business, practice or employment of an attorney or solicitor, save as by 6 & 7 *V. c.* 73, or this Act otherwise provided; and every person bound as aforesaid shall, before being admitted an attorney or solicitor, prove by the affidavit required under 6 & 7 *V. c.* 73, *s.* 14 (*h*), that he has not held any office or engaged in any employment contrary to this enactment, and the form of such affidavit as aforesaid shall be varied by such addition thereto as may be necessary for this purpose" (*i*).

Except with consent of solicitor and sanction of judge.

This enactment, by 37 & 38 *V. c.* 68 (The Attorneys and Solicitors Act, 1874), *s.* 4, "shall not henceforth apply to cases in which any person bound by articles as therein mentioned shall, before or after he enters upon the office, or engages in the employment, have applied for and obtained—

(a.) The consent thereto in writing of the attorney or solicitor to whom he is bound; and (*k*)

(b.) The sanction thereto of one of the judges of one of the Superior Courts of law at Westminster, or the Master of the Rolls, or one of the judges of the High Court of Justice, to be evidenced by an order of such judge:

Provided that this section shall apply to the case of any person bound by articles expiring after, or not more than two years before the passing of this Act, who shall have held any office or been

(*f*) By 23 & 24 V. c. 127, s. 6, "section 6 of 6 & 7 V. c. 73, shall apply as well to any person bound as therein mentioned as a clerk to a practising attorney or solicitor for the term of four years only where under the said regulations that term is sufficient, as to any person so bound for the term of five years, and shall be read and construed accordingly." And see further, as to service with London agents when clerk bound for less than five years, 23 & 24 V. c. 127, ss. 2, 3, 4 and 15, ante, p. 44 et seq.

(*g*) The appointment as clerk to a vestry is an office and employment within this section. *Ex p. Greville*, L. R., 9 C. P. 13; 43 L. J., C. P. 58. See *Re Taylor*, 5 B. & Ald. 538; 6 D. & R. 428: *R.* v. *The Scriveners' Company*, 10 B. & C. 511: *Re Taylor*, 4 B. & C. 341: *R.* v. *The Scriveners' Company*, 3 Q. B. 939: *Ex p. Carr*, 3 Q. B. 447.

(*h*) See this section, post, p. 73.

(*i*) See *Ex p. Peppercorn*, 35 L. J., C. P. 239; L. R., 1 C. P. 473.

(*k*) *Ex p. Hill*, 7 T. R. 456: *Ex p. Bruton*, 23 L. J., Q. B. 290, cases before this Act.

engaged in any employment during the service under such articles before or after the passing of this Act, and who, within one year after the passing of this Act, or within one year after the expiration of his articles, shall prove, by an affidavit from the attorney or solicitor to whom he is bound, or by such other evidence as shall be satisfactory to such judge, that the holding of such office, or being engaged in such employment, was with the consent of the attorney or solicitor to whom he was or is bound, and has not interfered with due service under such articles; and the judge hearing such application shall have power to make any order which he shall think fit as to the service by the person so bound as aforesaid for the remainder of the term of service of his articles, or any part thereof, after the acceptance of such office, or as to the passing of any examination. Provided that not less than fourteen days before any such application to a judge is made, notice in writing of the application shall be given to the registrar, which notice shall state the names and residences of the applicant, and of the attorney or solicitor to whom he is bound, and the nature of the office or employment, and the time it is expected to occupy."

Sect. 5. "Any such judge making any such order may, in and by the order, impose on the applicant such terms and conditions touching the office or engagement and his employment therein as such judge thinks fit."

Sect. 6. "Where any terms or conditions shall be so imposed, and the person authorized by the order shall accept the office or engage in the employment, he shall, before being admitted an attorney or solicitor, prove to the satisfaction of a judge of one of the Superior Courts of law at Westminster, or the Master of the Rolls, or one of the judges of the High Court of Justice, and of the examiners for the time being appointed under the provisions of the Act of 1860, or of any Act amending the same, to examine persons applying to be admitted as attorneys and solicitors, that he has duly observed and fulfilled those terms and conditions."

Power for Master of Rolls to admit though service under articles is irregular.

By 40 & 41 *V. c.* 25, *s.* 15, "Where any person articled to a solicitor has not served as a clerk under such articles strictly within the provisions of the Solicitors Act, 1843 [6 & 7 *V. c.* 73], and the Solicitors Act, 1860 [23 & 24 *V. c.* 127], and any Act amending the same, but subsequently to the execution of his articles *bonâ fide* serves (either continuously or not) one or more solicitors as an articled clerk for periods together equal in duration to the full term for which he was originally articled, and has obtained such certificates as he is required by this Act to obtain, it shall be lawful for the Master of the Rolls in his discretion, if he is satisfied that such irregular service was occasioned by accident, mistake or some other sufficient cause, and that such service, although irregular, was substantially equivalent to a regular service, to admit such person to be a solicitor in the same manner as if such service had been a regular service within the meaning of the said Acts and any Act amending the same."

What service deemed sufficient.

The enactments as to the service must in general (*l*) be strictly complied with. There must in general be an actual and continued

(*l*) See *Re Duncan*, 33 L. J., Q. B. 190, where the clerk had been eighteen years a clerk before he was articled.

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service under the master's control and in his business of a solicitor (*m*) during the entire period (*n*) specified in the articles, that period being reckoned from the day of the execution of them (*o*). In a case since 23 & 24 *V. c.* 127, where during the term of service the clerk was appointed to succeed his father as steward of a manor, the inheritance of which devolved on his mother and family, and he held the appointment at their desire and to protect the property in which he and they were all interested, and the duties were discharged by deputy, but the clerk had held courts on three days during a year and a half of his clerkship, with the consent of the solicitors to whom he was articled, the Court of Common Pleas, after conferring with the Court of Queen's Bench, allowed the clerk to be admitted (*p*). Service by a person whilst he is a barrister will not count (*q*). It was held before the last-mentioned Act that it was not inconsistent with the required service, for the clerk, in his leisure hours, after he had completed his master's business, to work for another solicitor (*r*). And in one case (*s*) before the last-mentioned Act, where an articled clerk had accepted the office of auditor of a poor law union, but the duties of this office were performed by him after the close of business hours as extra labour, it was held to be no objection to the sufficiency of his service. Where before the 40 & 41 *V. c.* 25, a clerk had been unavoidably absent from his master's service for several months during the five years, but had served an equal period after the expiration of the articles, he was admitted (*t*). An articled clerk who had served under the articles two years and a half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted, was allowed by the Court to be admitted (*u*); and the same where the clerk had resided abroad by the advice of his physician during an entire year out of the five (*x*). Where an articled clerk who had served under his articles for three of the term of five years, was then absent by reason of illness for eleven months, but on his return served to the end of the term and passed his final examination: it was held, before 40 & 41 *V. c.* 25, that an application for his admission as though he had served the full term of five years could not be granted (*y*).

Working extra hours.

Unavoidable absence, &c.

(*m*) *Ex p. Fereday*, W. N. 1877, 86. See *R.* v. *The Scriveners' Company*, 3 Q. B. 93.

(*n*) As to the time of service required, see ante, p. 49. See *Ex p. Earle*, 1 B. C. C. 180; 17 Jur. 440, where four months of the three years had been served with a pleader.

(*o*) *Ex p. Angel*, 4 Jur. 656.

(*p*) *Ex p. Peppercorn*, L. R., 1 C. P. 473; 35 L. J., C. P. 239. See 37 & 38 V. c. 68, s. 4, ante, p. 54.

(*q*) *Ex p. Bateman*, 14 L. J., Q. B. 89; 6 Q. B. 853; 2 D. & L. 725.

(*r*) *Ex p. Blunt*, 2 W. Bl. 764. See *Ex p. Joyce*, 4 Ch. D. 596, where the clerk himself introduced and carried on a business of his own on terms.

(*s*) *Ex p. Llewellyn*, 2 Dowl., N. S. 701; 12 L. J., Q. B. 138.

(*t*) *Ex p. Frost*, 3 Dowl. 323; 1 H. & W. 111: *Ex p. Hubbard*, 1 Dowl. 438: *Ex p. Earle*, 1 B. C. C. 180; 17 Jur. 440: *Fletcher's case*, 2 W. Bl. 734: *Ex p. Tomkins*, 6 Dowl. 3: *sed quære*. See *Ex p. Smith*, 28 L. J., Q. B. 263; 1 El. & El. 928, where Lord *Campbell* said that *Ex p. Frost* could not be supported. See *Ex p. De Jivas*, 34 L. J., Q. B. 7; 4 B & S. 992: *Ex p. Keddle* and *Ex p. Rogers*, 34 L. J., Q. B. 136.

(*u*) *Ex p. Matthews*, 1 B. & Ad. 160. See *Ex p. Digby*, W. N. 1876, 196, M. R.

(*x*) *Ex p. Hodge*, M. 1838, 2 Jur. 989: and see *Ex p. Cross*, 2 Dowl., N. S. 692.

(*y*) *Ex p. Moses*, L. R., 9 Q. B. 1;

Service must be under the articles.

The service must be under the written articles (*z*). Where a clerk had been articled to one of two members of a firm, and covenanted to serve him, a service with the other partner after the decease of the former was held not to be a service under the articles, although the latter partner was a party to them (*a*). The clerk must pass the preliminary examination, unless exempted from it, *before* the commencement of the service (*b*).

Need not be for more than required time.

Where a clerk was articled for six years, and had actually served at different times more than five, though he had been wrongfully absent during the remainder of the term, it was held that the partial service was sufficient (*c*).

Bad service cannot be reckoned.

If the service under the articles be not sufficient, in consequence of the want of continued service, and of repeated acts of non-service running over the whole time, it seems that in general no portion of that service can be reckoned, so as to couple it with a fresh due service under fresh articles, to make up the full period of five years' service (*d*). In such a case there must be entirely fresh articles for the required term.

When objection to service to be made.

By 6 & 7 *V. c.* 73, *s.* 29, *ante*, p. 49, an objection to any defect in the service must be made within twelve months after the admission or enrolment, unless in the case of fraud.

Solicitor being struck off the roll does not disqualify clerk;

It may be added, that service under the articles is deemed sufficient, although the master is afterwards struck off the roll. This is provided for by sect. 28 of the above Act, which enacts, "That no person who shall have duly served his clerkship under articles in writing, pursuant to the provisions of this Act, shall be prevented or disqualified from being admitted and enrolled as an attorney or solicitor, nor liable to be struck off the roll if admitted, by reason or in consequence of the attorney or solicitor to whom he may have been bound by such articles having been after such service struck off the roll; provided that such clerk or person be otherwise entitled to be admitted and enrolled, according to the provisions hereinbefore contained."

nor solicitor omitting to take out his certificate.

Also, by 7 & 8 *V. c.* 86, *s.* 4, "No person who now has, or hereafter shall have, regularly served an attorney for the term of years required by law, shall be disqualified from being admitted an attorney by reason of any omission of the person whom he served having neglected to take out his certificate, or to enter or register the same."

Where service completed before 6 & 7 V. c. 73.

By 6 & 7 *V. c.* 73, *s.* 44, "Every person who at the time of the passing of this Act, shall have completed his period of service according to the laws in force at the time of the passing of this Act,

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(*z*) 3 L. J., Q. B. 13: *Ex p. Trenchard*, L. R., 9 Q. B. 406: *Ex p. Adams*, L. R., 10 Q. B. 227: *Ex p. Digby*, 45 L. J., Ch. 692: *Ex p. Keddle*, 34 L. J., Q. B. 136; 4 B. & S. 993. See *Ex p. Fereday*, 46 L. J., Ch. 504, where the Master was absent for a year through illness.

(*a*) *Ex p. Dalton*, 9 Dowl. 110: *Ex p. Wallis*, 31 L. J., Q. B. 176; 2 B. & S. 416: *Ex p. Smith*, El. & El. 928; *Ex p. Adams*, 44 L. J., Q. B. 102: *Ex p. Bratton*, 23 L. J., Q. B. 290; 44 L. J., Q. B. 103.

(*b*) *Ex p. Jones*, 22 L. T. 300.

(*c*) *Ex p. Tench*, T. T. 1827, per *Bayley*, J.

(*d*) *Ex p. Taylor*, 4 B. & C. 341: *Ex p. Austin*, 28 L. T. 121. See 40 & 41 V. c. 25, s. 15, ante, p. 55.

(*e*) 6 & 7 V. c. 73, s. 3: *Ex p. Adams*, 4 Ch. D. 39; 46 L. J., Ch. 42. A reasonable allowance may be made. *Ex p. Smith*, W. N. 1877, 4, M. R.

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but shall not have been admitted an attorney or solicitor in pursuance of such service, shall, if otherwise qualified, be capable of being admitted and enrolled an attorney or solicitor, in pursuance of the provisions of this Act, in the same manner in all respects as if he was actually bound by contract in writing at the time of the passing of this Act."

Fresh service in case of death, &c. of master, or discharge of clerk, &c.

Fresh Service in case of Death, leaving off Practice, or Bankruptcy, &c. of the Master.]—By 6 & 7 *V. c.* 73, *s.* 13, "If any attorney or solicitor to or with whom any such person shall be so bound shall happen to die (*e*) before the expiration of the term for which such person shall be so bound, or shall discontinue or leave off practice (*f*) as an attorney or solicitor, or if such contract shall by mutual consent of the parties (*g*) be cancelled, or in case such clerk shall be legally discharged before the expiration of such term by any rule or order of the Court wherein such attorney or solicitor shall have been admitted, such clerk shall and may in any of the said cases be bound by another contract or other contracts in writing to serve as clerk to any other practising attorney or solicitor, or attorneys or solicitors, during the residue of the said term; and service under such second or other contract in manner hereinbefore mentioned, shall be deemed and taken to be good and effectual, provided that an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time and in the manner hereinbefore directed (sects. 8, 9, *ante*, p. 50), and subject to the like regulations with respect to the original contract and affidavit of the execution thereof."

Proviso as to filing of affidavit and second articles.

On bankruptcy or imprisonment of master, Court may discharge clerk.

And by sect. 5, "In case any attorney or solicitor, to whom any clerk shall be bound by contract in writing as aforesaid, shall, before the end or determination of such contract, become bankrupt (*h*), or take the benefit of any Act for the relief of insolvent debtors, or be imprisoned for debt and remain in prison for the space of twenty-one days, it shall be lawful for any of the said Courts of law or equity, wherein such attorney or solicitor is admitted as aforesaid, upon the application of such clerk to order and direct the said contract to be discharged, or assigned to such person upon such terms and in such manner as the said Court shall think fit."

And in other cases.

The Courts have power, it would seem, independently of these enactments, to discharge the articles, and enable the clerk to enter into fresh articles so as to complete the five years' or other service; and they would exercise such power where the master absconds (*i*),

(*e*) See *Ex p. Lewis*, 2 D. & L. 130, where the solicitor died intestate, and no administrator had been appointed.

(*f*) *Ex p. Smith*, W. N. 1877.

(*g*) See *Ex p. Trenchard*, L. R., 9 Q. B. 406; *Ex p. Williamson*, 4 Ch. D. 581; 46 L. J., Ch. 624.

(*h*) And see post, p. 60. The Court before this Act could discharge the clerk in the case of bankruptcy (see *Anon.* 1 Chit. Rep. 558, n.; 2 Id. 62); but they could not order the articles to be *assigned*.

(*i*) *Ex p. Wilkinson*, 9 Dowl. 320; *Ex p. Carnley*, 2 Dowl., N. S. 945; 12 L. J., Q. B. 98. The rule for the discharge, &c. may be ordered to be served by leaving a copy of it at the absconding solicitor's last place of abode, and posting a copy of it in the office, and if he have an agent in England, by also leaving a copy of it with him: *Ex p. Wilkinson*, supra. See *Ex p. Hancock*, 2 Dowl., N. S. 54. See form, Chit. Forms.

or becomes insane (*k*), or the like (*l*). Where the clerk had been guilty of crim. con. with the solicitor's wife, the Court refused to compel an assignment, even after a promise to assign (*m*). Except in cases within the above section, or where the Court make a special order, the former incomplete service under articles cannot be reckoned at all (*n*).

Interval of non-service before serving fresh master.

The service to the two masters need not be continuous; and an interval of time happening between the services will not render the service bad, so long as the proper time of actual service has been performed (*o*).

For what period the fresh service to be.

The period of service under the fresh articles must be for the residue of the required term, so as to make up a full actual service for such term, with the several masters in their respective practices or employments of solicitors (*p*). In the cases of the absconding or insanity of the master, or the like, above alluded to, the service with him must be considered to have ended when he absconded or became insane; and therefore the fresh articles must be for the residue of the term of five years, or other required term, not elapsed at that period (*q*). After the expiration of the term mentioned in the original articles, no leave of the Court to enter into fresh articles is required, although there was no sufficient service under the original articles (*r*).

Stamp on fresh articles.

In the case of fresh articles for the residue of the term (where the first articles were duly stamped), a stamp of 10*s.* will suffice. (33 & 34 *V. c.* 97, Schedule, *Deed; ante*, p. 50 (*s*)).

No assignment of articles to be made.

In June, 1877, by direction of the Master of the Rolls, the following notice was issued (*t*):—"For the future it is requested that no assignment of articles be made, but that further articles be entered into, reciting that the original contract has been put an end to by mutual consent (or by the death of the master, or as the case may be). No objection will be made to taking assignments for registration, at all events till after the long vacation; but the profession are requested to conform to the new practice as quickly as possible."

Refunding premium where clerkship put an end to.

Refunding Premium.]—Where the contract of service is put an end to before the end of the term, the Court, or a judge, in cases where the clerk or his parents are in justice entitled to a return of part of the premium given with him, will sometimes interfere summarily, and refer it to the Master to say what portion of the premium given should be refunded. This has been done where the business of a solicitor so much decreased during the clerkship that there remained little or nothing for the clerk to do, and consequently he could not gain the necessary instruction in his profession (*u*); so,

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(*k*) *Ex p. Darbell*, 6 Dowl. 505: *Ex p. Allen*, 8 Jur. 1169, B. C.

(*l*) See *Ex p.* ——, 8 Jur. 848, B. C., where the solicitor had been transported; *Ex p. De Jivas*, 34 L. J., Q. B. 7.

(*m*) *Ex p. Briggs*, 1 Tidd's Pr. 9th ed. 63.

(*n*) *Ex p. Austin*, 28 L. T. 121.

(*o*) See *Re Smith*, 1 D. & R. 14: and see *Ex p. Tomkins*, 6 Dowl. 3: *Ex p. Brown*, 9 Dowl. 526.

(*p*) See *Ex p. Dalton*, 9 Dowl. 110. See *Ex p. Harrison*, 44 L. J., Q. B. 103.

(*q*) *Ex p. Brown*, 9 Dowl. 526.

(*r*) *Ex p. Keddle*, 34 L. J., Q. B. 136; 4 B. & S. 993.

(*s*) See *Ex p. Unthank*, 2 M. & P. 453.

(*t*) See *Re Adams*, 46 L. J., Ch. 42.

(*u*) 2 Barnard. 227; and see 1 Id. 331.

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where the solicitor died before the expiration of the service (*x*), and so where the master refused to take back the clerk on account of misconduct (*y*). And where a party was articled as a clerk to one of two solicitors in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the solicitor to whom he had been articled died, the Court ordered the surviving partner, who had two clerks and could not take another, to refund a portion of the premium, although, at the time of payment of such premium, his partner was indebted to him, and the premium had been set off in account between them (*z*).

But where the solicitor absconded, and made an assignment of his property to C., the Court refused to order C. to refund any part of the premium (*a*). The Court refused to order a solicitor to repay any portion of a premium of two hundred guineas received by him with an articled clerk, who died within a month after he was articled (*b*).

Where master becomes bankrupt.

It was formerly held that an articled clerk to a solicitor was not an apprentice within the Bankrupt Act (12 & 13 *V. c.* 106, *s.* 170), and was not as such entitled under that Act to a return of a portion of the premium upon his master becoming a bankrupt (*c*). But by the Bankruptcy Act, 1883 (46 & 47 *V. c.* 52), *s.* 41 (*d*), it is provided that "(1) Where at the time of the presentation of the bankruptcy petition any person is apprenticed or is an articled clerk to the bankrupt, the adjudication of bankruptcy shall, if either the bankrupt or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement, and if any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as the trustee, subject to an appeal to the Court, thinks reasonable, out of the bankrupt's property to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf and to the time during which he served with the bankrupt under the indenture or articles before the commencement of the bankruptcy and to the other circumstances of the case" (*e*).

"(2) Where it appears expedient to a trustee he may, on the

(*x*) *Ex p. Bayley*, 9 B. & C. 691: *Hirst* v. *Tolson*, 18 L. J., Ch. 308; 19 L. J., Ch. 441. But see *Re Thompson*, infra, note (*b*): *Whincup* v. *Hughes*, 40 L. J., C. P. 104.

(*y*) *Ex p. Prankerd*, 3 B. & Ald. 257: *Ex p. Fisher*, 1 Chit. Rep. 694. In this case the premium was 400*l.*, the time of service was a year and a half, and the sum ordered to be refunded 196*l.* See *Mercer* v. *Whall*, 5 Q. B. 447, where a solicitor pleaded a plea justifying the dismissal of his articled clerk for misconduct. And see *Phillips* v. *Clift*, 4 H. & N. 168.

(*z*) *Ex p. Bayley*, 9 B. & C. 691. The premium was 200*l.*; the sum refunded 180*l.* See *Ex p. Haden*, 2 Jur. 873.

(*a*) *Ex p. Carnley*, 2 Dowl., N. S. 945; 12 L. J., Q. B. 98.

(*b*) *Re Thompson*, 1 Ex. 864. See *Craven* v. *Stubbings*, 34 L. J., Ch. 126; 10 Jur., N. S. 1189, where the clerk was a ward in Chancery, and wanted to change his profession.

(*c*) *Ex p. Prideaux*, 3 M. & Cr. 327, reversing the decision in 2 Deac. 158; 3 M. & A. 67.

(*d*) This practically re-enacts the Bank. Act, 1869, *s.* 31.

(*e*) See *Ex p. Haynes*, 2 G. & J. 122, where the fee was paid, but the articles were not executed: *Ex p. Soames*, 3 D. & C. 320.

application of any apprentice or articled clerk to the bankrupt, or any person acting on behalf of such apprentice or articled clerk, instead of acting under the preceding provisions of this section, transfer the indenture of apprenticeship or articles of agreement to some other person."

Preliminary, intermediate, and final examinations.

Preliminary, Intermediate, and Final Examinations.]—We have seen, *ante*, p. 44, that by 6 & 7 *V. c.* 73, *s.* 3, no one shall be admitted and enrolled as a solicitor unless after the expiration of the time for which he is articled he shall have been examined in manner by that Act directed (*f*).

Certificate of having passed examinations requisite for admission as solicitor.

By 40 & 41 *V. c.* 25 (*g*), *s.* 5, "Subject to the exemptions allowed by this Act, or by regulations made under the authority thereof, a person shall not be admitted as a solicitor unless he has obtained from the Incorporated Law Society, or some person authorized in writing by that society, a certificate or certificates to the effect that he has passed a preliminary, an intermediate, and a final examination."

Examinations to be held under management of Incorporated Law Society.

By sect. 6, "The Incorporated Law Society are hereby authorized and required to hold, at least three times in the year commencing with the first day of January one thousand eight hundred and seventy-eight, and in every succeeding year, a preliminary examination, an intermediate examination, and a final examination, and the society shall, subject to the provisions of this Act, have the entire management and control of all such examinations, and shall have power from time to time to make regulations with respect to all or any of the following matters; (that is to say,)

(A.) With respect to the subjects for and the mode of conducting the examination of candidates; and

(B.) With respect to the times and places of examinations and the notices of examinations; and

(C.) With respect to the certificates to be given to persons of their having passed any examination; and

(D.) With respect to the appointment and removal of examiners (other than the ex-officio examiners in this Act mentioned) and with respect to the remuneration by fees or otherwise of the examiners so appointed; and

(E.) With respect to any other matter or thing as to which the society think it expedient to make regulations for the purpose of carrying this section into execution.

Any regulation made under the authority of this section may be altered or revoked by a subsequent regulation; and copies of all regulations made under the authority of this section shall be transmitted to the presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and to the Master of the Rolls, and if within twenty-eight days after a copy of any regulation has been so transmitted, any two of those judges (the Master of the Rolls being one) signify by writing under their hands, addressed to the president or the vice-president or secretary of the society, their dissent from such regulation or any part thereof, the same shall be

(*f*) To what solicitors the Act does not extend, see sect. 47, *ante*, p. 40.

(*g*) ... certain general provisions of the Act, and the interpretation clause, *ante*, p. 41 *et seq.*

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of no force or effect; and if after any such regulation or any part thereof has come into force any two of those judges (the Master of the Rolls being one) shall signify in manner aforesaid their dissent from such regulation or any part thereof the same shall, at the expiration of two months, cease to be of any force or effect.

Masters of Common Law Divisions to be ex-officio examiners.

By sect. 7, "Unless and until the presidents of the Queen's Bench Division, Common Pleas Division, and Exchequer Division of the High Court of Justice, and the Master of the Rolls, otherwise order the several masters for the time being of those Divisions shall be ex-officio examiners for the intermediate and the final examinations, and one of such ex-officio examiners shall act in the conduct of every such examination in conjunction with the examiners appointed by the society in pursuance of this Act."

Fees payable to Law Society in respect of examinations.

By sect. 8, "Any person applying to be examined or re-examined at a preliminary, intermediate, or final examination shall pay to the Incorporated Law Society such fees in respect of such examinations (and in such proportions and at such times) as may be from time to time determined by regulations to be made by the presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any two of them, of whom the Master of the Rolls shall be one (*g*).

"All moneys paid to the society in pursuance of this Act in respect of the preliminary, intermediate, and final examinations, shall be applied by the society in payment of the expenses from time to time incurred by the society with reference to such examinations and with reference to the lectures, classes, and other teaching provided by the society from time to time for persons bound or about to be bound under articles of clerkship to solicitors."

Appeal to Master of the Rolls against refusal of certificate.

By sect. 9 (*h*), "Any person who has been refused a certificate of having passed an intermediate or final examination, and who objects to such refusal, whether on account of the nature or difficulty of the questions put to him by the examiners, or on any other ground whatsoever, shall be at liberty within one month next after such refusal to appeal by petition in writing to the Master of the Rolls against such refusal, such petition to be presented in such manner and subject to such regulations as the Master of the Rolls may from time to time direct.

(*g*) By Reg. made under this Act, it is ordered as follows:—

1. There shall be paid to the Incorporated Law Society, by persons applying to be examined at a preliminary, intermediate or final examination, the following fees (that is to say):—

By every person applying to be examined at a preliminary examination a fee of 2*l*.

By every person applying to be examined at an intermediate examination a fee of 3*l*.

By every person applying to be examined at a final examination a fee of 5*l*.

Every such fee shall be payable to the secretary of the society, or such other officer as the council may from time to time direct, by the candidate, on giving notice of his desire to be examined at the examination, in respect of which the fee is payable.

Where a candidate, after giving notice of his desire to be examined at a preliminary, intermediate or final examination, has not presented himself at, or has failed to pass such examination, one-half only of the prescribed fee shall be payable by him on applying to be examined at a subsequent examination of the same class.

(*h*) See *Ex p. Stewart*, 41 L. J., Ex. 76.

"In the meantime and until the Master of the Rolls otherwise directs, such petition shall, as to a final examination, be presented at the Petty Bag Office without the payment of any fee, and a copy of such petition shall be left therewith and shall be delivered by the clerk of the petty bag to the secretary of the Incorporated Law Society, and the clerk of the petty bag shall also notify to such secretary the day appointed for the hearing of the petition, and the same shall be heard by the Master of the Rolls on such day after the expiration of fourteen days from the day on which such petition was presented and at such time as he may appoint.

"On the hearing of any petition under this section the Master of the Rolls may make such order as to him may seem meet, and where any person who has been refused a certificate of having passed his final examination, on appeal to the Master of the Rolls obtains an order for his admission, such order shall entitle him to a certificate from the Incorporated Law Society of his fitness and capacity to act as a solicitor, and in the usual business transacted by a solicitor, in the same manner as if he had passed his final examination."

General exemptions from preliminary examination.

By sect. 10, "A certificate of having passed a preliminary examination under this Act shall not be required from any person who has taken the degree of Bachelor of Arts or Bachelor of Laws in the Universities of Oxford, Cambridge, Dublin, Durham or London, or in the Queen's University in Ireland, or the degree of Bachelor of Arts, Master of Arts, Bachelor of Laws, or Doctor of Laws in any of the universities of Scotland, (none of such degrees being honorary degrees,) or who has been called to the degree of Utter Barrister in England, or who has passed the first public examination before moderators at Oxford or the previous examination at Cambridge, or the examination in arts for the second year at Durham, or who has passed one of the local examinations established by the University of Oxford, or one of the non-gremial examinations established by the University of Cambridge, or one of the examinations of the Oxford and Cambridge Schools Examination Board, or one of the matriculation examinations at the Universities of Dublin or London (notwithstanding he may not have been placed in the first Division of such matriculation examination), or the examination for the first-class certificate of the College of Preceptors incorporated by Royal Charter in 1849.

"The presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any three of them (the Master of the Rolls being one), may make, and from time to time alter and revoke, regulations extending the above exemption to any persons who pass any examination held in any of the above-mentioned universities or in the Owen's College, Manchester, or in any other university, college or educational institution, and specified in that behalf in the said regulations" (*i*).

(*i*) By Reg. 2 of the Judges, 5th December, 1877, "In addition to the exemptions contained in section 10 of the Solicitors Act, 1877, a certificate of having passed a preliminary examination under this Act shall not be required from any person who has passed the Junior Students' General Examination in the Owen's College, Manchester."

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Power of judges to grant special exemptions from preliminary examination.

By sect. 11, "The presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, and the Master of the Rolls, or any one or more of them, may, where under special circumstances they or he see fit so to do, exempt any person from compliance with the enactments and regulations for the time being in force with respect to the preliminary examination either entirely or partially, or subject to any such conditions as to them or him may seem fit."

Exemption of certain barristers from intermediate examination.

By sect. 12, "Any person who has been called to the degree of Utter Barrister in England, and is of not less than five years' standing at the bar, and has procured himself to be disbarred with a view of becoming a solicitor, and has obtained from two of the benchers of the inn to which he belongs or to which he belonged a certificate of his being a fit and proper person to practise as a solicitor, shall not be required to obtain a certificate of having passed an intermediate examination under this Act, and shall be entitled on passing a final examination under this Act (except so much of such examination as relates to articles and service under articles) to be admitted and enrolled as a solicitor."

Regulations made by Law Society respecting examinations.

The following Regulations were made by the Incorporated Law Society, on the 27th November, 1877, and came into operation on the 1st November, 1878:—

Terms used in these Regulations have (unless inconsistent with the context) the same meanings as they have in the Solicitors Act, 1877:—"the council" means the council for the time being of the Incorporated Law Society; "the secretary" means the secretary for the time being of the society; and "the registrar" means the registrar of solicitors.

[*Reg. 1 to 5 relate to the appointment, &c. of the examination committee, referred to as "the committee," and to the appointment, &c. of examiners.*]

Preliminary Examination (k).

6. Four preliminary examinations shall be held in each year (that is to say), one in each of the months of February, May, July and October, on such days in those months respectively as the committee may appoint.

7. The preliminary examinations shall be conducted either by the examiners appointed under these regulations personally in the hall of the

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(*k*) The examinations will be held at the Incorporated Law Society's Hall, Chancery Lane, London, and at *some* of the following towns, in the months of February, May, July, and October of each year:—Birmingham, Bristol, Cambridge, Cardiff, Carlisle, Carmarthen, Chester, Durham, Exeter, Lancaster, Leeds, Lincoln, Liverpool, Manchester, Newcastle-on-Tyne, Oxford, Plymouth, Salisbury, Shrewsbury, Swansea, Worcester, York.

Candidates are required to give, at least thirty days before the day appointed for the examination, notice to the Secretary of the Incorporated Law Society, of the *languages* in which they propose to be examined, the towns at which they wish to be examined, and their *age* and *residence*, and *place* or *mode of education*.

All notices should be addressed to the Secretary of the Incorporated Law Society, Chancery Lane, W.C.

Candidates who fail to pass, or attend at the examination for which they have given notice, may attend at any subsequent examination. A *renewed* notice must, in that case, be given fourteen days at least before the date of such subsequent examination.

The fee payable on giving notice of examination is 2*l.*, and for a *renewed notice* 1*l.* Cheques or post office orders should be crossed "Messrs. Goslings & Sharpe."

society, or in such other place as the committee may from time to time appoint; or by two local solicitors to be appointed by the committee, in the following towns or some of them, and at such place or places in those towns as the said local solicitors may in each case specify:—Birmingham, Bristol, Cambridge, Cardiff, Carlisle, Carmarthen, Chester, Durham, Exeter, Lancaster, Leeds, Lincoln, Liverpool, Manchester, Newcastle-on-Tyne, Oxford, Plymouth, Salisbury, Shrewsbury, Swansea, Worcester, York.

8. The preliminary examination shall be on the following subjects (namely):—

1. Writing from dictation.
2. Writing a short English composition.
3. Arithmetic: The first four rules, simple and compound; the rule of three; and decimal and vulgar fractions.
4. Geography of Europe and History of England.
5. Latin—Elementary.
6. And any two languages to be selected by the candidate out of the following six, namely:—(1) Latin; (2) Greek, Ancient; (3) French; (4) German; (5) Spanish; (6) Italian.

At least *five* months before the day appointed for holding any preliminary examination, the committee shall furnish to the secretary of the society, or to such other officer as the council may direct, a list of the books selected by them for the examination of candidates in the said six languages, and the secretary or such officer shall furnish a copy to any person applying for the same.

9. Every candidate shall, at least thirty days before the date of the preliminary examination at which he proposes to be examined, give written notice (*l*) to the secretary, or such other officer as the council may direct, of his desire to be examined, and shall state in such notice the two languages in which he proposes to be examined under these regulations, and the town at which he wishes to be examined, and his age and residence, and place or mode of education.

10. With respect to the examination of candidates at the preliminary examination, desiring to be examined in the country, papers shall be transmitted by the committee to the local solicitors appointed by them under these regulations.

The secretary, or such other officer as the council may direct, shall summon the candidates at such times as may be fixed by the committee, and the said local solicitors shall require the candidates in their presence to write from dictation as hereinbefore mentioned, and to give written answers to the papers so transmitted; and the said solicitors shall, without delay, seal up and send to the committee the writing from dictation and the answers so written.

11. If the committee are satisfied as to the proficiency and fitness of a candidate at a preliminary examination, they shall certify the same in the form of a report to the council of the result of such examination, and the council may thereupon resolve that a certificate in the Form (A) in the First Schedule to these Regulations or to the like effect, signed by the president or vice-president of the society, shall be delivered to such candidate.

Intermediate Examination (m).

12. Four intermediate examinations shall be held in each year (that is to say), one in each of the months of January, April, June and November,

(*l*) See Chit. F. 12th ed. p. 2.

(*m*) Candidates are required to give to the Secretary of the Incorporated Law Society at least *thirty days' notice* before the date of the examination at which they propose to be examined, and at the same time to leave their articles of clerkship

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on such days in those months respectively as the committee may appoint.

13. The intermediate examinations shall be held in the hall of the society, or such other place as the committee may from time to time appoint.

14. The subjects of the intermediate examination shall be such elementary works on the laws of England as may be from time to time selected by the committee.

Not later than the month of July, in every year, the committee shall furnish to the secretary, or to such other officer as the council may direct, a list of the works selected by them for the examination of candidates in the ensuing year; and the secretary or such officer shall furnish a copy of such list to any person applying for the same.

15. Every person serving under articles of clerkship shall (subject as hereinafter mentioned) present himself at an intermediate examination, and shall be examined within the six months next succeeding the day on which he completes half his term of service.

16. A candidate who fails to present himself at or to pass an intermediate examination within the above period may present himself at any subsequent intermediate examination; but, if he fails to pass an intermediate examination within twelve months next after the date of the expiration of one-half his term of service, his final examination shall be postponed for a period equal to the period intervening between the expiration of such twelve months and his passing such intermediate examination, or for such shorter period as the committee may, on the ground of illness, or on other special grounds, direct.

17. Every candidate, at least thirty days before the date of the intermediate examination at which he proposes to be examined, shall give to the secretary, or to such other officer as the council may direct, written notice (*n*) of his desire to be examined, and shall leave with the secretary or such other officer the articles and any assignment thereof, or supplemental articles, duly stamped and registered, under which the candidate has served or is serving his clerkship, or any portion thereof, together with a certificate of his having passed a preliminary examination (unless he shall have been exempted therefrom), and together with answers to the questions in that behalf specified in Part I. of the Second Schedule hereto (*o*), signed by the candidate, and by the solicitor or solicitor's London agent, barrister or special pleader with whom he has served or is serving his clerkship, or any portion thereof, or with whom he has been or is a pupil.

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and supplemental articles (if any) duly stamped and registered, and answers to the questions as to due service and conduct up to that time. Prints of these questions can be obtained on application at the office of the Incorporated Law Society.

Candidates who apply to be examined under the 4th section of the Solicitors Act, 1860, may, on application, obtain copies of the further questions relating to the ten years' service antecedent to the articles of clerkship; and such questions, duly answered, must be left at the time of giving notice.

Candidates who fail to pass, or attend at the examination for which they have given notice, may attend at any subsequent examination. A *renewed* notice must, in that case, be given fourteen days at least before the date of such subsequent examination.

The examinations will be held at the hall of the society, Chancery Lane, London.

The fee payable on giving notice of examination is 3*l.*, and for a *renewed notice* 1*l.* 10*s.* Cheques or post office orders should be crossed "Messrs. Goslings & Sharpe."

N.B.—Candidates *cannot* present themselves for Intermediate Examination *before the expiration of their half-term of service.*

(*n*) Chitty's Forms, p. 11.

(*o*) See Chitty's Forms, pp. 12 and 13.

18. The secretary, or such other officer as aforesaid may, in any case where he thinks proper, refer such answers to the committee; and if the committee, after such further inquiries as they see fit, are of opinion that any of such answers are unsatisfactory, they shall certify the same to the council, and the candidate shall not be permitted to present himself for examination: Provided that the council may in any case, on special grounds, allow the candidate to be examined, notwithstanding such answers.

19. If the committee are satisfied as to the proficiency and fitness of a candidate at an intermediate examination they shall certify the same in the form of a report to the council of the result of such examination, and the council may thereupon resolve that a certificate in the Form (B) in the First Schedule to these Regulations, or to the like effect, signed by the president or vice-president of the society, shall be delivered to such candidate.

Final Examination (*p*).

20. Four final examinations shall be held in each year (that is to say), one in each of the months of January, April, June and November, on such days in those months respectively as the committee may appoint.

21. The final examinations shall be held in the hall of the society, or in such other place as the committee may from time to time appoint.

22. The final examinations shall be on the following subjects, namely:—

1. Principles of law and procedure:—
   (*a*) In matters usually determined or administered in the Chancery Division of the High Court of Justice;
   (*b*) In matters usually determined or administered in the Queen's Bench Division of the High Court of Justice.
2. Principles of the law of real and personal property, and the practice of conveyancing.
3. The law and practice of bankruptcy.

(*p*) SUBJECTS OF EXAMINATION.

Essential.]—1. Principles of law and procedure: A. In matters usually determined or administered in the Chancery Division of the High Court of Justice. B. In matters usually determined or administered in the Queen's Bench Division of the High Court of Justice.

2. Principles of the law of real and personal property and the practice of conveyancing.

Optional.]—3. The law and practice of bankruptcy.

4. Criminal law and practice; proceedings before justices of the peace.

5. The law and practice of the Probate, Divorce and Admiralty Division of the High Court of Justice, and ecclesiastical law and practice.

Candidates are required to give notice in writing *forty-two days* at least before the date of the examination to the secretary of the Incorporated Law Society, Chancery Lane, London.

Candidates are also required, *at the same time*, to leave with the secretary of the society their articles of clerkship and supplemental articles (if any), and certificate of having passed the Intermediate Examination, together with answers to the questions as to due service and conduct, to be answered by the candidate and his principal and agent if any. Prints of these questions can be obtained on application at the office of the Incorporated Law Society.

The examinations will be held at the hall of the society, Chancery Lane, London.

Candidates who fail to pass, or attend at the examination for which they have given notice, may attend at any subsequent examination. A *renewed* notice must, in that case, be given fourteen days, at least, before the date of such subsequent examination.

The fee payable on giving notice of examination is 5*l.*, for a *renewed* notice 2*l.* 10*s.*, and for the Honors Examination 1*l.* Cheques or post-office orders should be crossed "Messrs. Goslings & Sharpe."

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4. { Criminal law and practice.
   { Proceedings before justices of the peace.
5. The law and practice of the Probate and Divorce Division of the High Court of Justice.

23. Every candidate at least forty-two days before the date of the final examination at which he proposes to be examined shall give to the secretary, or to such other officer as the council may appoint, written notice (*q*) of his desire to be examined, stating his place or places of residence and of service under articles for the last preceding twelve months, together with the name or names and place or places of residence of the person or persons with whom he has served during the continuance of his articles; and shall also leave with the secretary or such officer the articles and any assignment thereof, or supplemental articles, duly stamped and registered, under which the candidate has served or is serving his clerkship, or any portion thereof, together with certificates of his having passed a preliminary and intermediate examination (unless he shall have been exempted therefrom respectively), and together with answers to the questions in that behalf specified in Part II. of the Second Schedule hereto (*r*), signed by the candidate, and also by the solicitor (*s*) or solicitor's London agent, barrister or special pleader with whom he has served his clerkship, or any portion thereof, or with whom he has been a pupil.

24. The secretary, or such other officer as aforesaid, may, in any case where he thinks proper, refer such answers to the committee; and if the committee, after such further inquiries as they see fit, are of opinion that any of such answers are unsatisfactory, they shall certify the same to the council, and the candidate shall not be permitted to present himself for examination: Provided that the council may in any case, on special grounds, allow the candidate to be examined notwithstanding such answers.

25. If the committee are satisfied as to the proficiency and fitness of a candidate at a final examination, they shall certify the same in the form of a report to the council of the result of such examination, and the council may thereupon resolve that a certificate in the Form (C) in the First Schedule to these Regulations, or to the like effect, signed by the president or vice-president of the society, shall be delivered to such candidate. The committee may, in their report, recommend any candidate for honourable distinction as they may see proper.

General.

26. If any candidate for examination does not present himself at or fails to pass any examination at which he has given notice of his intention to present himself, he shall be entitled, on giving at least fourteen days' written notice to the secretary, or such other officer as the council may direct, and otherwise complying with the requirements of these regulations, to present himself at any subsequent examination (*t*).

27. Any person claiming the benefit of any exemption or exception in respect of any examination under the Solicitors Acts, 1843, 1860 and 1877, or under any regulations made in pursuance thereof, shall, before he shall be entitled to the benefit of such exemption or exception, produce to the secretary, or such other officer as the council may direct, a testamur,

(*q*) Chitty's Forms, p. 14.
(*r*) Id. pp. 15 and 16.
(*s*) If it were made manifest to the Court that a solicitor improperly refused to answer the questions as to the service, &c., the Court might grant a rule, calling upon him to show cause why he should not do so. *Ex p. Lewis*, 7 Jur. 442.
(*t*) For forms of renewed notices, see Chitty's Forms.

certificate, judge's order or other satisfactory evidence showing his right thereto.

28. Any person (not being entitled to exemption from the preliminary examination) who enters into articles of clerkship shall, before or at the time of producing his articles to the registrar, pursuant to sect. 7 of the Solicitors Act, 1860, produce to the registrar a certificate of having passed a preliminary examination.

29. Where any allegation is made by the registrar as to the moral unfitness of any candidate at a final examination to be an officer of the Supreme Court, it shall be the duty of the secretary or such other officer to refer such allegation to the committee, who shall take such steps for inquiring into the matter referred to them as they may deem necessary and proper.

If the allegation referred to the committee is, in their opinion, proved, the committee shall report the same to the council, and the council may, in their discretion, refuse to grant a certificate to the candidate.

Temporary Provision.

30. All notices issued and other things duly done or suffered before the 1st day of January, 1878, under any of the regulations repealed by the Solicitors Act, 1877, shall, so far as the same are respectively applicable, be deemed to have been issued, done or suffered under and in pursuance of these regulations.

Rules made by the Incorporated Law Society for the Honours Examination.

Terms used in these rules have (unless inconsistent with the context) the same meanings as they have in the regulations made by the society on the 27th November, 1877, as to the Preliminary, Intermediate and Final Examination of persons intending to become solicitors of the Supreme Court (hereinafter referred to as "the Regulations").

1. No honorary distinction (except local prizes already instituted) will be awarded by the society to any candidate in respect only of the Final Examination. All honorary distinctions awarded by the society will—with the exception mentioned—be awarded to candidates who pass the Honours Examination as hereinafter mentioned.

2. There shall be held in the hall of the society, or in such other place as the council may from time to time appoint, four voluntary Examinations for Honours in each year. The examinations shall take place on such days as the council may from time to time appoint.

3. The examination committee shall, with the assistance (so far as they may think proper to resort to the same) of the examiner or examiners to be appointed for the purpose by the council, conduct the Honours Examinations.

4. The council may, from time to time, by resolution, appoint such competent person or competent persons as they may see fit to be an examiner or examiners to assist the committee in the Honours Examination, and the council may at pleasure remove any examiner so appointed.

5. There shall be paid to every examiner so appointed, not being a member of the committee or of the council, such remuneration as the council may from time to time, by resolution, prescribe.

6. The Honours Examinations shall be open to all candidates *without reference to age*, who shall, in the opinion of the examiners, have attained a certain standard of proficiency at the Final Examinations, and shall be upon the subjects specified for the final examinations in the regulations.

7. Every candidate who is eligible and desirous to compete for honours shall, at the time when he gives notice of his desire to be examined at any Final Examination, give notice in writing of his desire to be

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examined for honours. Forms of notice can be obtained at the office of the society.

8. At each Honours Examination the candidates who, in the opinion of the committee, are deserving of honorary distinction will be arranged in three classes; and, in awarding honorary distinction, the marks obtained in the Honours Examination will alone be considered.

9. The names of candidates placed in the first class will be arranged in order of merit, and every candidate placed in that class will, in addition to a class certificate, receive a prize.

The names of candidates placed in the second and third classes respectively will be arranged alphabetically, and every candidate placed in those classes will receive a class certificate.

The certificate will be in the following or an equivalent form:—

Honours Examination.

By Authority of the Council of
The Incorporated Law Society
of the United Kingdom.

I do hereby certify
that
at the Honours Examination

held on the.....day of..... 188

.....

who served his Articles of Clerkship to

.....

was placed in the first [second or third] class.

.....*President.*

10. The names of all candidates who attain honorary distinction will be printed in the society's calendar.

11. At each Honours Examination the following prizes will be awarded, unless in the opinion of the committee the standard attained should not justify the issue of any first-class list:—The Clement's Inn Prize (value 10*l.* 10*s.*); the Clifford's Inn Prize (value 5*l.* 5*s.*); and the New Inn Prize (value 5*l.* 5*s.*); or an additional Society's Prize of like value; and the Daniel Reardon Prize, being the one-fourth part of the dividend on £3,333 : 6*s.* 8*d.* Consolidated Bank Annuities. In addition, the society will give as many prizes (value 5*l.* 5*s.* each) as are required. The value of each prize will be expended by the society in the purchase of legal, historical or constitutional works, to be selected by the successful candidate, and such works will be bound at the expense of the society, and be stamped with the arms of the society.

12. In addition the following prizes will be awarded according to the result of the Honours Examinations during the year, namely:—

The Scott Prize, being the dividend on £1,265 Preferential 4½ per Cent. London, Brighton and South Coast Railway Co.'s Stock (1863).

The Broderip Gold Medal, to be purchased with the dividend on £333 : 6*s.* 8*d.* Reduced Annuities.

Where the three, four, or five years expire in vaca-

By 23 & 24 *V. c.* 127, *s.* 12, "Whenever any of the periods of three years, four years, and five years mentioned in this Act or in 6 & 7 *V. c.* 73 (whether the same period shall have commenced before or after the passing of this Act), shall expire in any vaca-

tion, then and in such case any person whose period of clerkship shall so expire shall be at liberty to pass his examination in the term immediately preceding the said vacation; and at any time in or after such vacation, and after the said period of clerkship shall have expired, the Master of the Rolls as to the Court of Chancery and any one of the judges as to the Courts of Common Law at Westminster, on being satisfied by affidavit or otherwise that the period of clerkship of such person has expired, may proceed to administer to him the oath mentioned in 6 & 7 *V. c.* 73, and the oath of allegiance, and may do all other acts necessary for or towards the admission and enrolment of such person as an attorney and solicitor as provided in the said last-mentioned Act.

tion, examination may take place in term preceding.

2. *The Admission.*

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Enactments respecting.]—By 6 & 7 *V. c.* 73, *s.* 2, "From and after the passing of this Act no person (*u*) shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit or defend any action, suit or other proceeding, in the name of any other person or in his own name (*x*), in her Majesty's High Court of Chancery, or Courts of Queen's Bench, Common Pleas or Exchequer, or Court of the Duchy of Lancaster, or Court of the Duchy Chamber of Lancaster at Westminster, or in any of the Courts of the Counties Palatine of Lancaster and Durham, or in the Court of Bankruptcy, or in the Court for the Relief of Insolvent Debtors, or in any County Court, or in any Court of civil or criminal jurisdiction, or in any other Court of law or equity in that part of the United Kingdom of Great Britain and Ireland called England and Wales, or act as an attorney or solicitor in any cause, matter or suit, civil or criminal, to be heard, tried or determined before any justice of assize, of oyer and terminer or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, division, liberty, city, borough or place, or before any justice or justices, or before any commissioners of her Majesty's revenue, unless such person shall have been, previously to the passing of this Act, admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this Act be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pur-

No person to act as a solicitor unless admitted and enrolled.

(*u*) See *Re Humphreys*, 19 L. J., Q. B. 65, as to an attorney of the Welsh Court of great sessions. To what solicitors the Act does not extend, see ante, p. 40.

(*x*) The fact that the person acts in the name and with the consent of a duly qualified solicitor, will not protect him. *Abercrombie* v. *Jordan*, *In re Hunt*, 8 Q. B. D. 187; 30 W. R. 810.

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suant to the directions and regulations of this Act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid" (*y*).

An indictment will lie against a person who acts as a solicitor without being admitted and enrolled pursuant to this Act (*z*).

By 40 & 41 *V. c.* 25, 2*nd Sched., Part* 2 (*a*), "If the Master of the Rolls or any of the judges of the Queen's Bench Division, the Common Pleas Division, or the Exchequer Division of the High Court of Justice is, by a certificate or certificates granted in pursuance of this Act, satisfied with respect to any person applying to be admitted a solicitor of the Supreme Court that such person is duly qualified to be admitted to act as a solicitor of the Supreme Court, then and not otherwise the Master of the Rolls shall administer the requisite oath and cause such person to be admitted a solicitor of the Supreme Court, and his name to be enrolled as a solicitor of such Court, which admission shall be written on parchment and signed by the Master of the Rolls."

Preliminary steps to admission.

Preliminary Steps to Admission, Notices, &c.]—The Master of the Rolls, in January, 1878, issued the following directions as to notices of admission:—"The Master of the Rolls directs that every gentleman applying to be admitted a solicitor of the Supreme Court, shall, six weeks at least before the first day of the month in which he shall propose to be admitted, cause to be delivered to the Petty Bag Office a notice in writing (*b*), signed by himself, containing a statement of his then place of abode, and the name or names, and place or places of abode of the person or persons with whom he has served as an articled clerk during the continuance of his articles of clerkship, and containing, in addition thereto, a statement of his place or places of abode or service for the last preceding twelve months, and the clerk of the Petty Bag shall reduce all such notices into an alphabetical list under convenient heads, and shall, three weeks at least before the first day of the month named in such notices, affix such list in some conspicuous place in the Petty Bag Office, and shall also at the time aforesaid furnish the secretary of the Incorporated Law Society of the United Kingdom with copies of the said list."

A person who omits to give the notice within the proper time may, under special circumstances, by means of a summons taken out at the Petty Bag Office and served on the Registrar of Solicitors, obtain an order allowing him to be admitted notwithstanding the omission (*c*).

(*y*) See 23 & 24 V. c. 127, s. 26, post, p. 88. A clerk or other officer to a board of guardians, duly empowered by the board, may make or resist any application, claim or complaint, or take or conduct any proceedings on behalf of the board, before any justices of the peace at petty or special sessions, or out of sessions, although such clerk or officer be not a solicitor. (7 & 8 V. c. 101, s. 68. And see 23 & 24 V. c. 127, s. 13, ante, p. 41.)

(*z*) *R.* v. *Buchanan*, 15 L. J., Q. B. 227; 8 Q. B. 883.

(*a*) See s. 23.

(*b*) See Chit. F. p. 17.

(*c*) See *Ex p. Hay*, 41 L. J., Q. B. 375; *S. C.* sub nom. *Anon.* L. R., 7 Q. B. 587; *Ex p. Cumberland*, L. R., 10 Q. B. 138; 44 L. J., Q. B. 73, where the omission was intentional: *Ex p. Taylor*, 14 L. J., C. P. 65.

Under a repealed rule on this subject, where the name of the person with whom the clerk resided was inserted by mistake instead of the name of the person to whom he was articled, the Court allowed him to amend his notices, and to be admitted on the last day of the following term (*d*). And the same permission was granted to a clerk who had by mistake inserted in his notices his present name instead of his former one (*e*). And where the master and clerk were each described in the notices by two christian names, and in the articles by one only, the Court allowed the clerk to be admitted, upon an affidavit stating the identity of the parties, and that they were truly described in the notice (*f*). It is no longer necessary to renew notices for admission not acted upon. In most cases, unless there has been great delay, the clerk of the Petty Bag Office will dispense with any further notice. If he requires a further notice, a fresh one must be given. For the former practice, *see Ex parte An Articled Clerk*, L. R., 7 Q. B. 587; S. C. nom. *Ex parte Hay*, 41 L. J., Q. B. 375.

Affidavit of service, &c. for the purpose of admission.

Affidavit of Service, &c. for the Purpose of Admission.]—By 6 & 7 *V. c.* 73, *s.* 14, "Every person who shall have been or shall be bound as a clerk as aforesaid shall, before he be admitted an attorney or solicitor according to this Act, prove by an affidavit (*g*) of himself or of the attorney or solicitor to whom he was bound as aforesaid, or such agent, barrister, or special pleader as aforesaid, to be duly made and filed with the proper officer hereinbefore mentioned [*i.e.* one of the Masters, or such other officer as the judges may appoint (*see* 40 & 41 *V. c.* 25, 2*nd Sched.*, *Pt.* 2, *post*, p. 76)], that he hath actually and really served and been employed by such practising attorney, solicitor, agent, barrister, or special pleader during the whole time and in the manner required by the provisions of this Act, and in the form to be approved by the judges of the Court wherein such person shall apply to be admitted." *See* 23 & 24 *V. c.* 127, *s.* 10, *ante*, p. 54.

Affidavit of execution of articles, &c.

And by sect. 10, "No person who shall from and after the passing of this Act become bound as aforesaid shall be admitted an attorney or solicitor before such affidavit so marked as aforesaid [*i.e.* the affidavit of the execution of the articles as required by sect. 8, *ante*, p. 50] shall have been produced to the Court or judge to whom such person shall apply to be admitted an attorney or solicitor, in pursuance of the provisions hereinafter contained, unless such Court or judge shall be satisfied that the same cannot be produced, and shall think fit to dispense with the production thereof" (*h*).

Oath to be taken on admission.

Oath to be taken on Admission.]—By 6 & 7 *V. c.* 73, *s.* 19, "Every person who shall pursuant to this Act apply to be admitted an attorney or solicitor shall, before he be admitted and enrolled as

(*d*) *In the matter of Clarke*, 4 N. & M. 709: *Anon.* 1 H. & W. 146. And see *Ex p. Collins*, 6 Dowl. 495: *Ex p. Dukes*, 7 Dowl. 605.
(*e*) *Ex p. Ridley*, 2 H. & W. 66.
(*f*) *Ex p. Croft*, 5 N. & M. 58; 1 H. & W. 375. See other instances noticed in the 12th edition of this work.
(*g*) Chit. F. p. 18.
(*h*) See *Ex p. Nicholls*, 1 Dowl., N. S. 263.

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aforesaid, take and subscribe the oath, or if he be one of the people called Quakers, the affirmation following:

> I, *A. B.*, do swear, [*or*, solemnly affirm, *as the case may be*,] that I will truly and honestly demean myself in the practice of a solicitor, according to the best of my knowledge and ability.
>
> So help me GOD.

Since the Promissory Oaths Act, 1868 (31 & 32 *V. c.* 72), no other oath is required (*i*).

Practical directions as to obtaining the admission.

Practical Directions as to obtaining Admission (*k*).]—The applicant for admission having passed his examination, and obtained the examiners' certificate (*ante*, 61), *should make an affidavit of due service under the articles* (*as required by* 6 & 7 *V. c.* 73, *s.* 14, *ante*, 73) *and of the due service and entries of the notices for admission* (*ante*, 73), *and annex to the affidavit the articles, and the fresh articles, if any.* As early as possible the applicant should leave at the Petty Bag Office the affidavits and the articles (*l*) and certificate, also a form of admission filled up and duly stamped (33 & 34 *V. c.* 97) (*m*), which can be purchased at the Inland Revenue Office. Attend at the Petty Bag Office, and accompany a clerk in that office into the Court, where the oath above mentioned will be administered to the applicant, and he will sign the roll. The admission and certificate of having passed the final examination can some few weeks afterwards be obtained from the Petty Bag Office.

Admission in other courts.

Admission in other Courts.]—By 6 & 7 *V. c.* 73, *s.* 27, "Every person who shall have been duly admitted an attorney of any one of the superior Courts of law at Westminster, shall be entitled, upon the production of his admission therein or an official certificate thereof and that the same still continues in force, to be admitted as an attorney in any other of the said Courts, or in any inferior Court of law (*n*) in England and Wales, upon signing the roll of such other Court, but not otherwise; and shall thereupon be entitled to practise as an attorney therein, in like manner as if he had been sworn in and admitted an attorney of such Court: *Provided always*, that no additional fee besides those payable by virtue of this Act shall be demanded or paid; and that every person who shall have been duly admitted a solicitor of the High Court of

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(*i*) See 34 & 35 V. c. 48. As to the oaths to be taken by a Mahomedan, see *Re Cornoodham Tyabjee*, 28 L. J., Q. B. 22.

(*k*) Query, whether the Court will allow a minor to be admitted as a solicitor, see *Ex p. Steele*, 33 L. J., Q. B. 326: *Ex p. Cragg*, 6 Dowl. 256: *Ex p. Tibbs*, 9 Dowl. 151.

(*l*) See *Ex p. Clarke*, 3 B. & Ald. 610. Where a party was unable to find his articles by reason of his master having absconded, the Court allowed him to be admitted without producing them, a certificate of their enrolment being produced: *Ex p. Nicholls*, 1 Dowl., N. S. 263. See *Ex p. Taunton*, 4 Jur. 8, B. C.

(*m*) See *Middleton* v. *Chambers*, 1 Scott's N. R. 99.

(*n*) In *Reg.* v. *Mayor of London*, 16 L. J., Q. B. 185; 13 Q. B. 1 (see 17 L. J., Q. B. 330, *S. C.* in error), the Court of Queen's Bench decided that the Mayor's Court, London, is an inferior Court within this section: and that every solicitor, duly qualified, is entitled to be admitted to practise in that Court, although there was not any roll of that Court.

Chancery shall be entitled, upon the production of his admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as a solicitor in any inferior Court of equity in England and Wales, and in the Court of Bankruptcy, upon signing the roll of such other Court, but not otherwise; and shall thereupon be entitled to practise as a solicitor therein in like manner as if he had been sworn in and admitted a solicitor of such Court: *Provided also*, that no additional fee besides those payable by virtue of this Act shall be demanded or paid."

It seems that if a solicitor changed his name after admission in one of the superior Courts, another Court would allow him to sign the roll under this section in his altered name, upon an affidavit of the circumstance (*o*).

In County Courts.

By "The County Court Rules, 1875," *Ord. XVI. r.* 7, "No solicitor shall be allowed to appear for any person in a County Court until he has signed a roll or book to be kept by the registrar for that purpose: but no fee shall be payable for that purpose; and he shall once in every year, if required by the registrar, produce his certificate for the year to the registrar, who shall note the fact on the roll" (*p*).

Admission in certain cases.

As to the admission of solicitors of the Courts of the Counties Palatine, *see* 23 & 24 *V. c.* 127, *s.* 14.

As to the admission as solicitors of writers to the signet and solicitors in Scotland, *see* 23 & 24 *V. c.* 127, *s.* 15, *ante*, p. 47.

By 20 & 21 *V. c.* 39, attorneys and solicitors of certain colonial Courts may be admitted in Courts in England, subject to certain regulations. This statute is amended and extended by stats. 37 & 38 *V. c.* 41, and 47 & 48 *V. c.* 24.

Improper admission.

Improper Admission.]—If any fraud or false swearing have been practised to obtain the admission, the Court will strike the party off the roll; and if the master be concerned in the fraud, they will grant an attachment against him. Cases also may occur in which the Court might strike a solicitor off the roll for a defect in the articles of clerkship, or in the registry thereof, or in the service under the articles, or in the admission and enrolment, provided the application is made within twelve months from the time of admission and enrolment. There is no limit of time to the application where there has been fraud (*q*).

Notice, &c. for re-admission.

Notices, &c. for Re-admission.]—*See post*, p. 85.

(*o*) *Ex p. James*, 9 C. B. 220: *Re James*, 5 Exch. 310; 19 L. J., Ex. 272. See post, p. 77, as to altering roll, where solicitor changes his name after enrolment.

(*p*) See *Clutterbuck* v. *Halls*, 15 L. J., Q. B. 310; 4 D. & L. 80.

(*q*) *Ex p. Hill*, 2 W. Bl. 991. And see *Re Taylor*, 5 B. & Ald. 538; 6 & 7 V. c. 73, s. 29, ante, p. 49: *Re Myers*, 8 Q. B. 515; 15 L. J., Q. B. 209, where sufficient stamp duty had not been paid: *Ex p. Page*, 1 Bing. 160; 7 Moore, 572: *Re Anon.* 2 B. & Ad. 766: *Paget* v. *Chambers*, 7 Sc. 610; 5 Bing. N. C. 630.

II. SOLICITORS.

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1. *The Enrolment of.*

By 40 & 41 *V. c.* 25, 2*nd Sched., Part* 2, "Such person or persons as the Presidents of the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the High Court of Justice, jointly with the Master of the Rolls, shall for that purpose appoint, shall have the custody and care of the rolls or books wherein persons are enrolled as solicitors of the Supreme Court, and shall be deemed and taken as the proper officer or officers for filing such affidavits as in the Solicitors Act, 1843, are mentioned, and he or they is or are hereby also respectively required from time to time, without fee or reward, other than as in the said Act mentioned, to enrol the name of every person who shall be admitted a solicitor of the Supreme Court pursuant to the directions in the said Act, and the time when admitted, in alphabetical order, in rolls or books to be kept for that purpose, to which rolls or books all persons shall and may have free access without fee or reward."

By *Reg.* 2, November, 1875 (*s*), "The clerk of the Petty Bag shall have the custody and care of the rolls or books wherein persons are and shall be enrolled as solicitors of the Supreme Court, and shall be the proper officer for filing all affidavits, and enrolling and registering all contracts or articles, and assignments of articles, relating to the admission of solicitors of the Supreme Court, and shall have and retain the custody of all books, affidavits, and documents relating to attorneys or solicitors, which now are or should be in the custody of the Masters of the late several Courts of law at Westminster, or which now are or should be in his own custody as clerk of the Petty Bag."

Consequences of non-enrolment.

Care should be taken by the solicitor that his admission is duly enrolled. We have seen that by sect. 2, *ante*, p. 71, he cannot practise as a solicitor without it; and, as will be seen *post*, p. 82, if he do so he will be deemed guilty of a contempt of Court and subject to

(*s*) See 40 & 41 V. c. 25, s. 14.

punishment accordingly, besides being deprived of all remedy for his costs (*t*) and being liable to a penalty of 50*l*. But the proceedings in an action conducted by a solicitor not thus enrolled, will not in general be affected on that account (*u*).

Enrolment *nunc pro tunc*.

The Court may allow the enrolment to be made *nunc pro tunc* (*x*).

Judicial notice of roll.

The Court will take judicial notice of a solicitor being on the roll (*y*).

Solicitor changing his name.

On the application of a solicitor to be allowed to substitute the name of J. *Heaton* D. on the roll of solicitors in the place of J. D., the Court of Exchequer refused to alter the roll, but directed the Master to make a memorandum on the roll opposite the party's name, stating that he was now known by the name of J. Heaton D., and that the memorandum was made by rule of Court (*z*).

2. *The Certificate, and Renewal thereof.*

Necessity for and how long in force.

Before a solicitor (*a*) can practise as such, he must obtain a stamped certificate; otherwise he will not only be subject to a penalty of 50*l*., but will be disabled from recovering his fees for business done whilst so uncertificated (6 & 7 *V.* c. 73, *s.* 26; 33 & 34 *V.* c. 97, *ss.* 59, 60, *post*, p. 82) (*b*). Where two or more solicitors are in partnership, each must take out a certificate (*c*).

Only one certificate is necessary for any one year, and that must be taken out in accordance with 6 & 7 *V.* c. 73, and 23 & 24 *V.* c. 127; *see* 33 & 34 *V.* c. 97, *ss.* 61, 62.

The certificate expires on the 15th November, but may be renewed at any time before the 16th December. From what time it takes effect and when it expires, *see* 23 & 24 *V.* c. 127, *s.* 22, *post*, p. 81.

Amount of stamp duty.

Amount of Stamp Duty.]—The amount of the stamp duty is regulated thus:—If the solicitor practises or carries on his business (*d*)

(*t*) He could not sue for them even before this Act, see *Humphrey* v. *Harvey*, 4 M. & Sc. 500; 1 Bing. N. C. 62; 2 Dowl. 827. See *Young* v. *Dowlman*, 3 Y. & J. 24: *Latham* v. *Hide*, 1 Dowl. 594; 1 C. & M. 128. See 37 & 38 V. c. 68, s. 12, post.

(*u*) See *Glynn* v. *Hutchinson*, 3 Dowl. 529: *Hilleary* v. *Hungate*, Id. 56. And see the cases as to a solicitor being uncertificated, post, 82.

(*x*) *Ex p. Fry*, 3 Dowl. 338: *Ex p. Swift*, Id. 536; 1 Bing. N. C. 734.

(*y*) *Ex p. King*, 3 Dowl. 41: *Ex p. Hore*, Id. 600; 1 H. & W. 211. It is, however, usual, when making an application against a solicitor, to show by the affidavit in support of it that he is a solicitor of the Court.

(*z*) *Re Dearden*, 5 Ex. 740; 1 Pr. Rep. 666. See 9 C. B. 222, n. Where a solicitor for family reasons and no other was desirous of changing his name, the Court directed the proposed alteration on the roll of solicitors, although no royal licence had been obtained. *Re Gimlet*, 11 W. R. 210; 7 L. T., N. S. 562, Q. B. See the form of the rule (5 Ex. 740, n. (*b*)), and affidavit in this case (9 C. B. 222, n.). There seems to be some conflict in the cases as to the course to be pursued where a solicitor changes his name after enrolment. See n. (*b*), 9 C. B. 221: *Ex p. Daggett*, 1 Pr. Rep. 1: *Ex p. Moses*, 19 L. J., Q. B. 345; 15 Jur. 153: *Ex p. Benthall*, 7 Sc. N. R. 407: *Ex p. Ware*, 6 Dowl. 311: *Ex p. Hayward*, 5 Sc. 712.

(*a*) See 7 & 8 V. c. 101, s. 68, which enables a clerk or officer of a board of guardians, under certain circumstances, to practise before justices.

(*b*) See also 37 & 38 V. c. 68, s. 12, post.

(*c*) *Edmondson* v. *Davis*, 4 Esp. 14.

(*d*) By 23 & 24 V. c. 127, s. 19, "for determining the rate of stamp duty payable on the certificate, the place or places where the attorney or solicitor shall carry on his business, shall be deemed to be the place or

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within ten miles from the General Post-Office in London, and has been admitted or carried on business for three years or upwards, he has to pay 9*l.* duty; or, if he has not been so long admitted, or has not so long carried on business, 4*l.* 10*s.* If the solicitor practises or carries on business elsewhere, and has been admitted, &c. for three years or upwards, he has to pay 6*l.*; or, if he has not been admitted, &c. so long, 3*l.* (33 & 34 *V. c.* 97).

Appointment of registrar of solicitors.

To keep alphabetical roll.

Registrar to certify that Party entitled to stamped Certificate.]—By 6 & 7 *V. c.* 73, *s.* 21, "There shall be a registrar of attornies and solicitors; and that it shall be the duty of such Registrar to keep an alphabetical roll or book, or rolls or books, of all attornies and solicitors; and to issue certificates of persons who have been admitted and enrolled as attornies or solicitors, and are entitled to take out stamped certificates authorizing them to practise as such; and it shall be lawful to and for the Lord Chief Justice of Her Majesty's Court of Queen's Bench, the Master of the Rolls, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, (or any three of them, of whom the Master of the Rolls shall be one,) to make such orders, directions and regulations touching the performance and execution of the duties aforesaid, as they shall think proper; and such Registrar, or some person duly appointed by him, shall have free access to, and shall be at liberty from time to time to examine and take copies or extracts, without fee or reward, of all rolls or books kept for the enrolment of attornies and solicitors in any of the Courts at Westminster, and for the enrolment of attornies and solicitors in the Court of the Duchy of Lancaster, or Court of the Duchy Chamber of Lancaster at Westminster, or in any Courts of the Counties Palatine of Lancaster and Durham, and that the duties of such office of Registrar shall be performed by the Incorporated Law Society until the Lords Chief Justices of the Queen's Bench and Common Pleas, and the Lord Chief Baron, and the Master of the Rolls, or any three of them, of whom the Master of the Rolls is to be one, shall otherwise appoint."

Commissioners of Stamps not to grant certificate until Registrar certifies that the party is entitled thereto.

By sect. 22 (*e*), "From and after the fifteenth day of November next, it shall not be lawful for the Commissioners of Stamps and Taxes or any of their officers, to grant or issue to any person any stamped certificate authorizing such person to practise as an attorney or solicitor, unless nor until he shall leave with the said Commissioners or their proper officer, at the head office for stamps and taxes at Somerset House, in the county of Middlesex, a certificate from such Registrar as aforesaid that such person is an attorney or solicitor, and entitled to take out such stamped certificate: and the said Commissioners, or their proper officer, shall deliver to the said Registrar, on the 6th day of April in every year, or so soon afterwards as the said Registrar shall apply for the same, all such Registrar's certificates, under the authority of which any stamped certificates shall have been granted or issued since the fifteenth day of November preceding, with a note or memorandum

Commissioners to deliver such certificates to the Registrar, endorsed with date of granting certificate.

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places of his residence, within the meaning of the Acts relating to the stamp duties on certificates." [The remainder of this section is repealed by 40 & 41 V. c. 25.]

(*e*) This enactment is much altered by 23 & 24 V. c. 127, s. 18, noticed post, p. 80.

indorsed or written thereon respectively by the proper officer of the said Commissioners, stating the date of the stamped certificate granted or issued in respect thereof, and shall from time to time afterwards, whenever application shall be made for that purpose by the said Registrar, deliver to him all such other Registrar's certificates under the authority of which any stamped certificates shall have been granted or issued upon or after the sixth day of April and before the sixteenth day of November in every year, with a like note or memorandum indorsed or written thereon respectively as aforesaid."

On application for certificate, a declaration to be signed and entered in a book.

By sect. 23, "For the purpose of obtaining such Registrar's certificate as aforesaid, a declaration in writing (*f*), signed by such attorney or solicitor, or by his partner, or, in case such attorney or solicitor shall reside more than twenty miles from London, then by his London agent on his behalf, containing his name and place of residence (*g*), and the Court or one of the Courts of which he is then admitted an attorney or solicitor, together with the Term and year in or as of which he was so admitted, shall be delivered to the said Registrar, who shall cause all the particulars in such declaration to be entered in a proper book to be kept for that purpose, which shall be open to the inspection and examination of all persons without fee or reward; and the said Registrar shall, after the expiration of six days after the delivery of such declaration (unless he shall see cause and have reason to believe that the party applying for such certificate is not upon the said roll of attornies or solicitors), deliver to the said attorney or solicitor, or to his agent, on demand, a certificate in the form set forth in the third schedule to this Act annexed, and which last-mentioned certificate shall be delivered to and left with the Commissioners of Stamps and Taxes as hereinbefore directed."

Registrar to deliver certificate.

The declaration, on applying for, to be in duplicate, and one copy to be left with the Commissioners.

By 23 & 24 *V. c.* 127, *s.* 20, "The declaration required to be made for the purpose of obtaining the Registrar's certificate shall be made out and signed in duplicate, and one of such duplicates shall be delivered to and left with the Registrar, and the other produced to him, and the duplicate so produced, together with the certificate granted on such declaration, shall be left with the Commissioners, or their proper officer, on applying to have the certificate stamped, and shall be and be deemed the note in writing required by law to be delivered to the Commissioners, or their officer, to entitle the attorney or solicitor to a stamped certificate; and for every such certificate issued by the Registrar, and the previous requisite search and inquiry, there shall be paid to him the sum of five shillings, and the Registrar shall yearly render an account of all sums of money received in respect thereof, and of the application of the same to the Lord Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer, jointly with the Master of the Rolls, who may from time to time, by order under their hands, diminish such sum as they think fit (*h*): *Provided always*, that a copy of such account so rendered as aforesaid shall be open to the inspection of any attorney or solicitor at the hall of the Incorporated Law Society."

Fees for the Registrar's certificate and for the examinations.

(*f*) 23 & 24 V. c. 127, s. 20, infra.

(*g*) See s. 19 of 23 & 24 V. c. 127, noticed ante, p. 77, n. (*d*).

(*h*) See 40 & 41 V. c. 25, Sched.

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Form of Registrar's certificate.

By 40 & 41 *V. c.* 25, *s.* 16, "The annual certificate required by law to be obtained by every practising solicitor from the registrar of solicitors, and the declaration required to be delivered to the registrar for the purpose of obtaining such certificate may respectively be in the forms (A.) and (B.) in the first schedule to this Act, or to the like effect" (*i*).

On Registrar's refusal to issue certificate application to be made to Court.

By 6 & 7 *V. c.* 73, *s.* 24, "In case the said Registrar shall decline to issue such certificate as he is hereinbefore directed and required to give, the party so applying for the same, if an attorney, shall and may apply to any of the said Courts of law at Westminster, or to any judge thereof, or, if a solicitor, to the Master of the Rolls, who are hereby respectively authorized to make such order in the matter as shall be just, and to order payment of costs by and to either of the parties, if they shall see fit."

Certificate after neglect to take it out for a year.

In case of neglect to take out the certificate for a year, the Registrar is not to grant his certificate without an order of the Master of the Rolls. (*See post*, p. 85.)

Registrar's certificates to be made the stamped certificates.

By 23 & 24 *V. c.* 127, *s.* 18, "From and after the fifteenth day of November next after the passing of this Act, instead of separate annual stamped certificates for attornies and solicitors to be issued by the Commissioners of Inland Revenue as now required by law, the stamp duties chargeable on such certificate shall be denoted upon the Registrar's certificates; and upon any such certificate being stamped accordingly, and the date of the payment of the duty certified by the proper officer by writing under his hand, or by other sufficient means, the same shall be and be deemed the proper stamped certificate required by law to be taken out by the attorney or solicitor named therein."

Certificates not to be issued to conveyancers under the bar without annual permission.

By 23 & 24 *V. c.* 127, *s.* 34, "From and after the thirty-first day of October next after the passing of this Act it shall not be lawful for the Commissioners of Inland Revenue, or any of their officers, to grant or issue in any year to any person any such stamped certificate as is required to be taken out by every person who after the passing of this Act shall become a member of one of the four Inns of Court in England practising under the bar as a conveyancer, unless and until he have left with the said Commissioners or their proper officer an order of the benchers of the Inn of Court of which the applicant is a member, granting him permission for that year to take out such certificate or a copy of such order certified under the hand of their treasurer, sub-treasurer, or steward: Provided always, that this clause shall not extend or apply to any person who at the time of the passing of this Act shall be lawfully practising as a certificated conveyancer."

Practical directions for obtaining certificate.

Practical Directions for obtaining Certificate.]—*In order to obtain the certificate, deliver to the Registrar of solicitors at the Law Institution in Chancery Lane, a declaration in duplicate in the form referred to ante, p.* 79. *Leave the same there for six days, and then if you are entitled to a stamped certificate the Registrar will give you a certificate in the form referred to supra, on payment of a fee of 5s. Take the certificate and duplicate declaration to the Stamp Office at Somerset House, and the officer there will hand you a ticket* (*j*) *which you must fill up and*

(*i*) See Chit. F. p. 23. (*j*) Id. p. 24.

return to him together with the duplicate declaration, then pay the duty. You will afterwards receive the certificate on applying for it.

Account of certificates to be furnished to the Registrar and entered by him.

Account of Certificates to be furnished to the Registrar.]—By 23 & 24 *V. c.* 127, *s.* 21, "For enabling the Registrar to enter upon the roll of attorneys and solicitors kept by him a note or minute of the time of stamping every certificate, the Commissioners shall, whenever the same shall be required after the fifteenth day of February in every year, furnish to the Registrar an account of the certificates issued between the fifteenth day of November and the second day of January preceding, for which during the same period the stamp duties have been paid, specifying the names and places of business, of the parties respectively to or for whom the same have been issued, and the dates of payment of the stamp duties; or in lieu of such account, the Commissioners at their option shall return to the Registrar the aforesaid duplicate declarations to which such certificates relate, with a note or memorandum on each of them specifying the date of payment of the stamp duty for the certificate; and the Registrar shall upon such account being furnished or such duplicate declarations being returned to him as aforesaid, enter such note or minute as aforesaid: and in order to such entry being made in respect of certificates stamped at any other time, every such last-mentioned certificate shall, within a month of the payment of the duty, be produced to the Registrar, who shall thereupon make such entry, and signify the same by a note or memorandum upon the certificate; and every such last-mentioned certificate which shall not be so produced within the said period shall have effect only as a qualification to practise from the time when it shall be produced: *Provided* that it shall be lawful for the Master of the Rolls in the case of a solicitor, or one of the superior Courts of law at Westminster or one of the judges thereof, in the case of an attorney, at any time to make an order directing that any certificate not so produced shall have effect upon and from the time of stamping the same, or any subsequent period."

Where stamped after 1st January, certificate to be produced by the party to be entered within a month.

When certificate to bear date and take effect, &c.

When Certificate to bear date and take effect, &c.—Law List to be Evidence.]—By 23 & 24 *V. c.* 127, *s.* 22, "Every certificate issued by the Registrar between the fifteenth day of November and the sixteenth day of December in any year shall bear date on the sixteenth of November, and shall take effect on that day (*i*) for all purposes, provided it be stamped before the sixteenth day of December; and in every such case the sixteenth day of November shall, for the purpose of this Act, be deemed to be the date of the payment of the duty; but if such certificate be not so stamped, it shall take effect as regards the qualification to practise on the day on which it is stamped; and every certificate issued at any other time shall bear date on the day on which it is issued and subject to the provision herein contained relating to certificates stamped after the first day of January in any year, and not produced within a month to be entered by the Registrar, shall take effect as regards such qualification on the day on which it is stamped: and every certificate shall be and continue in force from the day on

(*i*) See *Eyre* v. *Shelley*, 6 M. & W. 269; 8 Dowl. 185, per Parke, B.

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Law List to be primâ facie evidence.

which it shall take effect as aforesaid, until the fifteenth day of November next following, inclusive, and no longer: and any list of attorneys, solicitors and conveyancers, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of attorneys, solicitors, and conveyancers who have obtained stamped certificates for the current year on or before the 1st day of January in the same year, shall, until the contrary be made to appear, be evidence in all Courts, and before all Justices of the Peace and others, that the persons named therein as attorneys, solicitors, or conveyancers holding such certificates as aforesaid for the current year are attorneys, solicitors, or conveyancers holding such certificates; and the absence of the name of any person from such list shall, until the contrary be made to appear, be evidence as aforesaid that such person is not qualified to practise as an attorney, solicitor, or conveyancer under a certificate for the current year; but in the case of any person being an attorney or solicitor whose name does not appear in such list an extract from the roll of attorneys and solicitors kept by the Registrar, certified under the hand of the Secretary of the Incorporated Law Society (while such society performs the duties of Registrar), or of the Registrar for the time being, shall be evidence as aforesaid of the facts appearing in such extract, and in the case of any person being a conveyancer whose name does not appear on such list, the fact of his being so shall be proved in the way in which it is now by law required to be proved."

Consequences of practising without certificate.

Cannot recover fees.

Consequences of practising without Certificate.]—By 6 & 7 *V.* c. 73, *s.* 26, it is enacted, "That no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action, or suit, or any proceedings in any of the Courts aforesaid, without having previously obtained a stamped certificate which shall be then (*k*) in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid" (*l*).

Penalty for practising without a certificate,

or not making true statement on application for certificate,

And by the Stamp Act, 1870 (33 & 34 *V.* c. 97), *s.* 59—

"(1.) Every person who in any part of the United Kingdom

(a) Directly or indirectly acts or practises (*m*) in any Court as an attorney, solicitor, proctor, writer to the signet, agent or procurator, or as a notary public without having in force at the time a duly stamped certificate, according to the provisions hereinafter contained and referred to;

(b) On applying for any such certificate does not truly specify the facts and circumstances upon which the amount of duty chargeable upon his certificate depends,

(*k*) See *Re Duke of Brunswick*, 4 Ex. 492; 19 L. J., Ex. 112.

(*l*) *Taylor* v. *Crowland Gas & Coke Co.*, 10 Exch. 293; 23 L. J., Exch. 254.

(*m*) See *In re Horton*, 8 Q. B. D. 434; 51 L. J., Q. B. 309, where it was held that a country solicitor, whose offices were in the country and who practised there, and who held a country certificate, did not, by attending a taxation in London, "act or practise" there within the meaning of the statute, so as to render him liable to the higher duty payable in respect of town certificates.

shall forfeit the sum of 50*l.* (*n*), and shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by him in any such capacity.

50*l.*, and incapacity to recover fees, &c.

"(2.) Any person in whose name, either alone or together with any other person, any proceeding is taken in any Court shall, unless the proceeding is set aside by the Court as irregular, or unless the contrary is otherwise satisfactorily proved, be deemed to have acted in such proceeding" (*o*).

By sect. 60, "Every person who (not being a serjeant-at-law, barrister, or a duly certificated attorney, solicitor, proctor, notary public, writer to the signet, agent, procurator, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceedings in law or equity, shall forfeit the sum of 50*l.* (*p*).

Penalty on unqualified persons preparing instruments, 50*l.*

Provided as follows:—

Proviso.

(1.) This section does not extend to

(a) Any public officer drawing or preparing instruments in the course of his duty.

(b) Any person employed merely to engross any instrument or proceedings.

(2.) The term 'instrument' in this section does not include

(a) Wills or other testamentary instruments.

(b) Agreements under hand only.

(c) Letters or powers of attorney.

(d) Transfers of stock containing no trust or limitation thereof."

See also stat. 37 & 38 *V. c.* 68, *s.* 12, *post*, p. 89.

It was held that 6 & 7 *V. c.* 73, *s.* 26, only applied to business done in the Courts referred to in it (*q*). But the words of the later statutes are wider (*r*). If a bill of costs is referred to taxation, the Master will disallow charges for business done for which the solicitor is not entitled to charge, on the ground of his being

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(*n*) By s. 26 (1) penalties are to be sued for by information in the Court of Exchequer, in England in the name of the Attorney-General for England, in Scotland in the name of the Lord Advocate, and in Ireland in the name of the Attorney-General for Ireland, and may be recovered with full costs of suit. (2) The Commissioners of Inland Revenue may, at their discretion, mitigate, or stay, or compound proceedings for any penalty, and reward any person who may inform them of any offence against this Act or assist in the recovery of any penalty. Formerly it was held that *common informers* might sue for similar penalties imposed by 37 G. 3, c. 90. *Davis* v. *Edmonson*, 3 B. & P. 382. But their suing was put a stop to by 44 G. 3, c. 98, s. 10. Both 37 G. 3, c. 90, and 44 G. 3, c. 98, are now repealed by 33 & 34 V. c. 99.

(*o*) See *Barnard* v. *Gostling*, 1 N. R. 245.

(*p*) And cannot sue for his fees. See *Taylor* v. *Crowland Gas and Coke Co.*, 10 Exch. 293; 23 L. J., Exch. 254, decided on the old Act, 44 G. 3, c. 98, s. 14.

(*q*) *Richards* v. *Lord Suffield*, 17 L. J., Ex. 362; 2 Ex. 616: *Green* v. *Reece*, 8 C. B. 88. See *Jones* v. *Smith*, 17 L. J., Ex. 255: *Coren* v. *Sharpe*, 1 B. & Ad. 386: *Austen* v. *Davies*, 28 L. T. 557; 21 W. R. 884, costs of proceedings in Probate Court not recoverable.

(*r*) *Verlander* v. *Eddolls*, 51 L. J., Q. B. 55; 45 L. T. 543.

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uncertificated (*s*). A solicitor cannot sue for (*t*) nor has he any lien for such business (*u*). But if money be paid to him for work done whilst he is so uncertificated, it cannot be recovered by action, nor will the Court compel him to refund it (*x*). A defence to an action for his bill, that he was uncertificated, must be pleaded specially (*y*).

Decisions under 37 G. 3, c. 90.

The following decisions under the repealed Act 37 *G.* 3, *c.* 90 (*z*), may still be useful to refer to. This enactment, being of a penal nature, was not extended beyond its strict letter (*a*). It did not extend to actions in which the solicitor was himself a party (*b*); nor to suits in the old County Court, although prosecuted there by virtue of a writ of justicies, for more than 40*s.* (*c*). It was doubted whether a solicitor was liable to distinct penalties for each step he took in a cause during the time he was without his certificate, or for one penalty only for all the proceedings he took in it (*d*). We have seen, *ante*, p. 77, that where two or more solicitors are in partnership, each must take out a certificate: and those who neglect to do so must be sued separately, and not jointly, for the penalties (*e*).

Effect on client.

Although a solicitor by practising without a certificate renders himself liable to a penalty, and cannot recover his fees, still the proceedings taken by him are not deemed, as against his client, void or irregular on that account (*f*), unless it can be shown that he was aware at the time of the retainer that the solicitor had not taken out a certificate, in which case an order may be obtained for staying the proceedings until a certificated solicitor is appointed, or to set them aside unless such solicitor is appointed in a limited time (*g*). Since the statute 37 *& 38 V. c.* 68, *s.* 12 (*post*, p. 89), the

(*s*) *Fowler* v. *Monmouthshire R. &c. Co.*, 4 Q. B. D. 334; 45 L. J., Q. B. 457: *Re Angell*, 6 D. & L. 144, B. C. See *Punter* v. *Lord Grantley*, 3 M. & Gr. 295: *Fullalove* v. *Parker*, 31 L. J., C. P. 259; 12 C. B., N. S. 146. See *Re Jones*, 39 L. J., Ch. 83; L. R., 9 Eq. 63, and observe that in that case the application to tax was by the *client*, and in such cases the order in Chancery contained an *undertaking to pay*. See also *Re Hope*, L. R., 7 Ch. App. 766; 41 L. J., Ch. 797.

(*t*) *Verlander* v. *Eddolls*, supra.

(*u*) See *Wilton* v. *Chambers*, 7 A. & E. 524; 2 N. & P. 392.

(*x*) See *Nash* v. *Goode*, 9 Dowl. 929, per *Wightman*, J. And see *Wilson* v. *Knapp*, 8 Dowl. 426: *Fullalove* v. *Parker*, supra.

(*y*) Ord. XIX. r. 15: *Hill* v. *Sydney*, 7 A. & E. 956.

(*z*) Upon the construction of 37 G. 3, c. 90, s. 30, some difficulty arose from the words "with intent to evade the payment of higher duties." See 2 A. & E. 122, n. (*a*): *Bowler* v. *Brown*, Id. 116; 4 N. & M. 17: et per *Parke*, B., in *Eyre* v. *Shelley*, 6 M. & W. 272.

(*a*) *Middleton* v. *Chambers*, 1 Sc. N. R. 110; 1 M. & Gr. 97; 8 Dowl. 545, per *Tindal*, C. J.

(*b*) *Prior* v. *Moore*, 2 M. & Sel. 605: *Skirrow* v. *Tagg*, 5 M. & Sel. 281.

(*c*) *Cross* v. *Kaye*, 6 T. R. 663. And see *Jones* v. *Stevens*, 11 Price, 235: *Ex p. Hodgson and Ross*, 3 A. & E. 224: *Hodkinson* v. *Mayer*, 6 L. J., Q. B. 113; 1 N. & P. 397; 6 A. & E. 194: *Bowler* v. *Brown*, 2 A. & E. 116; 1 N. & M. 17: *Eyre* v. *Shelley*, 6 M. & W. 269.

(*d*) *Edmonson* v. *Davis*, 4 Esp. 14.

(*e*) *Barnard* v. *Gostling*, 1 N. R. 245, overruling 2 East, 569.

(*f*) *Brown* v. *Tolley*, 31 L. T. 485: *Sparling* v. *Brereton*, L. R., 2 Eq. 64; 35 L. J., Ch. 461.

(*g*) *Welch* v. *Pribble*, 1 D. & R. 215: *Reeder* v. *Bloom*, 10 Moore, 261; 3 Bing. 9: *Smith* v. *Wilson*, 1 Dowl. 545: *Anon.* v. *Sexton*, Id. 180: *Bayley* v. *Thompson*, 2 Dowl. 655: *Hill* v. *Mills*, Id. 696: *Hilleary* v. *Hungate*, 3 Dowl. 56: *Glynn* v. *Hutchinson*, 3 Dowl. 529. See *R.* v. *Burgess*, 8 A. & E. 275; *Paterson* v. *Powell*, 9 Bing. 620: *Holgate* v.

fact that the solicitor employed by a party was uncertificated will deprive him of his right to recover costs which the opposite party would otherwise be liable to pay (*h*). And where the proceedings are really for the benefit of the solicitor and not of his client they may be stayed, or set aside, without costs, on the ground of the solicitor being uncertificated. And where the defendant, on being sued, paid the debt, but refused to pay the costs, and plaintiff's solicitor proceeded to trial and issued execution for them, the Court stayed the proceedings, the solicitor being uncertificated, and plaintiff having made him no advances; for the proceedings were evidently for the benefit of the solicitor only (*i*). The objection that the solicitor is not duly qualified, and that a party to an action cannot, therefore, recover his costs, *must be taken before the Master* on the taxation of costs, and if not taken then, cannot afterwards be taken on a motion to set aside the taxation, unless the omission be satisfactorily explained (*k*). As to what are the consequences of the solicitor in the suit not being duly admitted and enrolled, *see post*, p. 89.

In case of neglect for a year to renew certificate, order of Master of Rolls necessary.

Re-admission, and Renewal of Certificate after Neglect to take it out.]—By 40 & 41 *V. c.* 25, 2*nd Sched., Part* 2 (*l*), "If a solicitor of the Supreme Court, after having at any time taken out a stamped certificate, neglects for a whole year after the expiration thereof to renew the same for the following year, the registrar shall not afterwards grant a certificate to such solicitor, except under an order of the Master of the Rolls, and it shall be lawful for the Master of the Rolls to direct the registrar to issue a certificate to such person on such terms and conditions as he may think fit."

By *r.* 2, *November*, 1875 (*m*), "On an application to re-admit (*n*) a solicitor of the Supreme Court who has been struck off the roll, or on an application to take out or renew the annual certificate of a solicitor, the applicant shall, six weeks before the application is

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Slight, 21 L. J., Q. B. 74, where an attestation by an uncertificated solicitor to a warrant of attorney was held good. *Sparling* v. *Brereton*, supra.

(*h*) *Fowler* v. *Monmouthshire Canal Co.*, 4 Q. B. D. 334; 45 L. J., Q. B. 457, where the solicitor acting for a claimant in an arbitration for the assessment of compensation for land compulsorily taken by a railway company under the Lands Clauses Act had omitted to take out his certificate, and it was held that the client as well as the solicitor was precluded by s. 12 of 37 & 38 V. c. 68, from recovering his costs against the company, notwithstanding that the award had been in his favour, and he had been ignorant of the disqualification of his solicitor. Cp. *Verlander* v. *Eddolls*, 45 L. T. 543. Prior to this statute the law was otherwise: *Wilson* v. *Knapp*, 8 Dowl. 426: *Reeder* v. *Bloom*, 10 Moore, 261; 3 Bing. 91: *Anon.* v. *Sexton*, 1 Dowl. 180. See *Young* v. *Dowlman*, 3 Y. & J. 24: *Humphreys* v. *Harvey*, 4 M. & Sc. 500; 1 Bing. N. C. 60; 2 Dowl. 827: *Fullalove* v. *Parker*, 31 L. J., C. P. 239; 12 C. B., N. S. 146.

(*i*) *Meekin* v. *Whalley*, 1 Bing. N. C. 59; 2 Dowl. 823.

(*k*) *Fullalove* v. *Parker*, 31 L. J., C. P. 239; 12 C. B., N. S. 146; following *Punter* v. *Lord Grantley*, 3 M. & G. 295.

(*l*) See sect. 23.

(*m*) See 40 & 41 V. c. 25, s. 14, ante.

(*n*) If a solicitor has been struck off the roll and called to the bar he must be disbarred before he can be re-admitted. *Ex p. Cole*, 1 Doug. 114: *Ex p. Warner*, 6 Jur. 1016. And see *Re Pyke*, 34 L. J., Q. B. 121, 209.

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intended to be made, give notice thereof (*o*) as in the case of an original admission, and the affidavits (*p*) in support of such application shall be filed at the Petty Bag Office, and a copy thereof shall at the same time be left with the clerk of the Petty Bag, to be delivered by him to the registrar of solicitors, and the order for such re-admission, taking out, or renewal shall (if made) be drawn up (as the Master of the Rolls shall direct) on reading such affidavits, and an affidavit of such copies having been left and notices given in compliance with this order.

"Upon an application to dispense (*q*) with the required notice of intention to take out or renew a certificate, a summons shall be served on the registrar of solicitors calling on him to show cause within ten days why such taking out or renewal of certificate should not be allowed; and if no cause be shown to the satisfaction of the Master of the Rolls, he may, if he shall think proper, make an order for allowing such certificate to be issued.

"Any application for re-admission shall be by petition to the Master of the Rolls, to be presented at the Petty Bag Office without the payment of any fee, and a copy of such petition shall be served on the registrar of solicitors not less than fourteen days before the same shall be heard. On hearing such petition the Master of the Rolls may dispose of the same, or if he shall think fit may refer the same to any other Division of the High Court of Justice.

"All applications to dispense with any rule or rules as to any re-admission or taking out or renewal of certificates, shall be made to the Master of the Rolls in such manner as he shall from time to time direct.

"All orders made by the High Court of Justice or the Court of Appeal, or any Division or judge thereof, for striking any solicitor off the roll, or for suspending any solicitor from practice, or for re-admitting any solicitor or restoring the name of any solicitor to the roll, or for altering the name of any solicitor on the roll, or for any other purpose involving any alteration in or addition to the roll of solicitors of the Supreme Court, shall be filed with the clerk of the Petty Bag, who shall thereupon make such entry on or alteration in the said roll as may be directed by such order, and inform the registrar of solicitors thereof."

(*o*) Chit. Forms, pp. 25, 26, n.

(*p*) Ibid. pp. 25, 26.

(*q*) The Master of the Rolls, under special circumstances, will dispense with these notices. See *Ex p. Smith*, 7 Sc. 344: *Re Macmurdo*, 7 Jur. 420: *Ex p. French*, 5 Dowl. 374: *Ex p. Knipe*, 9 Dowl. 108: *Ex p. Wybrow*, 9 Dowl. 197: *Ex p. Webb*, 4 D. & L. 641. He will do so if the solicitor has not taken out his certificate, having reason to suppose that his agent or some other person has done so. *Ex p. Gude*, 1 D. & L. 675: *Ex p. Thorpe*, 3 Dowl. 592: *Ex p. Bartlett*, 1 Chit. Rep. 207: *Ex p. Winter*, 1 B. & Ald. 189: *Ex p. Jones*, 4 Moore, 347: *Ex p. Vaughan*, Tidd, 9th ed. 79: *Ex p. Jones*, 2 Dowl. 199: *Ex p. Rigby*, 1 N. & M. 593: *Ex p. Minchin*, 5 Dowl. 253. But these notices will not in general be dispensed with because the solicitor was prevented, by pecuniary difficulties or illness (*Ex p. Bartlett*, 1 Chit. Rep. 207: see, however, *Ex p. French*, 5 Dowl. 374), or absence abroad (*Ex p. Watson*, 1 Chit. Rep. 208), or mere inadvertence (*Ex p. Franks*, 3 Dowl. 319: see *Ex p. Barnes*, 2 B. C. R. 156; 5 D. & L. 294: *Ex p. Weymouth*, 5 D. & L. 60; 2 B. C. R. 102), from taking out his certificate. It would seem unnecessary to give the commissioners of stamps any notice of the application, as was formerly required (see *Ex p. Franks*, 3 Dowl. 319: *Ex p. Bridgman*, Id. 371), but the point has not been decided.

In what cases order for certificate granted, and on what terms.

The Master of the Rolls has full power to grant or refuse an order for the renewal of the certificate at his discretion, and, if granted, to impose such terms and conditions as he may think fit. It may be useful to notice the cases in which the Courts have granted or refused re-admission before the 6 & 7 *V. c.* 73, and the terms upon which it has been granted.

The Courts always granted the re-admission, where the applicant had not practised on his own account in this country (*r*) since the expiration of his last certificate, and this without payment of fine or arrears of duty (*s*), the affidavit in support of the application stating positively that he had not practised, and explaining why he had not done so (*t*), and how he had been since employed (*u*). And the same, where the solicitor had not practised since his admission (*x*).

But where the solicitor had practised on his own account in this country (*y*) since the expiration of his last certificate, the Courts would not order him to be re-admitted except upon the terms of his paying all arrears of duty, and a fine (*z*). And, in this case, the Courts also would require to be satisfied by the affidavit, that the party's not having taken out his certificate arose from the mere neglect of himself or his agent (*a*) or clerk (*b*), and not from any wilful omission or improper motive.

If the solicitor had practised on his own account without a certificate, well knowing that he had not taken it out, then the Courts, at all events, would not re-admit him without payment of something more than a nominal fine, together with all arrears of duty (*c*). And sometimes they refused the re-admission altogether—as where he had been twice convicted of conspiracies to extort money by means of libels (*d*), or done any other act that would render him liable to be struck off the roll. A solicitor who had practised abroad (*e*), or in a borough Court, where persons not solicitors might practise (*f*), or who had practised after ceasing to take out his certificate, but had the penalties remitted by the Commissioners of Stamps, stood in the same situation as a person who had not practised, and would have been re-admitted on the same terms as such person, viz., without payment of fine or arrears of duty (*g*).

Time for making the application.

There is no time limited for making the application. Solicitors have been re-admitted under the old law after ceasing to practise for many years (*h*), and where a solicitor had been struck off the

(*r*) *Ex p. Philcox*, 2 Dowl. 450. See *Ex p. Thompson*, 5 Dowl. 275.
(*s*) *Ex p. Clarke*, 2 B. & Ald. 214: *Ex p. Calland*, Id. 315: *Ex p. Richards*, 1 Chit. Rep. 101: *Ex p. Matson*, 2 D. & R. 238: *Ex p. Thompson*, 2 Dowl. 160.
(*t*) *Ex p. Mayer*, 5 Moore, 141: *Ex p. Maliphant*, 7 Id. 495.
(*u*) *Re Saunders*, 2 Smith, 154.
(*x*) *Ex p. Davis*, 1 Chit. Rep. 725.
(*y*) *Ex p. Philcox*, 2 Dowl. 450. See *Ex p. Thompson*, 5 Dowl. 275.
(*z*) *Ex p. Philpot*, 3 Dowl. 339. See *Ex p. Murray*, 1 T. & R. 56: *Ex p. Leacroft*, 4 B. & Ald. 90.
(*a*) See *Ex p. Leacroft*, supra: *Re Winter*, 8 Taunt. 129: *Ex p. Jones*, 2 Dowl. 199: *Ex p. Gude*, 1 D. & L. 675.
(*b*) *Ex p. Rigby*, 1 N. & M. 593.
(*c*) *Ex p. Stonecroft*, 1 H. & W. 368: *Ex p. Minchin*, 5 Dowl. 253: *Ex p. Philpot*, 3 Dowl. 339. See *Re Taylor*, 16 Jur. 728, B. C.
(*d*) *Re Hawdone*, 9 Dowl. 970: *Ex p. Grey*, 5 D. & L. 275.
(*e*) *Ex p. Philcox*, 2 Dowl. 450. See *Ex p. Thompson*, 5 Dowl. 275.
(*f*) *Ex p. Thompson*, 5 Dowl. 275.
(*g*) *Ex p. Tuffkin*, 1 H. & W. 516.
(*h*) *Ex p. Smith*, 1 Chit. 692: *Ex p. Cunningham*, 7 Moore, 410; 1 Bing. 91.

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roll at his own request, he was re-admitted after the lapse of fifteen years, without payment of arrears of duty or fine (*i*). And so, where he had ceased to practise for twenty-seven years, during which time he had not been engaged in the law, and he then became a managing clerk in the office of a solicitor, with whom he continued upwards of two years, and who swore to his capacity as a lawyer, *Williams*, J., allowed him to be re-admitted (*k*). But the Court refused to re-admit a party who had discontinued practice for thirty years, and had occupied himself in the meantime as an officer of the customs (*l*).

Affidavits for. An affidavit should be made, stating the admission of the applicant and the time of such admission (*m*), and up to what time he obtained his certificate, and also stating the reason (*n*) for his not having continued to take it out, and the manner in which he has since been employed (*o*). If he has not practised on his own account since his last certificate, the affidavit should state such fact, otherwise the contrary will be presumed (*p*). As to filing this affidavit, &c., *see supra*. By leave of the Master of the Rolls, it may be lodged *nunc pro tunc* (*q*). An affidavit must also be made in support of the application, showing the service of the requisite notices, &c.

Examination. If the application is made after a great lapse of time since the applicant practised as a solicitor, the Master of the Rolls may require him to be examined before making an order under the above section (*r*).

Draw up the order, if granted, in the usual way, take it to the Registrar at the Incorporated Law Society, Chancery Lane, with the declaration and duplicate (*ante*, p. 79) *filled up and signed, and he will grant a certificate, which will be stamped at Somerset House on payment of the duty. If the order is granted upon payment of arrears of duty or a fine, the arrears must be paid at the Stamp Office and the fine at the Crown Office, and the receipts produced to the Registrar, with the Order.*

3. *Unqualified Persons acting as Solicitors.*

Penalty for wrongfully acting as a solicitor. By 23 & 24 *V. c.* 127, *s.* 26 (*s*), "Every person who acts as an attorney or solicitor contrary to the enactment in section 2 of the

(*i*) *Ex p. Calland*, 2 B. & Ald. 315, n. See *Ex p. Clarke*, 2 B. & Ald. 314. See a case where he had not taken out his certificate or practised for twenty-four years, *Ex p. Marshall*, 6 Dowl. 526.

(*k*) *Ex p. Brabant*, 7 Dowl. 622.

(*l*) *Ex p. Billings*, 5 Dowl. 395. See also *Ex p. Rudge*, 12 L. J., Q. B. 186; 2 Dowl., N. S. 682.

(*m*) *Ex p. Wentworth*, 2 Dowl. 607, where the fact of admission was not positively stated.

(*n*) See the reasons that may be assigned, ante, p. 87.

(*o*) See the form, Chit. Forms, p. 26.

(*p*) *Ex p. Wybrow*, 9 Dowl. 197: *Ex p. Knipe*, 9 Dowl. 108: *Ex p. Miller*, 8 Dowl. 323.

(*q*) R. 2, Nov. 1875, ante, p. 85: *Ex p. Norman*, 8 Dowl. 136: *Ex p. Blunt*, 6 Jur. 949, B. C.: *Ex p. Makinson*, 18 C. B. 661.

(*r*) *Ex p. Robinson*, 2 D. & L. 9: *Ex p. Bray*, 2 D. & L. 10 (*n*): *Anon.* 16 Jur. 222, B. C.: *Re Sewell*, 32 Beav. 475. As to the examination, see ante, p. 67.

(*s*) See 6 & 7 V. c. 73, s. 35, the previous enactment on this subject. See *Hulls* v. *Lea*, 10 Q. B. 940: *Re Humphreys*, 14 Q. B. 388.

6 & 7 *V. c.* 73 (*t*), or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate or the Court for Divorce and Matrimonial Causes (*u*) without being duly qualified so to act, shall be deemed guilty of a contempt of the Court in which the action, suit, cause, matter, or proceeding in relation to which he so acts is brought, had, or taken and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done or any disbursement made by him in the course of so acting, and shall in addition to any other penalty or forfeiture and to any disability to which he may be subject, forfeit and pay for every such offence the sum of 50*l.*, to be recovered, with full costs of suit, by action brought with the sanction of her Majesty's Attorney-General, in the name of the Incorporated Law Society, in any of the superior Courts of law at Westminster, or in any County Court, and such penalty shall be applied in like manner as fines imposed for practising without a stamped certificate are now by law applicable."

See also 33 & 34 *V. c.* 97, *s.* 60, *ante*, p. 63.

By 37 & 38 *V. c.* 68 ("The Attorneys and Solicitors Act, 1874"), *s.* 12, "Any person who wilfully and falsely pretends to be or takes or uses any name, title, addition, or description implying that he is duly qualified to act as an attorney or solicitor, or that he is recognized by law as so qualified, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding the sum of 10*l.* for each such offence. No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever (*x*). For the purposes of this section, a person shall be deemed to be duly qualified to act as an attorney or solicitor if he shall have in force at the time at which he acts as an attorney or solicitor a duly stamped certificate authorizing him so to do, pursuant to the provisions of the Stamp Laws and the laws for the time being relating to attorneys and solicitors, or shall have been appointed to be solicitor of the Treasury, Customs, Inland Revenue, Post Office, or any other branch of her Majesty's Revenues, or of any public department, including the department of the Ecclesiastical Commissioners, and of the Governors of Queen Anne's Bounty, or if he be a clerk or officer appointed to act for the solicitor for any public department as hereinbefore described. Any offence under this Act may be prosecuted before a Court of summary jurisdiction, in manner provided by the Summary Jurisdiction Acts. Provided always, that the Court of summary jurisdiction, when hearing, trying, determining and adjudging an information

(*t*) See this section, ante, p. 71. It extends to the case of an unqualified person who acts as a solicitor in the name and with the consent of a duly qualified solicitor. *Abercrombie* v. *Jordan, In re Hunt*, 8 Q. B. D. 187; 30 W. R. 810.

(*u*) See *Law Society* v. *Shaw*, 8 App. Cas. 407; 52 L. J., Q. B. 674, where law stationers were unsuccessfully proceeded against by the Incorporated Law Society under this section. See also *Dockings* v. *Vickery*, *Re Symons*, 46 L. T. 139, where the evidence that the unqualified person had "acted" as a solicitor was held insufficient.

(*x*) This extends to County Court proceedings. *Verlander* v. *Eddolls*, 51 L. J., Q. B. 55; 45 L. T. 543.

PART I.

or complaint in respect of an offence under this Act, shall be constituted either of two or more justices of the peace in petty sessions, or of some magistrate or officer sitting alone or with others at some Court or other place appointed for the administration of justice, and for the time being empowered by law to do alone any act authorized to be done by more than one justice of the peace."

By 40 & 41 *V.* c. 62 ("The Legal Practitioners Act, 1877"), *s.* 2, "Any surrogate or other person not being a qualified practitioner who for or in expectation of any fee, gain, or reward, either directly or as the agent of any other person whether a qualified practitioner or not, takes instructions for or draws or prepares any papers on which to found or oppose a grant of probate or of letters of administration, shall be guilty of an offence within the meaning of the 12th section of the Attorney and Solicitors Act, 1874 (37 & 38 *V.* c. 68); but nothing in this section contained shall be construed to affect any remedy against any such person under any other Act or Acts whatsoever."

By sect. 3, "The term 'qualified practitioner' in this Act means and includes any serjeant-at-law, barrister-at-law, certificated solicitor, proctor, notary public, certificated conveyancer, special pleader, or draughtsman in equity."

Consequences of so practising.

By sect. 4, "This Act shall not extend to Scotland or Ireland."

As to practising without a stamped certificate, *see ante*, p. 82. If an unqualified person have any securities in his hands delivered to him for business, done when so unqualified, the Court or a judge will, it seems, order him to deliver them up (*y*). But it seems that, if money be paid to him for such business it cannot be recovered back by action, nor will he be ordered to refund it (*z*).

Where the proceedings on behalf of another are in the name of an unqualified person, they may be stayed until a proper solicitor be appointed, or they may be set aside unless a proper solicitor be appointed within a limited time (*a*); but proceedings taken by an uncertificated solicitor are not as regards his client deemed void or irregular (*b*). Where the proceedings are carried on by the unqualified person in the name of a qualified one, without his consent or knowledge, the proceedings may, it seems, be set aside (*c*). But a proceeding taken by an unqualified person in his own name (*d*), or in that of a solicitor without consent, cannot be treated as a nullity (*e*): and the Court in one case entertained a motion, notwithstanding the solicitor whose name was used in it and in the proceedings deposed that he never acted or sanctioned the use of his name in it (*f*).

Since the above stat. (37 & 38 *V.* c. 68, *s.* 12), the successful party in a legal proceeding cannot, when the solicitor employed by him is uncertificated, recover his costs and disbursements from the party otherwise liable (*g*).

(*y*) *Wilton* v. *Chambers*, 7 A. & E. 524; 2 N. & P. 392.

(*z*) *Nash* v. *Goode*, 9 Dowl. 929. And see *Wilson* v. *Knapp*, 8 Dowl. 426.

(*a*) *Bayley* v. *Thompson*, 2 Dowl. 655; 2 C. & M. 673: *Hawkins* v. *Edwards*, 4 Moore, 603.

(*b*) *Brown* v. *Tolley*, 31 L. T. 485.

(*c*) *Norton* v. *Curtis*, 3 Dowl. 245: *Oppenheim* v. *Harrison*, 1 Burr. 20: *Horwood* v. *Adams*, 5 Burr. 2660.

(*d*) *Bayley* v. *Thompson*, 2 Dowl. 655; 2 C. & M. 673.

(*e*) *Hill* v. *Mills*, 2 Dowl. 696.

(*f*) *R.* v. *Burgess*, 3 N. & P. 366; 8 A. & E. 275.

(*g*) *Fowler* v. *Monmouthshire Canal*

A person may be indicted for acting as a solicitor when not admitted or enrolled (*h*).

May be indicted.

By 6 & 7 *V. c.* 73, *s.* 32, "If any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any Court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act, or practise in any respect as an attorney or solicitor in any suit at law or in equity, knowing (*i*) such person not to be duly qualified as aforesaid, and complaint thereof shall be made in a summary way to any of the said superior Courts wherein such attorney or solicitor has been admitted, and proof made thereof upon oath to the satisfaction of the Court that such attorney or solicitor hath wilfully and knowingly offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid to the prison of the said Court, without bail or mainprize, for any term not exceeding one year." This is a re-enactment of 22 *G.* 2, *c.* 46, *s.* 11, with certain additions.

Solicitors not to act as agents for persons not qualified, &c.

A solicitor who forms a partnership with an unqualified person is, it seems, within the provisions of this enactment (*k*). And where a solicitor engaged a certificated conveyancer to conduct his business, and allowed him a moiety of the profits instead of a salary, and the business was carried on in their joint names, the Court held the case within 22 *G.* 2, *c.* 46, and ordered the solicitor to be struck off the roll, and the conveyancer to be imprisoned for a month (*l*). But an agreement by the eldest son of a solicitor who had died and bequeathed his property to his widow, entered into with his mother, for the mixed consideration of the goodwill of the business, the advancement of money for carrying it on, and family affection, to continue the business and to account to her for the profits during the minority of his brothers and sisters, was held not contrary to the Act (*m*). The payment of a clerk by commission

What cases within the Act.

Co., 4 Q. B. D. 334; 45 L. J., Q. B. 457.

(*h*) *R.* v. *Buchanan*, 8 Q. B. 883; 15 L. J., Q. B. 227. See *R.* v. *Buchanan*, 13 Jur. 423, Q. B., where it was held that the solicitors who were the prosecutors were entitled to costs.

(*i*) See *Re Hodgson*, 3 Dowl. 330.

(*k*) So decided under 22 G. 2, c. 46, s. 11: *Tench* v. *Roberts*, Mad. & Geld. 145, n. See per *Richardson*, J., *Hopkinson* v. *Smith*, 7 Moore, 243; 1 Bing. 16.

(*l*) *Re Jackson and Wood*, 1 B. & C. 270; 3 D. & R. 263, n. And see *Re Clark*, 3 D. & R. 260.

(*m*) *Candler* v. *Candler*, 6 Mad. 141: *Scott* v. *Miller*, Johns. 220; 28 L. J., Ch. 584. See *Sterry* v. *Clifton*, 9 C. B. 110: *Eddison* v. *Rothery*, 10 Jur., N. S. 543: *Aubin* v. *Holt*, 25 L. J., Ch. 36, where an agreement entered into on the dissolution of a partnership between two attorneys, by which the retiring partner was to have an annuity, and his name was to be used as before, was held legal. See also *Galloway* v. *Mayor, &c. of London*, 36 L. J., Ch. 978; L. R., 4 Eq. 90.

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on the business done has been said by the Council of the Incorporated Law Society to be within the enactment (*n*). A solicitor who resided occasionally at A., occupied part of a house in B., where his articled clerk lived, the name of both being on the door; the clerk was in the habit of attending a court of requests and before magistrates as such clerk, but deriving a profit to himself therefrom; he also conducted an appeal in the name of his master, who allowed part of the bill to be paid by a suit of clothes made for the clerk; it also appeared that several writs, issued out of the King's Bench, had been placed in the hands of an officer to be executed, having the master's name upon them, for part of which he paid, but referred the officer to the clerk for the remainder, saying it was the clerk's business and not his; and that, in an action carried on in the King's Bench in the name of the master, with his knowledge and concurrence, the clerk appeared and acted as the solicitor, and after a verdict obtained, claimed to have the costs paid to himself, and objected to have them paid to the master; it was held that this was a case within 22 *G.* 2, c. 46, and the Court ordered the solicitor to be struck off the roll (*o*). And where a bailiff had written to a solicitor for writs, which the latter sent without knowing anything of the parties or circumstances, but the bailiff had never represented himself or been considered as a solicitor, nor looked for any profit upon the law proceedings, the Court held that, although this was not a case within that Act, yet that it was a most improper practice, which the Court, in virtue of its general jurisdiction over solicitors, would punish severely (*p*). But the Court of Common Pleas refused to strike a solicitor off the roll, on an affidavit which stated that a person who had lately been his clerk, and who lived at a town eight miles distant from the residence of the solicitor, carried on business at an office over the door of which was written the solicitor's name, but that he (the solicitor) only attended on market days, and then transacted all his business at an inn; on the ground, that it should have been shown that such person either participated in the profits, or carried on business on his own account (*q*), and the Queen's Bench gave a similar decision in a more recent case (*r*). A solicitor who had been regularly admitted, but who had neglected to take out his certificate for a year, was held not an "unqualified person," within 22 *G.* 2, c. 46 (*s*).

When both must be proceeded against.

The Court will not entertain an application under the above enactment against an unqualified person alone—the solicitor must also be proceeded against. But it seems they will entertain an application against the latter alone (*t*). The matter in practice is, in general, referred to one of the Masters to report thereon to the Court (*u*). If the charge be satisfactorily made out, the Court will be bound to perform their duty, and proceed according to the directions of the statute, by striking the solicitor off the roll, and

(*n*) See a letter to that effect printed in the Law Times (Journal), Vol. 48, p. 447, April 9th, 1870.

(*o*) *Re Palmer*, 1 Harr. & W. 55; 4 N. & M. 529.

(*p*) *Ex p. Whatton*, 5 B. & Ald. 824.

(*q*) *Ex p. Garbutt*, 9 Moore, 157.

(*r*) *Re King*, 1 A. & E. 560.

(*s*) *Re Ross and Hodson*, 3 Ad. & El. 244; 4 N. & M. 763; 1 Harr. & W. 265.

(*t*) *Re Hodgson*, 3 Dowl. 330; 1 Harr. & W. 110.

(*u*) *Re Jaques*, 2 D. & R. 64.

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(*r*) See Id.: *Re Clark a*
3 D. & R. 260: *Re Pop*
June 7, 1872.

(*y*) *Hopkinson* v. *Smith*,
29, per *Richardson*, J., 1 B

(*z*) I.e. the old County C
to signing the roll of a
County Court, see ante, p.

(*a*) *Gerard's case*, 2 W. B

(*b*) *R.* v. *Routledge*, 2 Do
Gerard's case, 2 W. Bl. 112
V. c. 109, s. 6.

(*c*) *Gerard's case*, 2 W. B
Ex p. Jefferies, 6 Bing. 195.

committing the unqualified party to the prison of the Court, for a term not exceeding one year (*x*).

Fees not recoverable.

Where a solicitor has allowed an unqualified person to act in his name, no action is maintainable by him or by the unqualified person against the client for the amount of the business done (*y*). (*Ante*, p. 88.)

Unqualified persons prohibited from acting in County Court.

By 6 & 7 *V. c.* 73, *s.* 36, "In case any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceedings in the Court commonly called the County Court (*z*), holden in any county in that part of Great Britain called England and Wales, who is not or shall not then be legally admitted an attorney or solicitor according to this Act, or shall not himself be plaintiff or defendant in such proceeding respectively, such person shall and is hereby made incapable to maintain or prosecute any action or suit in any Court of law or equity, for any fee, reward, or disbursement on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto: and such offence shall be deemed a contempt of the Court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly."

Associate, judges' clerks, &c. not to act as solicitors.

By 15 & 16 *V. c.* 73, *s.* 11, an associate in either of the superior Courts of law, or a clerk of one of the judges of such Courts, or a clerk in any of the offices of the same Courts, cannot act as an attorney or solicitor, or as agent for any attorney or solicitor in any Court of law or equity: but any attorney or solicitor, or agent of an attorney or solicitor, at the time of the passing of the Act, holding any office or appointment mentioned in the Act, may continue to practise as such attorney, solicitor or agent.

4. *Privileges and Disabilities of Solicitors.*

Privileges of exemption from serving offices.

Privileges of.] Solicitors who are practising are exempted from serving all offices where personal service is required, even although imposed by Act of Parliament and in the most comprehensive terms (*a*), such as the office of constable (*b*), overseer of the poor (*c*), or tything man, offices under the commissioners of sewers, collectors of subsidies, watch and ward, &c. (*c*), and corporation offices, such as sheriffs, &c., even although the solicitor be resident in the corporation town (*d*). Nor can they be compelled to serve on juries (*e*). But they are not privileged from being balloted for the militia, for they can pay for substitutes (*f*).

(*x*) See Id.: *Re Clark and others*, 3 D. & R. 260: *Re Pope*, C. P., June 7, 1872.

(*y*) *Hopkinson* v. *Smith*, 7 Moore, 235, per *Richardson*, J., 1 Bing. 16.

(*z*) *I.e.* the old County Court. As to signing the roll of a modern County Court, see ante, p. 74.

(*a*) *Gerard's case*, 2 W. Bl. 1126.

(*b*) *R.* v. *Routledge*, 2 Doug. 538: *Gerard's case*, 2 W. Bl. 1126; 5 & 6 V. c. 109, s. 6.

(*c*) *Gerard's case*, 2 W. Bl. 1126: *Ex p. Jefferies*, 6 Bing. 195.

(*d*) *Mayor of Norwich* v. *Berry*, 1 W. Bl. 636; 4 Burr. 2109.

(*e*) 6 G. 4, c. 50, s. 2. By 33 & 34 V. c. 77, s. 9, the following persons (amongst others) are exempt from serving on juries:—"Attorneys, solicitors, and proctors, if actually practising and having taken out their annual certificates, and their managing clerks, and notaries public in actual practice."

(*f*) *Gerard's case*, 2 W. Bl. 1126. See *Evindon's case*, 2 Str. 1145, contra.

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Privilege from arrest.

A solicitor is privileged from arrest or civil process on his way to and from Court (*h*). But this privilege does not protect him from arrest under an attachment issued for contempt of Court (*h*).

Privileges as plaintiffs.

Before the Judicature Acts a solicitor had the privilege in all personal actions of suing in his own Court, and (excepting in actions respecting real property) (*i*) of laying and retaining the venue in Middlesex (*k*). But, in order to enforce this privilege he must have sued in person and in his own right, and not by another solicitor (*l*), nor as executor or assignee (*m*), nor with his wife (*n*), nor jointly with an unprivileged person (*n*). This privilege of laying and retaining the venue in Middlesex (which was designated as an odious one) did not extend to laying the venue in London (*o*); and it was waived by laying the venue in any other county than Middlesex, though done by mistake (*p*). But inasmuch as all solicitors are now solicitors of the Supreme Court, and a solicitor is not exempted from the provisions of the County Courts Act (12 & 13 *V. c.* 101, *s.* 18) (*q*), the privilege of suing is of no practical value or importance.

Under County Courts Acts.

As defendants.

As a defendant, a solicitor has no privilege as to the venue (*r*). He is not privileged as a solicitor from arrest before or after judgment (*s*). As to his privilege from arrest on process while attending a Court or tribunal in his professional capacity, *see Ch. CXXVII.*

As to costs where party to suit.

Where a solicitor is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as solicitor for some other person, and not merely to the costs which another person suing or defending in person would be entitled to (*t*), but this does not entitle him to costs which the union of the characters of solicitor and client renders impossible or unnecessary, such as attendance on or instruction to or from himself (*t*), or costs attributable to either character, such as attendance at the trial (*t*).

(*h*) *In re Freston* (C. A.), 11 Q. B. D. 545; 49 L. T. 290.

(*i*) *Att.-Gen.* v. *Lord Churchill*, 9 Dowl. 789, per *Alderson*, B.; and *S. C.*, 8 M. & W. 171.

(*k*) *Pye* v. *Leigh*, 2 W. Bl. 1065: *Mounsey* v. *Watson*, 7 B. & Cr. 683: *Cutts* v. *Surridge*, 16 L. J., Q. B. 2, even where the witnesses on both sides resided in the county to which the venue was sought to be changed. *Pitcher* v. *Sheriff of Monmouth*, 2 Marshall, 152, and the cause of action arose there: *Grace* v. *Wilmer*, 6 El. & Bl. 982; 26 L. J., Q. B. 1.

(*l*) *Harrington* v. *Page*, 2 Dowl. 164: *Lowless* v. *Timms*, 3 Id. 707. This privilege was not taken away by 2 W. 4, c. 39, ss. 1, 2: *Meggison* v. *Cole*, MS. K. B. 11th June, 1833: *Partington* v. *Woodcock*, 2 Dowl. 550: *Burn* v. *Pasmore*, 1 Dowl. 17. He need not have been described as a solicitor in the proceedings: *Cutts* v. *Surridge*, 4 D. & L. 373; 16 L. J., Q. B. 2: *Williams* v. *Powell*, 10 Jur. 966, B. C. And see *Wright* v. *Skinner*, 1 M. & W. 144; 4 Dowl. 745.

(*m*) *Newton* v. *Rowland*, 1 Lord Raym. 533.

(*n*) *Robarts* v. *Mason*, 1 Taunt. 254: *Newton* v. *Harland*, 4 Bing. N. C. 406.

(*o*) *Bradshaw* v. *Burton*, 7 Dowl. 329.

(*p*) *Lewis* v. *Shelley*, 7 Taunt. 146. And see *Mounsey* v. *Watson*, 7 B. & C. 683: *Bradshaw* v. *Burton*, supra.

(*q*) See *Lewis* v. *Hance*, 11 Q. B. 921; 5 D. & L. 641: *Jones* v. *Brown*, 2 Exch. 329: *Bishop* v. *Marsh*, 8 Sc. 128: *Gardner* v. *Jessop*, 2 Wils. 43: *Wiltshire* v. *Lloyd*, 1 Doug. 381: see the London Small Debts Act, 15 & 16 V. c. lxxvii. *s.* 49; and see *Jefferies* v. *Beart*, 2 B. C. 296; 5 D. & L. 646, and *Borradaile* v. *Nelson*, 14 C. B. 655; 23 L. J., C. P. 159.

(*r*) *Yeardley* v. *Roe*, 3 T. R. 573.

(*s*) *Flight* v. *Cook*, 1 D. & L. 714: *Thomson* v. *Moore*, 1 Dowl., N. S. 283: Ch. CXXVII.

(*t*) *London Permanent Building*

Must be in practice to be entitled to privileges.

A solicitor who has left off practice (*u*), or is in prison for debt (*x*), is not entitled to the privileges he would otherwise enjoy; for the privileges of a solicitor continue only while he is a *practising* solicitor, and capable of attending the Court (*y*). But the omitting to take out his certificate does not deprive him of them (*z*).

Solicitor acting as counsel.

A solicitor acting as an advocate is entitled to privilege of speech in the same way as a counsel (*a*). See as to the extent of this privilege, *post, Ch. LXV.*

By stat. 40 & 41 *V. c.* 25, solicitors are entitled to practise in Ecclesiastical Courts.

Privileged communications, &c.

What are.

Privileged Communications, &c.]—A solicitor is not bound, nor indeed will he be permitted, without the consent of his client, to disclose in evidence any communication made by his client (*b*) to him in his professional capacity (*c*) necessary for the purpose of the matter or proceeding on which the solicitor is employed (*d*); and this, although no action was commenced or contemplated at the time of the communication (*e*); and if he be guilty of a breach of duty in this respect, the client may bring an action against him (*f*). The communication if once privileged always continues so (*g*). Nor can a solicitor be compelled to expose or produce at a trial any deeds or papers entrusted to him in the course of his professional duty (*h*); nor is he compellable to disclose the contents of them (*i*). See further, *post, Ch. XLVIII.* "*Discovery.*"

Society v. *Chorley* (C. A.), 51 L. T. 100; 32 W. R. 781: affirming *S. C.*, 12 Q. B. D. 452; 53 L. J., Q. B. 272; *Jervis* v. *Dewes*, 4 Dowl. 764. See *Parsloe* v. *Foy*, 2 Dowl. 181: *Leaver* v. *Whalley*, 2 Dowl. 80: *Latham* v. *Hide*, 1 Dowl. 594: 1 C. & M. 128.

(*u*) *Goldsmith* v. *Baynard*, 2 Wils. 228: *Anon.* 1 Dowl. 208.

(*x*) *Bytes* v. *Wilton*, 4 B. & Ald. 88.

(*y*) *Brooke* v. *Bryant*, 7 T. R. 25. See also *Dyson* v. *Birch*, 1 B. & P. 4.

(*z*) *Skirrow* v. *Tagg*, 5 M. & Sel. 281: *Prior* v. *Moore*, 2 M. & Sel. 605: *Nixon* v. *Hewitt*, 10 Moore, 270.

(*a*) *Mackay* v. *Ford*, 5 H. & N. 792; 29 L. J., Ex. 404: *Munster* v. *Lamb* (C. A.), 11 Q. B. D. 588; 52 L. J., Q. B. 726.

(*b*) See *Baugh* v. *Cradocke*, 1 M. & Rob. 182: *Cleve* v. *Powel*, Id. 228: *Griffith* v. *Davies*, 5 B. & Ad. 502: *Greenough* v. *Gaskell*, 1 My. & K. 98: *Wheatley* v. *Williams*, 1 M. & W. 533: *Doe* v. *Watkins*, 3 Bing. N. C. 421: *Taylor* v. *Blacklow*, Id. 235: *Turquand* v. *Knight*, 2 M. & W. 98: *Brandford* v. *Brandford*, 4 P. D. 72; 48 L. J., P. D. 40.

(*c*) See *Wilson* v. *Rastall*, 4 T. R. 753: *Cromack* v. *Heathcote*, 2 B. & B. 4: *Doe* v. *Harris*, 5 Car. & P. 592.

(*d*) *Gillard* v. *Bates*, 8 Dowl. 774; 6 M. & W. 547. See *Cobden* v. *Kendrick*, 4 T. R. 431; 3 Russ. on Crimes, 5th ed. 539.

(*e*) *Clark* v. *Clark*, 1 M. & Rob. 3. See *Moore* v. *Terrell*, 4 B. & Ad. 870: *Taylor* v. *Blacklow*, 3 Bing. N. C. 235: *Doe* v. *Harris*, 5 Car. & P. 592: *Williams* v. *Mudie*, 1 Car. & P. 158: *Wadsworth* v. *Hamshaw*, 2 B. & B. 5, n.: *Turton* v. *Barber*, 22 W. R. 438.

(*f*) *Taylor* v. *Blacklow*, 3 Bing. N. C. 235.

(*g*) *Bullock* v. *Corrie*, 3 Q. B. D. 356; 47 L. J., Q. B. 352.

(*h*) *Ditcher* v. *Kenrick*, 1 Car. & P. 161: *Greenough* v. *Gaskell*, 1 My. & K. 98: *Newton* v. *Chaplin*, 19 L. J., C. P. 374; 10 C. B. 356.

(*i*) *Davies* v. *Waters*, 9 M. & W. 608; 1 Dowl., N. S. 651: *Hibberd* v. *Knight*, 2 Ex. 11; 17 L. J., Ex. 119. See *Marston* v. *Downes*, 6 Car. & P. 381: *R.* v. *Tylney*, 18 L. J., M. C. 36: *Volant* v. *Soyer*, 22 L. J., C. P. 83. As to giving secondary evidence when the solicitor refuses to produce them, see *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102: *Hope* v. *Liddell*, 24 L. J., Ch. 691, noticed post: *Phelps* v. *Prew*, 23 L. J., Q. B. 140; from which latter case, it seems, that, if the privilege of the client has been

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What are not.

But he may be asked, whether an instrument which came into his hands as solicitor for his client is in his possession, for the purpose of letting in secondary evidence of its contents (*k*). So, of facts which come to a solicitor's knowledge before his retainer, or otherwise than by reason of his being a solicitor, he is bound to give evidence (*l*). Thus, if a solicitor attests the execution of a deed by his client, he may be compelled to prove it (*m*). And he may be asked who employed him, in order to let in declarations by the party in evidence (*n*). But a solicitor cannot be examined as to communications with the client, for the purpose of proving his identity (*o*). A solicitor may be called by the opposite party to prove the contents of a notice to produce, served on him as solicitor in the action (*p*). So a solicitor who has obtained a knowledge of his client's handwriting, from seeing him execute a bail-bond, cannot on that account object to prove his signature to another instrument (*q*). So a solicitor is not privileged from disclosing his client's residence, unless it became known to him in professional confidence, for the purpose of obtaining professional advice (*r*). Information obtained by a solicitor from a third party whilst acting professionally for a client is not privileged (*s*). A communication between a solicitor and his client is not privileged, if made in the presence and within the hearing of the opposite solicitor (*t*).

Where employed on both sides.

If a party employ a solicitor who is also employed on the other side, the privilege is confined to such communications as are clearly made to him as the party's own exclusive solicitor (*u*), but these communications are privileged (*x*). Accordingly, where, upon the sale of an estate, the same solicitor was employed by the vendor and by the purchaser, a communication from the purchaser to the solicitor, asking for time to pay the purchase-money, was held not to be privileged (*y*). And where a solicitor acting as such for opposite parties, has an offer made to him by the one for the purpose of being communicated to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party (*z*). And where two persons having a dispute about a claim made by one of them upon the other, went together to a solicitor, when one of them made a statement and instructed the solicitor to write a

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violated, the party to the action against whom the evidence was admitted cannot make it a ground of application for a new trial.

(*k*) *Coates* v. *Mudge* or *Birch*, 1 Dowl., N. S. 540; 1 G. & D. 647: *Bevan* v. *Waters*, M. & Mal. 235: *Dwyer* v. *Collins*, 7 Ex. 639; 21 L. J., Ex. 225.

(*l*) B. N. P. 284.

(*m*) *Robson* v. *Kemp*, 5 Esp. 52: *Sandford* v. *Remington*, 2 Ves. jun. 189: *Doe* v. *Roe*, 6 Dowl. 518: *Doe* d. *Salt* v. *Carr*, 1 Car. & M. 123: *Tristram* v. *Roberts*, 10 Jur. 125.

(*n*) *Levy* v. *Pope*, M. & Mal. 410. See *Studdy* v. *Sanders*, 2 D. & R. 347.

(*o*) *Parkins* v. *Hawkshaw*, 2 Stark. 239.

(*p*) *Spenceley* v. *Schulenburgh*, 7 East, 357.

(*q*) *Hurd* v. *Moring*, 1 Car. & P. 372.

(*r*) *Ex p. Campbell*, L. R., 5 C. P. 703. See *Heath* v. *Crealock*, L. R., 15 Eq. 257; 42 L. J., Ch. 455.

(*s*) *Ford* v. *Tennant*, 32 L. J., Ch. 465.

(*t*) *Sorden* v. *Cowton*, 3 Jur. 1027, Q. B.: *Weeks* v. *Argent*, 16 L. J., Ex. 209; 16 M. & W. 817.

(*u*) *Perry* v. *Smith*, 9 M. & W. 681; 1 Car. & M. 554.

(*x*) *In re Ubsdell*, 27 L. T. 460; 21 W. R. 70.

(*y*) *Perry* v. *Smith*, supra: *Doe* d. *Salt* v. *Carr*, 1 Car. & M. 123.

(*z*) *Baugh* v. *Cradocke*, 1 M. & Rob. 182: *Cleve* v. *Powel*, Id. 228: *Perry* v. *Smith*, 9 M. & W. 681.

letter to a third party on the subject of the claim, it was held that both the statement and the letter were admissible in evidence (*a*). If, on the other hand, a solicitor be employed for two parties, as for mortgagor and mortgagee, and peruse, on behalf of the former, his abstracts of title, he cannot as against him disclose their contents (*b*). And where a professional man was engaged by vendor and purchaser to prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties, it was held that he could not produce it at the trial against the interest of the purchaser's devisees, though with the consent of the vendor (*c*).

This privilege is confined to communications made to solicitors and their agents and clerks (*d*). To whom privilege confined.

The privilege is the privilege of the client and not of the solicitor (*e*). It may be waived by the client (*f*); and if the solicitor be examined by him, he may be cross-examined as to the same point, though a matter of professional confidence, but not as to any other (*f*) corporation by answering interrogatories by their solicitor the privilege (*g*). There is no presumption of fact to be against a party who enforces the rule against the disclosure by his solicitor, of knowledge professionally acquired (*h*). It may be waived by client.

Disabilities of.]—By 6 & 7 *V. c.* 73, *s.* 33, "No attorney or solicitor shall be capable to continue or be a justice of the peace for any county within that part of Great Britain called England, or the principality of Wales, during such time as he shall continue in the business and practice of an attorney or solicitor" (*i*). When solicitors cannot be justices of peace.

But sect. 34 provides, "That the prohibition last hereinbefore contained shall not extend, or be construed to extend, to any city or town being a county of itself, or to any city, town, cinque port or liberty having justices of the peace within their respective limits and precincts by charter, commission or otherwise; but that in every such city, town, liberty and place attorneys or solicitors may be capable of being justices of the peace, and in such manner only as they might have been if this Act had never been made, anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

And by 34 *V. c.* 18, it is enacted, sect. 1, that (*j*) "no person shall be capable of becoming or being a justice of the peace for any county in England or Wales (not being a county of a city or county of a town), in which he shall practise and carry on the profession

(*a*) *Shore* v. *Bedford*, 5 M. & Gr. 271: 12 L. J., C. P. 138. See *Griffith* v. *Davies*, 5 B. & Ad. 502: *Weeks* v. *Argent*, supra.

(*b*) *Doe* v. *Watkins*, 3 Bing. N. C. 421; 4 Sc. 155; but see *R.* v. *Avery*, 8 Car. & P. 596.

(*c*) *Doe* v. *Seaton*, 2 A. & E. 171; 4 N. & M. 81.

(*d*) *Taylor* v. *Forster*, 2 Car. & P. 195: *Fountain* v. *Young*, 6 Esp. 113.

(*e*) *Herring* v. *Clobery*, 6 Jur. 202: *Parkhurst* v. *Lowten*, 2 Swanst. 216: *Greave* v. *Jones*, 7 Ex. 421; 24 L. J., Ex. 105: *Gresley* v. *Mousley*, 2 Kay & J. 288.

(*f*) 2 Stark. Ev. 3rd ed. 323.

(*g*) *Swansea* (*Mayor, &c.*) v. *Quirk*, 5 C. P. D. 106; 49 L. J., C. P. 157.

(*h*) *Wentworth* v. *Lloyd*, 10 H. of L. Ca. 589; 33 L. J., Ch. 688, per *Lord Chelmsford*.

(*i*) See 5 G. 2, c. 18, s. 2.

(*j*) The commencement of this section by which the 6 & 7 V. c. 73, s. 33, and 5 G. 2, c. 18, s. 2 were repealed, is repealed by 46 & 47 V. c. 39; but this does not revive the repealed sections (sect. 5).

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or business of an attorney, solicitor or proctor; and where any person practises and carries on such profession or business in any city or town being a county of itself, he shall for the purpose of this Act be deemed to carry on the same in the county within which such city or town or any part thereof is situate."

By sect. 2, "For the purpose of this Act a person shall be deemed to practise and carry on his profession or business in the county, city or town in which he maintains an office or place of business; and the word 'county' shall mean and include a riding or division of a county having a separate commission of the peace."

Other disabilities.

A solicitor, whilst practising, cannot be a Master, or (in general) clerk or messenger to a Master of the Supreme Court (*k*). Nor can he be bail (*l*), except in criminal cases (*m*).

May practise while under-sheriff, &c.

The 1 *H.* 5, c. 4, and 22 *G.* 2, c. 46, which provided that no solicitor, whilst under-sheriff or holding various minor offices, should practise in the Queen's Courts or at Quarter Sessions are repealed. (6 & 7 *V.* c. 73, *Sched.* 1, *Pt.* 1.)

Purchase of subject-matter of a suit.

A purchase of the subject-matter of a suit by the solicitor of a party thereto from his client is void as against the policy of the law (*n*).

Solicitors not to commence or defend suits if prisoners.

Disabilities of Solicitor Prisoner.]—By 6 & 7 *V.* c. 73, *s.* 31, "No attorney or solicitor, who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall or may, during his confinement in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, as an attorney or solicitor, in his own name or in the name of any other attorney or solicitor, sue out any writ or process, or commence or prosecute, or defend any action or suit, in any Courts of law or equity, or matter in bankruptcy; and such attorney or solicitor so commencing, prosecuting, or defending any action or suit as aforesaid, and any attorney or solicitor permitting or empowering any such attorney or solicitor as aforesaid to commence, prosecute, or defend any action or suit in his name, shall be deemed to be guilty of a contempt of the Court in which any such action or suit shall have been commenced or prosecuted, and punishable by the said Courts accordingly, upon the application of any person complaining thereof; and such attorney or solicitor so commencing, prosecuting, or defending any action or suit as aforesaid shall be incapable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him, whilst such prisoner as aforesaid, in his own name, or in the name of any other attorney or solicitor."

The above is a re-enactment of 12 *G.* 2, c. 13, *s.* 9, with the addition that it prohibits a solicitor prisoner from defending an action (*o*). The solicitor may, of course, commence an action at his

(*k*) 7 W. 4 & 1 V. c. 30, s. 15. This section contains a proviso in favour of attorneys practising at the time of the passing of the Act and employed in any office abolished by the Act, and who might be appointed to act as clerk or messenger under the Act. Such persons are exceptions to the above rule.

(*l*) See *Bologne* v. *Vautrin*, 2 Cowp. 828.

(*m*) 2 Doug. 467, n.

(*n*) *Simpson* v. *Lamb*, 7 El. & Bl. 84; 26 L. J., Q. B. 121. See *Earle* v. *Hopwood*, 30 L. J., C. P. 217; 33 & 34 V. c. 28, s. 11, post, p. 128.

(*o*) See *Noel* v. *Hart*, 8 Car. & P. 230.

own suit; for the statute is confined to actions commenced, prosecuted, or defended by him for his clients (*p*). Practising in a County Court, by entering a plaint or otherwise, it seems, is within it (*q*). See *Re Williams* (30 L. J., Ch. 609), where the Court of Chancery ordered a solicitor in a suit in custody for debt to deliver the papers of his client to a new solicitor, upon his undertaking to hold them subject to any lien there might be upon them for costs.

5. *Their Employment and Duties.*

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Right to sue or defend by solicitor.

Right to sue or defend by.]—Parties in an action may appear by solicitor (*r*), excepting in the cases of infants and idiots. Corporations cannot sue or defend otherwise than by solicitor (*s*). A party cannot appear by two solicitors; if he does, the appearance will be irregular, but not a nullity (*t*).

Suing in person.

The statutes giving the above-mentioned liberty to appear by solicitor do not take away the right of suing or defending in person (*u*). If a person sue or defend in person he is bound to know the practice of the Court, and cannot claim any indulgence on account of his ignorance of it (*x*). He will not be entitled to any remuneration for his labour in undertaking the cause unless he be a solicitor (*y*).

Solicitor how appointed.

Solicitor how appointed, and when.]—In general, it is advisable that the solicitor should have some authority in writing to prosecute or defend the action in question (*z*). A verbal authority, however, is sufficient (*a*): in fact in practice, any other than a verbal autho-

(*p*) *Kaye* v. *Denew*, 7 T. R. 671. See *Prior* v. *Moore*, 2 M. & Sel. 605.

(*q*) *Re Flint*, 2 D. & R. 406; 1 B. & C. 254.

(*r*) Stat. Westm. 2 (13 Ed. 1), c. 10; 7 R. 2, c. 14; 15 H. 6, c. 7; 29 El. c. 5; 2 Inst. 377; Fitz. N. B. 25; Gilb. C. B. ch. 3, p. 27. See *Thompson* v. *Blackhurst*, 1 N. & M. 271. As to infants, see Vol. 2, Ch. XCIX. As to idiots and lunatics, see Vol. 2, Ch. C.

(*s*) Co. Litt. 66 b; Vol. 2, Ch. XCII.

(*t*) *Williams* v. *Williams*, 10 M. & W. 178, per *Abinger*, C. B., and *Alderson*, B.; 11 L. J., Ex. 38.

(*u*) *La Grue* v. *Penny*, 2 H. Bl. 600: *Uppendale* v. *Lightfoot*, Say. 217. See *Ward* v. *Nethercote*, 7 Taunt. 145.

(*x*) *Gillingham* v. *Waskett*, M'Clel. 568.

(*y*) See ante, p. 94.

(*z*) See *Owen* v. *Ord*, 3 Car. & P. 349: *Bird* v. *Harris*, W. N. 1881, 5, C. A., reversing *S. C.*, 43 L. T. 434, V.-C. B. See the forms of retainer, Chit. Forms, p. 29.

(*a*) *In re Hincks*, W. N. 1868, 291: *Bird* v. *Harris*, C. A., W. N. 1881, 5, reversing *S. C.*, 43 L. T. 434; 29 W. R. 65; 1 Lil. Pr. Reg. 134—137: *Wiggins* v. *Peppin*, 2 Beav. 403.

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rity is scarcely ever given by the client to the solicitor, or indeed required by the latter, except in cases where the solicitor is apprehensive of his client's disclaiming the authority, and may, on that account, require a warrant or other authority in writing to serve as evidence of the retainer. When the employment has been revoked in writing a written withdrawal of this revocation should be obtained by the solicitor if he is again employed (*b*). The retainer by a corporation should, in general, be under their common seal (*c*), unless there is something in their Act of Parliament or charter of incorporation which enables them to appoint a solicitor in some other way (*d*). In the case of a company under the Companies Act, 1862, a retainer under seal is not necessary (*e*). If the solicitor accept the retainer from a party who is no party to the business in which the solicitor is to act, and who has no legal interest therein, it is still more prudent for the solicitor to take a written retainer, to prevent any question as to the person who really gave it, and more especially as it is in general presumed, in the absence of circumstances leading to a different conclusion, that the party who was the party in the business, or who was to be really benefited by the solicitor's services, was the person to whom the credit was given. And in case the credit is given to one party, and another comes forward to guarantee the solicitor's bill, then it is absolutely requisite, by the Statute of Frauds (29 *C.* 2, *c.* 3, *s.* 4), that the guarantee should be in writing, and signed by the party who gives it, or his agent (*f*).

By whom.

The retainer should, of course, come from the party to the action, or from a party duly authorized to give it on his behalf. An authority from the assignee of a debt to sue in the name of the assignor is sufficient, for the former has an implied power to give it (*g*). And so in many other cases would an authority from a *cestui que trust;* and which will be found noticed hereafter while treating of the consequences of a solicitor suing without authority. An authority from the principal does not authorize a solicitor to appear for his bail (*h*); nor does the landlord's authority authorize the solicitor to appear for and defend an ejectment in the name of the tenant (*i*). One partner cannot authorize a solicitor to enter

(*b*) *In re Hincks*, supra.

(*c*) *Arnold* v. *Mayor of Poole*, 4 M. & G. 860; 5 Sc. N. R. 471; 2 Dowl., N. S. 574; 12 L. J., C. P. 97: *Austin* v. *Guardians of Bethnal Green*, L. R., 9 C. P. 91: *Faviell* v. *Eastern Cos. R. Co.*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 297, where it was held, that as against plaintiff, the company were bound by an agreement to refer, though the solicitor had not been retained under the corporate seal. See per *Brett*, L. J., *Newington Local Board* v. *Eldridge*, 12 Ch. D. at p. 360.

(*d*) See *R.* v. *Cumberland* (*Js.*), 5 D. & L. 431, n.; 17 L. J., Q. B. 102.

(*e*) Stat. 30 & 31 V. c. 131, s. 37: *South of Ireland Collieries Co.* v. *Waddell*, L. R., 4 C. P. 617. A clause in the articles of association of a company, providing that they should employ a particular solicitor, does not constitute a contract between the company and the solicitor named to employ him, or operate as a perpetual retainer. *Eley* v. *Positive Government Security, &c. Ass. Co.*, 1 Ex. D. 88, 45 L. J., Ex. 451, C. A., affirming Ex. D.; 1 Ex. D. 40; 48 L. J., Ex. 58.

(*f*) *Barber* v. *Fox*, 1 Stark. 270: *Hellings* v. *Gregory*, 1 Car. & P. 627. See *Tomlinson* v. *Gell*, 1 N. & P. 588. As to its not being necessary for the consideration to appear in writing, see 19 & 20 V. c. 97, s. 3.

(*g*) *Pickford* v. *Ewington*, 4 Dowl. 453. See Jud. Act, 1873, s. 25, post, Ch. CXXI. as to assignment of debts.

(*h*) *Chivers* v. *Fenn*, 2 Show. 161.

(*i*) *Roe* v. *Doe*, Barnes, 39.

an appearance for the other (*k*). The fact of a party knowing that his name has, without authority, been introduced as plaintiff by the solicitor of some of the other plaintiffs in an action, and not taking any active steps to have his name expunged as plaintiff from the record, is not necessarily, as between that party and the solicitor, equivalent to a retainer, or an adoption of the latter as his solicitor (*l*). In some cases a wife may give a retainer so as to bind her husband, though he may expressly dissent from it, where professional assistance can be deemed a necessary for the wife; as, if a husband uses such violence towards his wife, that she is obliged to exhibit articles of the peace against him or obtain a divorce or judicial separation, she may employ a solicitor for that purpose at his expense, and this though he allow her a separate maintenance (*m*). The necessity for the proceedings must be shown as a fact in each case, otherwise the husband cannot be made liable (*n*). A solicitor is liable to defendant for costs, if there is no such person as the plaintiff (*o*).

Where actions brought against several defendants defending by the same solicitor are consolidated by order of Court and by consent to abide the event of one of them, which is proceeded with, the consolidation order and subsequent proceedings operate as a joint retainer by the defendants of the solicitor, in the action so proceeded with, and they are jointly liable for the subsequent costs of such action (*p*).

By the Court.

In a case where a plaintiff, not being able to find a solicitor willing to undertake his cause, applied to the Court to appoint one for him, the Court is said to have appointed a solicitor nominated by him to prosecute his suit (*q*). Yet, in another case, where a motion was made to compel a solicitor to appear for a party, the Court held that he was not compellable to appear for any one, unless he took his fee or backed his warrant (*r*).

Using solicitor's name without authority.

Using Solicitor's Name without Authority.]—A proceeding or a step taken in the name of a solicitor, but without his authority, cannot, in general, be treated as a nullity (*s*). Where a judgment was entered up by a solicitor's clerk, who used the name of the solicitor without his knowledge or consent, the judgment was set aside (*t*). In order to punish a person improperly using a solicitor's name, a special application to the Court must be made against him (*u*). We shall presently notice the rule by which a solicitor is

(*k*) *Humbidge* or *Hanbidge* v. *De la Croûée*, 3 C. B. 742; 4 D. & L. 466.

(*l*) *Hall* v. *Laver*, 1 Hare, 571.

(*m*) *Turner* v. *Rookes* or *Rooks*, 10 A. & E. 47; 2 P. & D. 294: *Brown* v. *Ackroyd*, 5 E. & B. 819; 25 L. J., Q. B. 193: *Re Hooper: Baylis* v. *Watkins*, 33 L. J., Ch. 300: *Ottaway* v. *Hamilton*, 3 C. P. D. 393; 47 L. J., Q. B. &c. 424, 725: *Rice* v. *Shepherd*, 12 C. B., N. S. 332: *Wilson* v. *Few*, L. R., 3 Ex. 63 (restitution of conjugal rights): *Re Hooper: Baylis* v. *Watkins*, 33 L. J., Ch. 300: *Stocker* v. *Patrick*, 29 L. T. 507.

(*n*) *Taylor* v. *Hailstone*, 52 L. J., Q. B. 101.

(*o*) *Hoskins* v. *Phillips*, 16 L. J., Q. B. 339.

(*p*) *Anderson* v. *Boynton*, 13 Q. B. 308; 19 L. J., Q. B. 42.

(*q*) *Anon.* 12 Mod. 583.

(*r*) *Anon.* 1 Salk. 87.

(*s*) *Hill* v. *Mills*, 2 Dowl. 696.

(*t*) *Hopwood* v. *Adams*, 5 Burr. 2660. See *Hawkins* v. *Edwards*, 4 Moore, 603.

(*u*) *Reg.* v. *Burgess*, 8 A. & E. 275: *Norton* v. *Curtis*, 3 Dowl. 245: *Oppenheim* v. *Harrison*, 1 Burr. 20. See *Hawkins* v. *Edwards*, supra.

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to declare upon demand, whether a writ of summons is issued by his authority or not, and the proceedings to be taken if it is not. (*Post*, p. 115.)

Extent of his authority.

Extent of Authority, and when it ceases.]—The general solicitor of a person has, it seems, an implied authority to accept service of process and appear for him, but he cannot commence an action for him without a special retainer (*x*), or a subsequent adoption or recognition of the act by his client (*y*). If a solicitor is only authorized to do some particular act, or conduct some particular proceeding, his authority, of course, is limited to such particular act or proceeding. Thus, if only employed to bring an action, he cannot accept service of process in a cross action (*z*). If employed to put in bail for a prisoner (*a*), or take out a summons for his discharge (*b*), he is not thereby authorized to defend the action (*c*). But if he is authorized to do a particular act, he may do everything that is necessary for the accomplishment of it (*d*). Where a party is sued for a debt, payment (*e*) or tender (*f*) of it to the plaintiff's solicitor is the same as payment or tender to the plaintiff himself, and the solicitor's receipt binds the client. So, if costs are ordered to be paid to a party to an action, his solicitor is competent to demand and receive them without an express power of attorney (*g*). A solicitor who has issued a *fieri facias* on behalf of his client has no implied authority to direct the sheriff to seize particular goods (*h*).

(*x*) See *Wright* v. *Castle*, 3 Mer. 12: *Tabram* v. *Horn*, 1 M. & R. 228: *Simms* v. *Henderson*, 17 L. J., Q. B. 209. However, it is advisable for a solicitor, whenever practicable, to get an authority to defend.

(*y*) *Anderson* v. *Watson*, 3 Car. & P. 214.

(*z*) *Anon.* v. *Davis*, 3 L. J., Ex. 212: *Crook* v. *Wright*, R. & M. 278.

(*a*) *Dent* v. *Halifax*, 1 Taunt. 493.

(*b*) Id.

(*c*) *Spencer* v. *Newton*, 6 A. & E. 630.

(*d*) See *R.* v. *Lichfield Town Council*, 16 L. J., Q. B. 333: *Richardson* v. *Daly* or *Daley*, 4 M. & W. 384: *Drake* v. *Lewin*, 4 Tyr. 730; 10 A. & E. 534. See *In re Snell*, 5 Ch. D. 815.

(*e*) *Yates* v. *Freckleton*, 2 Doug. 622: *Powel* v. *Little*, 1 W. Bl. 8: *Mason* v. *Whitehouse*, 4 Bing. N. C. 792; 6 Sc. 246. Payment may be made to the solicitor after judgment: *Bevins* v. *Hulme*, 15 M. & W. 96, *per Cur.*; 15 L. J., Ex. 226. If the action be brought without authority, the defendant will not be discharged by payment to the solicitor: *Robson* v. *Eaton*, 1 T. R. 62: *Hubbart* v. *Phillips* or *Philipps*, 2 D. & L. 703; 13 M. & W. 702; 14 L. J., Ex. 108. Payment to an agent employed to sue defendant by plaintiff's solicitor is not payment to plaintiff: *Yates* v. *Freckleton*, 2 Doug. 623. As to payment to the solicitor's agent, see post, s. 3 of this chap.

(*f*) See *Crozier* or *Crozer* v. *Pilling*, 4 B. & C. 26; 6 D. & R. 129: *Wilmot* v. *Smith*, 3 Car. & P. 453. A tender to his clerk has been held not sufficient (*Bingham* v. *Allport*, 1 N. & M. 398: *Hall* v. *Ashurst*, 1 Cr. & M. 714: *Iveson* v. *Conington*, 1 B. & C. 160; see *Finch* v. *Boning*, 4 C. P. D. 143; 40 L. T. 484, where the point was discussed and the judges differed), unless the solicitor, by his letter, require it to be paid not merely to him, but at his office or the like: *Kirton* v. *Braithwaite*, 1 M. & W. 310. See *Moffat* v. *Parsons*, 5 Taunt. 307: *Hemming* v. *Hale*, 7 C. B. 487; 29 L. J., C. P. 137; or there are circumstances from which the authority may be inferred: *Finch* v. *Boning*, supra. When the debt is tendered before action, the plaintiff is not entitled to recover from defendant the costs of the solicitor's letter: *Caine* v. *Coulson*, 32 L. J., Ex. 97.

(*g*) *Mason* v. *Whitehouse*, 4 Bing. N. C. 692; 6 Sc. 575.

(*h*) *Smith* v. *Keal* (C. A.), 9 Q. B. D. 340; 51 L. J., Q. B. 487; 47 L. T. 142.

He may refer a cause to arbitration (*i*). He cannot, however, settle it in an unusual manner (*k*). A solicitor has authority from his client to compromise an action under the ordinary retainer to bring or defend such action, unless he be expressly forbidden by the client to do so, and this be known to the other side (*l*).

When his authority ceases.

The warrant for his acting continues in force until the end of the action. His authority is in general determined on final judgment being signed (*m*); but, according to Sir Edward Coke (*n*), he may sue out execution under it at any time within a year after the judgment, and may prosecute such execution afterwards (*o*). So he

(*i*) *Smith* v. *Troup*, 7 C. B. 757: *Faviell* v. *Eastern Counties R. Co.*, 2 Exch. 344; 6 D. & L. 54: *Filmer* v. *Delber*, 3 Taunt. 486.

(*k*) See *per Curiam*, *Iveson* v. *Conington*, 1 B. & C. 160; 2 D. & R. 307, where the solicitors *personally* undertook: and see *Lewis* v. *Earl of Tankerville*, 11 M. & W. 109; 12 L. J., Ex. 234. As to compromising a suit, see infra.

(*l*) *Chown* v. *Parrott*, 14 C. B., N. S. 74; 32 L. J., C. P. 197: *Fray* v. *Fowles*, 1 El. & El. 839; 28 L. J., Q. B. 232: *In re Wood*, *Ex p. Wenham*, 21 W. R. 104, Bank.: *Berry* v. *Muller*, 5 Ir. R., Eq. 368: *Brady* v. *Curran*, 2 Ir. R., C. L. 314; 16 W. R. 514. As to the authority of counsel or solicitor to compromise a cause, see *Swinfen* v. *Swinfen*, 18 C. B. 485; 25 L. J., C. P. 303; and see *S. C.*, 1 C. B., N. S. 364; 26 L. J., C. P. 97; 2 De G. & J. 381; 27 L. J., Ch. 491: *Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890; 29 L. J., Ex. 382. In this case *Pollock*, C. B., in giving judgment, said: "We are of opinion that although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record [but see *Iveson* v. *Conington*, 2 D. & R. 307; 1 B. & C. 160], withdrawing a juror [see acc. *Strauss* v. *Francis*, L. R. 1 Q. B. 379; 35 L. J., Q. B. 133, entering a *stet processus*, *Rumsey* v. *King*, 33 L. T. 728], or calling a witness, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it [*Stretton* v. *Thompson*, 72 L. T. (Jour.) 136, Dec. 24, 1881]. For instance, we think in an action for a nuisance between the adjoining lands, however desirable it may be that litigation should cease, by one of the parties purchasing the property of the other, the counsel have no authority to agree to such a sale, so as to bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void." *Chambers* v. *Mason*, 5 C. B., N. S. 59; 28 L. J., C. P. 10: *Thomas* v. *Harris*, 27 L. J., Ex. 353: *Green* v. *Crockett*, 34 L. J., Ch. 606: *Prestwich* v. *Poley*, 18 C. B., N. S. 806; 34 L. J., C. P. 189: *Rumsey* v. *King*, 33 L. T. 728: *Holt* v. *Jessie*, 3 Ch. D. 177. See *May* v. *Lead*, 68 L. T. (Jour.) 299, Feb. 21, 1880, in the Court of Appeal, from which it would appear that in the opinion of that Court a compromise made in contravention of an express prohibition would not be binding on the client. A solicitor who compromises an action against the express directions of his client is liable to an action for damages at the suit of his client. The client and not the solicitor is *dominus litis*. *Fray* v. *Fowles* or *Foules*, El. & El. 839; 28 L. J., Q. B. 232: *Butler* v. *Knight*, L. R., 2 Exch. 109; 36 L. J., Exch. 66, where the solicitor compromised after judgment: *Batchelor* v. *Ellis*, 7 T. R. 337: *Parsons* v. *Gill*, 2 Ld. Raym. 1005.

(*m*) *Tipping* v. *Johnson*, 2 B. & P. 357: *Macbeath* v. *Cooke* or *Ellis*, 1 M. & P. 513; 4 Bing. 573; Jenk. 53, pl. 100: *Savory* v. *Chapman*, 11 A. & E. 829; 3 P. & D. 604; 8 Dowl. 656: *Lovegrove* v. *White*, L. R., 6 C. P. 440; 40 L. J., C. P. 253.

(*n*) 2 Inst. 378.

(*o*) See also *Isted* v. *Clark*, Comb. 40: *Lawrence* v. *Harrison*, Sty. 426; Gilb. Law of Executions, 92, 93. *Savory* v. *Chapman*, supra, per *Littledale*, J.: *Bevins* v. *Hulme*, 15 M. & W. 96, *per Cur.*, 15 L. J., Ex. 226: *Hemming* v. *Hale*, 7 C. B. 487; 29 L. J., C. P. 137. Possibly it may now be considered he has authority

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may, it seems, after judgment receive the damages without a writ of execution (*p*). Before the Judicature Acts the original warrant did not extend to a writ of revivor or other proceedings to revive the judgment (*q*). Where G. & C., after having been retained by a client to act for him as solicitors in a cause, dissolved partnership by G. retiring, and G. assigned the conduct of the cause to C., but without communicating the dissolution to the client, it was held that the dissolution operated as a discharge of the client by the solicitors (*r*). The warrant is also determined by the client obtaining an order to change his solicitor (*post*, p. 109), or by the solicitor's (*s*) or client's (*t*) death. As to a solicitor's authority to continue the action or defence when a feme sole marries pending an action, see *Vol.* 2, *Ch. LXXXVIII.*

Client when bound by solicitor's acts.

As between the solicitor and the client the latter is only bound by any act done by the former which the latter has either expressly or impliedly authorized him to do (*u*). The client is bound, as between him and his opponent, by every act which the solicitor does in the regular course of practice and without fraud or collusion, however unauthorized or injudicious that act may be (*x*). Therefore, if the solicitor plead an improper defence (*y*), or by negligence suffer judgment to go by default, or the like, the client is bound. But a client is not bound by a fraudulent defence put in by his solicitor without his knowledge (*z*). Where a solicitor agreed to refer a cause without the consent or approbation of his client, the Court held that the client was bound by the solicitor's act, and refused to set aside the rule of reference (*a*). So, where an action was brought for the price of a piano, and plaintiff's solicitor agreed to settle the

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to sue out execution at any time within six years after the recovery of the judgment. See Ord. XLII. r. 22; Ch. LXXIV.

(*p*) *Bevins* v. *Hulme*, supra, *per Cur.* As to entering satisfaction on the roll, see R. 80, H. T. 1853, post. Before this rule, it seems that a solicitor might acknowledge satisfaction on the roll upon receiving the amount of the debt and costs. See *Savory* v. *Chapman*, supra; 1 Roll. Abr. tit. Attorney (M). See *Lamb* v. *Williams*, 1 Salk. 89, as to a solicitor entering a *remittitur damna*. As to the solicitor's authority to discharge defendant from custody under a *ca. sa.*; and as to his authority to order a sheriff to withdraw when in possession under a *fi. fa.*, see Ch. LXXIV. See *Burr* v. *Atwood*, 1 Salk. 89; Carth. 447; 1 Ld. Raym. 328, as to *scire facias* against bail.

(*q*) See *Hussey* v. *Welby*, Say. 218. As to bringing error before the Jud. Act by a different solicitor without an order to change, see p. 109.

(*r*) *Griffiths* v. *Griffiths*, 2 Hare, 587; 12 L. J. (N. S.) Ch. 397: *Rawlinson* v. *Moss*, 30 L. J., Ch. 797. As to the effect of the bankruptcy of the solicitor, see *Re Moos*, 35 L. J., Ch. 554.

(*s*) Lil. Pr. Reg. 141. See *Ashley* v. *Brown*, 1 L., M. & P. 451; 19 L. J., Q. B. 477, where defendant's solicitor died, and plaintiff's solicitor, having no knowledge of such fact, proceeded as if he were alive, and the Court refused to set aside the proceedings.

(*t*) *Whitehead* v. *Lord*, 7 Ex. 691; 21 L. J., Ex. 239. Where after a verdict for plaintiff, and pending a rule for a new trial plaintiff died, it was held, that no cause could be shown against the rule until there was a personal representative: *Shoman* v. *Allen*, 1 M. & Gr. 96, n. See *Doe* v. *Cozens*, 1 Q. B. 426. Cause cannot, in such a case, be shown on behalf of the solicitor who claims a lien on the verdict for his costs: *Shoman* v. *Allen*, supra. See post, Ch. LXVIII.

(*u*) See *Griffiths* v. *Williams*, 1 T. R. 710.

(*x*) See *Latuch* v. *Pasherante*, 1 Salk. 86.

(*y*) *Payne* v. *Chute*, 1 Roll. 365.

(*z*) *Williams* v. *Preston*, 20 Ch. D. 672; 51 L. J., Ch. 927.

(*a*) *Filmer* v. *Delber*, 3 Taunt. 486:

action by the return of the piano and payment of costs, the client was held bound (*b*). So, where plaintiff's solicitor waived a judgment by default, the Court held that plaintiff was bound by the waiver, although he wished to insist upon his judgment (*c*). A solicitor has authority to undertake not to issue a *fi. fa.* in consideration of acceleration of payment (*d*), but he has no implied authority after judgment signed to agree to postpone execution (*e*). An admission made by a solicitor of one of the parties to a cause, to prevent the necessity of proving a fact on the trial, is binding on the client (*f*); but every statement made by the solicitor is not so binding (*g*). Where a letter is written by a solicitor "without prejudice," neither it nor the answer to it will, as a general rule, be receivable as evidence for or against the client (*h*). So, where the first of a series of letters on one subject is written without prejudice, the whole correspondence is privileged (*i*). The party who wrote a letter without prejudice may make use of it himself (*k*). The client is also liable for any tortious act of his solicitor done within the scope of his authority, as if he sue out an irregular writ, and a trespass is committed under it, and it is afterwards set aside (*l*); or if he sue out a regular writ, but direct a wrong person, or the goods of a wrong person, to be taken under it (*m*). The solicitor has no implied authority to bind his client by contract to pay counsel's fees (*n*). As to when the acts of a town agent are binding upon the client, *see post*.

Services of notices, &c. on the solicitor binds the client.

Notices and communications, which in the ordinary progress of a cause pass between the solicitors of the respective parties, should be given and made to the solicitor, and not to the client; and, if so given or made, will be binding on the client (*o*). Where country solicitors employ London agents, whose names appear on the proceedings, the latter always serve and are served with all the various notices, orders, and pleadings necessary in the course of the proceedings. As to the service where the action proceeds in the district registry, *see Ch. CXXIV.* As to the mode of service of proceedings on solicitors, *see Ch. CXXVI.*

Acting without authority.

Acting without Authority.]—When a solicitor brings an action without authority, the proper course is for the plaintiff to take out

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Rex v. *Addington*, Say. 259: *Thomas* v. *Hewes*, 2 C. & M. 519; 3 L. J., Ex. 158: *Bodington* v. *Harris*, 1 Bing. 187: *Faviell* v. *Eastern Counties R. Co.*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 297.

(*b*) *Pristwick* v. *Poley*, 18 C. B., N. S. 816; 34 L. J., C. P. 189.

(*c*) *Latuch* v. *Pasherante*, 1 Salk. 86.

(*d*) *Re The Commonwealth, &c. Co.* (*Limited*), 43 L. J., Ch. 99.

(*e*) *Lovegrove* v. *White*, L. R., 6 C. P. 440; 40 L. J., C. P. 253.

(*f*) See Ros. Evid.

(*g*) See *Petch* v. *Lyon*, 9 Q. B. 147: *Blackstone* v. *Wilson*, 26 L. J., Ex. 229.

(*h*) *Paddock* v. *Forrester*, 3 Sc. N. R. 734, per *Tindal*, C. J.: *Peacock* v. *Harper*, 26 W. R. 109: cp. *In re River Steamer Co., Mitchell's Claim*, L. R., 6 Ch. 822, 827, 831.

(*i*) *Ex p. Harris, In re Harris*, L. R., 10 Ch. 264; 44 L. J., Bk. 33.

(*k*) *Williams* v. *Thomas*, 2 Dr. & Sm. 29.

(*l*) *Parsons* v. *Loyd*, 3 Wils. 341: *Bates* v. *Pilling*, 6 B. & C. 38: *Codrington* v. *Lloyd*, 8 A. & E. 449: *Collett* v. *Foster*, 2 Ex. 356; 26 L. J., Ex. 412.

(*m*) *Jarmain* v. *Hooper*, 7 Sc. N. R. 663; 13 L. J., C. P. 63.

(*n*) *Mostyn* v. *Mostyn, Ex p. Barry*, L. R., 5 Ch. 457; 39 L. J., Ch. 780.

(*o*) See *per Curiam*, *Margettson* v. *Rush*, 8 Dowl. 388: *Rothwell* v. *Timbrell*, 1 Dowl., N. S. 778: *Pike* v. *Stephens*, 17 L. J., Q. B. 282.

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a summons, which he must serve on the defendant and the solicitor, for an order that the action may be dismissed, and that the solicitor do pay the costs of the plaintiff between solicitor and client, and those of the defendant as between party and party, and an order may be made accordingly (*p*).

Setting aside or staying proceedings in case of.

If a solicitor commence an action without plaintiff's authority, the Court will on defendant's application set aside or stay the proceedings, and make the solicitor pay defendant's costs, and this even after judgment (*q*). In a case, where a feme covert executrix, living apart from her husband, instructed a solicitor to bring an action in her name and that of her husband without his consent or authority, the Court, on the application of the husband, ordered the proceedings to be stayed until security was given to indemnify the husband against the costs of the action (*r*). And if a party's name be inserted in a writ as one of several plaintiffs without his authority, and there is no colour of authority for inserting it, the Court at his (*s*), or it seems at defendant's, instance (*t*), will order it to be struck out. So the Court, if a landlord defend an ejectment in the tenant's name without his authority, will set aside the appearance at defendant's instance, and this notwithstanding an indemnity be offered (*u*). Where plaintiff, without serving defendant, accepts the appearance of an unauthorized solicitor for defendant, the Court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent solicitor by summary proceedings (*x*) or action. But, as a rule, where defendant has been

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(*p*) *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 13 Ch. D. 310; 49 L. J., Ch. 231, C. A.: *Reynolds* v. *Howell*, L. R., 8 Q. B. 398; 42 L. J., Q. B. 181: *Nurse* v. *Durnford*, 13 Ch. D. 764; 49 L. J., Ch. 229: *The Cape Breton Co.* (*Limited*) v. *Fenn*, 50 L. J., Ch. 321: *Bird* v. *Harris*, 43 L. T. 434, reversed on appeal, W. N. 1881, 5: *In re Savage*, 15 Ch. D. 557; 29 W. R. 348: *Schjott* v. *Schjott*, 19 Ch. D. 94; 51 L. J., Ch. 368; 45 L. T. 333.

(*q*) See *Robson* v. *Eaton*, 1 T. R. 62: *Doe* d. *Baker* v. *Roe*, 3 Dowl. 496: *Newton* v. *Matthews*, 4 Dowl. 237: *Hubbart* v. *Phillips*, 13 M. & W. 702; 2 D. & L. 707: *S. C.* nom. *Hubbart* v. *Philipps*, 14 L. J., Ex. 103: *Coleman* v. *Biedman*, 7 C. B. 871; 18 L. J., C. P. 263: *S. C.* nom. *Collman* v. *Biedman*, 7 D. & L. 121: *Jenkins* v. *Fereday*, L. R., 7 C. P. 358; 41 L. J., C. P. 152, where it was held that the liability to pay the costs was a liability incurred by fraud: *Thames Haven Dock and R. Co.* v. *Hall*, 3 Railw. Cas. 441, where it was alleged that the company had ceased to exist: *Collins* v. *Johnson*, 16 C. B. 588; 24 L. J., C. P. 231, where the purser of a mine assuming to be authorized to sue on behalf of the adventurers instructed a solicitor to sue in the name of some of them. On an application by a defendant to stay proceedings on the ground that plaintiff's solicitor is going on with the action contrary to the express direction of his client, the plaintiff should be made a party to the rule. (*Thatcher* v. *D'Aguilar*, 11 Ex. 436.) As to bringing an action against the solicitor under such circumstances, see *Cotterell* v. *Jones*, 11 C. B. 713; 21 L. J., C. P. 2. See further as to staying proceedings in actions brought without authority, post, Ch. XXX.

(*r*) *Proctor* v. *Brotherton*, 23 L. J., Ex. 116.

(*s*) *Doe* v. *Fillis*, 2 Chit. 170. See n. (*p*), supra.

(*t*) *Doe* v. *Roe*, Id. 171: cp. *Turquand* v. *Fearon*, 4 Q. B. D. 480; 48 L. J., Q. B. 341.

(*u*) Barnes, 39; 2 Sellon, 170. See Vol. 2, Ch. CVI.

(*x*) *Bayley* or *Bayly* v. *Buckland*, 1 Ex. 1; 5 D. & L. 115: *Hambridge* v. *De la Croúée*, 3 C. B. 742; 4 D. & L. 466; 16 L. J., C. P. 85: *S. C.* nom. *Hambidge: Latuch* v. *Pascherante*, 1 Salk. 86: *Anon.*, 1 Salk. 88; 6 Mod. 16. And see *Chambers* v. *Donaldson*,

9 East, 471: *King* v.
579: *Anon.*, 6 Mod. 1
Smith, 1 Dowl. 633, 1
Stanhope v. *Firmin*,
301; 4 Scott, 39; 5
L. J. (N. S.) C. P.
Earl of Limerick v.
Rep. Ir. Ex. 80.

(*y*) So stated in all
of this work, *sed quær*
v. *Howell*, supra, n. (
(*z*) *Bayley* v. *Buc*
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Doe v. *Eyton*, 3 B. & A
Q. B. 253.

(*a*) *Souter* v. *Watts*,
(*b*) *In re Savage*, 1
29 W. R. 348. See ca
p. 106, n. (*p*). See
supra, in which case
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served with process, and a solicitor without authority appears for him, the Court will not interfere to set aside the proceedings if the solicitor be solvent, but will leave defendant to his remedy against the solicitor (*y*); if the solicitor be insolvent, the Court will relieve defendant on equitable terms, if he has a defence on the merits (*z*). Where after an action had been brought to issue, another action was commenced by a different solicitor for the same cause, and defendant moved to stay the proceedings in the latter, it appearing that the first was brought without authority, the Court refused to interfere, observing, that defendant might perhaps have a remedy against the solicitor in the first action for improperly suing him, but they could not make the solicitor discontinue that action, for he had no power over it (*a*).

Remedy against solicitor.

As a general rule the Court will compel a solicitor acting without authority to pay the costs occasioned by his so doing (*b*).

Payment to solicitor acting without authority.

It seems that, if a solicitor commence an action without plaintiff's authority, and judgment is obtained in it for plaintiff, and defendant pays the amount to the solicitor, who pays it over to the person who employed him under a forged authority purporting to be from plaintiff, still the latter might afterwards recover it of defendant in a subsequent action, and the solicitor's remedy would be against the person who had given him the forged authority (*c*). And in a case at Nisi Prius it was held, that if a solicitor sue out a writ against A. at the suit of B. without any authority, express or implied, from B. for so doing, and A. pay the costs of such writ to the solicitor, A. may recover back the amount of those costs, by bringing an action against the solicitor; but if the solicitor had any authority from B. to sue out the writ, such action will not lie against the solicitor, even though B. had no cause of action against A. (*d*).

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9 East, 471: *King* v. *Davies*, 2 Mod. 279: *Anon.*, 6 Mod. 16: *Williams* v. *Smith*, 1 Dowl. 633, per *Bayley*, B.: *Stanhope* v. *Firmin*, 3 Bing. N. C. 301; 4 Scott, 39; 5 Dowl. 357; 6 L. J. (N. S.) C. P. 175: *Lessee of Earl of Limerick* v. *Odell*, 1 Jones, Rep. Ir. Ex. 80.

(*y*) So stated in all former editions of this work, *sed quære*; see *Reynolds* v. *Howell*, supra, n. (*p*).

(*z*) *Bayley* v. *Buckland*, supra: *Mudry* v. *Newman*, 1 C., M. & R. 402; *S. C.* nom. *Muday* v. *Newman*, 2 Dowl. 695, where action was brought without plaintiff's authority: *Barber* v. *Wilkins*, 5 Dowl. 305. And see *Doe* v. *Eyton*, 3 B. & Ad. 785; 1 L. J., Q. B. 253.

(*a*) *Souter* v. *Watts*, 2 Dowl. 263.

(*b*) *In re Savage*, 15 Ch. D. 557; 29 W. R. 348. See cases cited ante, p. 106, n. (*p*). See *Doe* v. *Eyton*, supra, in which case an issue was directed between the solicitor and his client to try the question of authority: per *Alderson*, B., in *Hammond* v. *Thorpe*, 1 C., M. & R. 65; 2 Dowl. 721: *Souter* v. *Watts*, 2 Dowl. 263: *Bayley* v. *Buckland*, supra: *Re Manby*, 26 L. J., Ch. 313; 3 Jur., N. S. 259: *Wheatley* v. *Bastow*, 7 De G., Mac. & G. 261; 24 L. J., Ch. 727, 732. As to the person for whom he assumes to act bringing an action against him, see *Westaway* v. *Frost*, 17 L. J., Q. B. 286; 12 Jur. 698. As to the opposite party bringing an action against him, see *Cotterell* or *Cotterill* v. *Jones*, 11 C. B. 713; 21 L. J., C. P. 2. As to one of several solicitors in partnership being liable for the act of the others suing without authority, see *Re Manby*, supra. As to the measure of damages in an action by the client against the solicitor, see *Cockburn* v. *Edwards*, 16 Ch. D. 393; 43 L. T. 755.

(*c*) *Robson* v. *Eaton*, 1 T. R. 62. And see *Worley* v. ——, 12 Mod. 318: *Buckle* v. *Roach*, 1 Chit. Rep. 193.

(*d*) *Dupen* v. *Keeling*, 4 Car. & P. 102.

PART I.

When solicitor bound to proceed.

When Solicitor bound to proceed.]—The contract of the solicitor upon a retainer accepted by him, to carry on or defend an action, or to do any other business, is in general (*e*) an entire contract to carry on the action, or defence, or the other business, to its termination; subject, however, to the condition of his being paid by his client, upon a request made by him for the same, and a reasonable time allowed for compliance with it, such reasonable funds (*f*) as will be necessary to carry it on; and, in general, it is only on the non-compliance by the client with that condition, that a solicitor can refuse completing his contract, and withdraw from a further performance of the business in which he is retained (*g*). If he wrongfully refuse to proceed, and break his contract in this respect, he will be subject to an action for it (*h*); moreover, he could not recover his bill of costs already incurred (*i*); nor would he have any lien on his client's papers for them, so as to prevent him proceeding in the action (*k*). If, on the other hand, his client, after reasonable notice, refuse to supply him with adequate funds, he may refuse to proceed further in the business, and sue him for his bill of costs already incurred, and for any damages he may have sustained (*l*). He may also do so when the client disclaims his authority (*m*). But when he refuses to proceed unless funds are provided, he will not have such a lien on the papers in the action as to prevent his client proceeding, though he is not bound to deliver them up to the new solicitor without some undertaking on his part, or other security, for the returning them, or his holding them subject to his lien (*n*). The notice requiring funds, to justify the solicitor withdrawing from his contract and proceeding in the business, must be a reasonable one (*o*). Where a solicitor, only

(*e*) This rule does not apply to the employment in such matters as a bankruptcy, the administration of an estate, or the winding up of a company, or, perhaps, to any chancery suit: *Re Hall and Barker*, 9 Ch. D. 538. From this case it would appear doubtful whether the common law rule, which is that laid down in the text, might not be held in the Court of Appeal to be superseded in all cases: 47 L. J., Ch. 621.

(*f*) *I. e.* funds to meet expenses out of pocket, not payment for services. *Arnold* v. *Mayor of Poole*, 4 M. & Gr. 893, per *Erskine*, J.

(*g*) *Wadsworth* v. *Marshall*, 2 C. & J. 665: *Nicholls* v. *Wilson*, 11 M. & W. 106; 2 Dowl., N. S. 1031; 12 L. J., Ex. 266: *Harris* v. *Osborne*, 2 C. & M. 629: *Rowson* v. *Earle*, 1 M. & M. 538: *Vansandau* v. *Browne*, 2 M. & Sc. 543; 9 Bing. 402; 1 Dowl. 715; 2 L. J., C. P. 34: *Lawrence* v. *Potts*, 6 Car. & P. 428: *Whitehead* v. *Lord*, 7 Ex. 691; 21 L. J., Ex. 239; 19 L. T. 113.

(*h*) *Hoby* v. *Built*, 3 B. & Ad. 350; 1 L. J., Q. B. 121.

(*i*) *Nicholls* v. *Wilson*, supra: *Cresswell* v. *Byron*, 14 Ves. 272: *Commerell* v. *Poynton*, 1 Swanst. 1: *Mayne* v. *Watt*, 3 Swanst. 95: *Re Bevan and Whitting*, 33 Beav. 439. See *In re Hall and Barker*, ante, n. (*e*).

(*k*) *In re Faithfull*, L. R., 6 Eq. 325.

(*l*) *Vansandau* v. *Browne*, supra.

(*m*) *Hawkes* v. *Cottrell*, 3 H. & N. 243; 27 L. J., Ex. 369.

(*n*) *Robins* v. *Goldingham*, L. R., 13 Eq. 440; 41 L. J., Ch. 813: *Vansandau* v. *Browne*, supra; 14 Ves. 271: *Heslop* v. *Metcalfe*, 8 Sim. 622; 3 Myl. & Cr. 183. In that case he was ordered on petition of his client to hand over to the new solicitor all proceedings and documents, &c., necessary for the hearing, without prejudice to lien, and to be returned undefaced within a fixed time after. And see *Cane* v. *Martin*, 2 Beav. 584; 4 Jur. 500: *Wilson* v. *Emmett*, 19 Beav. 233: *Re Faithfull*, L. R., 6 Eq. 325.

(*o*) *Hoby* v. *Built*, supra.

five days before the commencement of the assizes, gave notice to his client that he would not deliver briefs to counsel unless he were furnished with funds for the purpose; and, such funds not being furnished, counsel were not instructed, and a verdict was given against the client; in an action against the solicitor for negligence, the jury found that the solicitor had not given reasonable notice (*o*).

Change of solicitor.

Notice of, when necessary.

Change of Solicitor.]—By *R. of S. C., Ord. VII. r.* 3, "A party suing or defending by a solicitor, shall be at liberty to change his solicitor in any cause or matter, without an order for that purpose, upon notice of such change being filed in the central office, or in the district registry, if the cause or matter is proceeding therein; but until such notice is filed and a copy thereof served, and (in causes or matters pending in the Chancery Division) left in the chambers of the judge to whom the cause or matter is assigned, the former solicitor shall be considered the solicitor of the party."

Formerly an order giving leave to change solicitors was necessary (*p*). The object of this was to prevent a party being embarrassed by several solicitors acting, or appearing to act, for his opponent during the progress of the suit. If the solicitor has acted at all as such in the action, though the proceedings have not gone far enough for his name to appear on the proceedings, the above rule applies, and notice of the change must be given (*q*). But a new solicitor might act without such notice, where the business in which he acts does not fall within the scope of the authority given to the former solicitor (as to which *see ante*, p. 102 *et seq.*). So, a new solicitor may act without such notice in cases where the former solicitor's authority is ended: he may, therefore, without such notice, issue execution upon (*r*) or move to set aside the judgment (*s*), or enter satisfaction (*t*). It may be here added, that, where a party has conducted an action or defence in person, it is not necessary, to enable him to take a step in the action by solicitor, that he should obtain an order for the purpose, or that he should give the other side previous notice of the appointment of the solicitor: taking the step by the solicitor is in itself sufficient notice to the opposite party of the appointment (*u*).

Proceedings on change.

The payment of the former solicitor's costs is not a condition precedent to the right to change (*x*). The notice must be filed as

(*o*) *Hoby* v. *Built*, supra.

(*p*) R. H. T. 1853, r. 4; Consol. Ch. Ord. III. r. 3; 1 Q. B., H. 1853, App. iii. 4. See the prior rules of K. B. and C. P., M. T. 1654, Rules and Orders X., XIII.; 1 Lil. Prac. Reg. 134, 143: *Macpherson* v. *Rorison*, 1 Doug. 217; 1 Lil. Pr. Reg. 141: *Anon.*, 7 Mod. 50: *Kaye* v. *De Mattos*, 2 Bl. 1323: *Powel* v. *Little*, 1 Id. 8: *Ginders* v. *Moore*, 1 B. & C. 654.

(*q*) *May* v. *Pike*, 6 Dowl. 667; 4 M. & W. 197; 7 L. J., Ex. 220: *King* v. *Archer*, 1 B. C. 219. See form of Notice, Chit. F. 29.

(*r*) *Tipping* v. *Johnson*, 2 B. & P. 357: *Bevins* v. *Hulme*, 15 M. & W. 88; 2 D. & L. 309; 15 L. J., Ex. 226: *Anon.*, 12 Mod. 440: *Batchelor* v. *Ellis*, 7 T. R. 337.

(*s*) *Doe* v. *Bransom*, 6 Dowl. 490.

(*t*) *Marr* v. *Smith*, 4 B. & Ald. 466.

(*u*) See *Jones* v. *King*, 5 D. & L. 412: *Kerrison* or *Harrison* v. *Wallingborough*, 5 Dowl. 564; W. W. & D. 205.

(*x*) *Grant* v. *Holland*, 3 C. P. D. 180; 47 L. J., Q. B. 518. This was the rule in equity before the Jud. Acts. The common law rule was different.

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directed by the rule (*supra*), and a copy of it must be served on the opposite solicitor before the new solicitor can properly take any steps in the action. It must also, it seems, be served on every person immediately connected with the proceedings (*y*).

Record need not notice change.

Under the old system the change was stated on the record (*z*); but under the present practice this is not necessary.

Solicitor may act for opposite party.

After the solicitor is changed, the court will not, in general, restrain him from acting for the opposite party, unless the change was procured by his own act, and some confidential communication has been made to him by the first party who employed him, the disclosure of which would be prejudicial to the party (*a*).

Consequences of want of notice of change.

Until the notice of change has been duly filed and the copy served, the opposite party and his solicitor are justified in considering the former solicitor as being still employed (*b*). A defence put in (*c*), or a second appearance entered (*d*), by a new solicitor for a defendant without a notice to change would be irregular. So, if an application be made to the Court or a judge in the action by a new solicitor, where there ought to be a notice of the change, and no such notice has been served, it will be a preliminary objection to the application that there has been no such notice (*e*). But in some cases the new solicitor may be allowed to act without notice for changing the first solicitor (*f*). It seems, also, that a party called on by a rule to show cause may oppose it by a new solicitor without notice to the other party (*g*). Payment to plaintiff's solicitor, who has been changed without notice, would be a good payment to plaintiff (*h*).

Although the steps taken by a solicitor changed without notice when notice is necessary are in general irregular, and may be objected to by the opposite party, yet the irregularity may be waived; as, by accepting plea and keeping it (*i*), or attending a summons and making no objection to it (*k*), or otherwise treating the new solicitor as the solicitor in the cause. And a step taken by a new solicitor without a notice of change cannot be treated as a nullity (*l*). There-

(*y*) *R.* v. *Sheriff of Middlesex*, 2 Dowl. 147: *Phillips* v. *Berkeley*, 5 Dowl. 279: *Lovegrove* v. *Dymond*, 4 Taunt. 669.

(*z*) *Anon.*, 12 Mod. 440: *Wood* v. *Plant*, 1 Taunt. 44. If a prochein amy, in an action by an infant, be removed and another appointed, the change ought to be noticed in the record: *Davies* v. *Lockett*, 4 Taunt. 765.

(*a*) *Little* v. *Kingswood Collieries Co.*, C. A., 20 Ch. D. 733; 51 L. J., Ch. 498: *Johnson* v. *Marriott*, 2 C. & M. 183; 2 Dowl. 843: *Grissell* v. *Peto*, 2 M. & Sc. 568; 9 Bing. 1: *Cholmondeley* v. *Clinton*, 19 Ves. 261: *Bricheno* v. *Thorp*, 1 Jacob, 300: *Beer* v. *Ward*, Id. 77: *Davies* v. *Clough*, 8 Sim. 262: cp. *Barber* v. *Stone*, 50 L. J., C. P. 297.

(*b*) See *Ginders* v. *Moore*, 1 B. & C. 654: *Lord* v. *Wardle*, 3 C. B. 295.

(*c*) *Perry* v. *Fisher*, 6 East, 549. See 13 Ves. 161, 195: *Kaye* v. *De Mattos*, ante, p. 109, n. (*p*).

(*d*) *The Oneiza*, L. R., 4 Adm. 36.

(*e*) *Doe* v. *Bransom*, 6 Dowl. 490: *Ginders* v. *Moore*, supra. In some cases the Court or judge would grant an adjournment in order to give time to obtain or serve the order for the change.

(*f*) *Haggett* v. *Argent*, 7 Taunt. 47; 2 Marsh. 365: *R.* v. *Sheriffs of London* in *Plomer* v. *Houghton*, 2 B. & Ald. 604; 1 Chit. R. 329: *Keys* v. *Tavernier*, 1 Chit. R. 291, where defendant was a prisoner.

(*g*) *Lovegrove* v. *Dymond*, ante, n. (*y*).

(*h*) *Powel* v. *Little*, 1 W. Bl. 8.

(*i*) *Margerem* v. *Mackilwaine*, 2 New Rep. 509.

(*k*) *Fairley* v. *Hebbes*, 3 Dowl. 538.

(*l*) *Doe* v. *Bransom*, supra: *Gilmour* v. *Brindley*, 7 D. & R. 259: *Kerrison* or *Harrison* v. *Wallingborough*, ante, n. (*u*).

fore it was no ground for treating a rule nisi for a new trial as a nullity, and signing judgment upon the verdict in the action, that the rule was obtained by a different solicitor from the solicitor on the record without notice of change (*m*). Nor would a defence pleaded by a different solicitor than the solicitor who appeared for defendant be such a nullity as would entitle plaintiff to sign judgment as for want of a defence (*n*).

Effect of change on solicitor's lien.

The effect of the change on the former solicitor's lien depends on whether the client has discharged the solicitor or the solicitor has discharged himself. In the former case, where the client discharges the solicitor, the lien still attaches, and the solicitor cannot, until his bill of costs is satisfied, be compelled either to produce or hand over the papers in his possession and which are covered by his lien (*o*), though he may be compelled to produce them for certain purposes (*p*); such is the drawing up of an order (*p*), or the management of estates by a receiver (*q*). In the latter case, where the solicitor discharges himself, he will be compelled to deliver up the papers to the new solicitor on his giving an undertaking to hold them without prejudice to his lien, and to return them intact after the conclusion of the action, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs (*r*).

Death of solicitor.

Death of Solicitor.]—Upon the death of the solicitor in the cause, notice must be given to the opposite party of the appointment of the new solicitor before the latter can proceed in the cause; and without such notice his proceedings would be irregular (*s*). If the party who employed the deceased solicitor neglect to appoint a new one after notice, the opposite party may proceed in the action as if the party were his own solicitor (*t*). If the London agent, however, be the solicitor on the record, the death of the country solicitor will not affect the agent's right to proceed (*u*).

His duties.

Bound to use skill and care.

His Duties to his Client, and when liable for Negligence.]—A solicitor impliedly undertakes and is bound to use skill and diligence in the management of the business in which he is employed by his client. It would be very difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or

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(*m*) *Doe* d. *Bloomer* v. *Bransom*, ante, n. (*c*).

(*n*) *Hill* v. *Mills*, 2 D. P. C. 696: *Bayley* v. *Thomson*, Id. 655.

(*o*) *In re Faithfull*, L. R., 6 Eq. 325: *Re Moss*, L. R., 2 Eq. 345; 35 L. J., Ch. 554: *Pilcher* v. *Arden*, 7 Ch. D. 318: cp. *Newington Local Board* v. *Eldridge*, 12 Ch. D. 349.

(*p*) *Clifford* v. *Turrill*, 2 De G. & Sm. 1: *Simmons* v. *Great Eastern R. Co.*, L. R., 3 Ch. 707; cp. *In re Toleman and England*, 13 Ch. D. 885.

(*q*) *Belaney* v. *Ffrench*, L. R., 8 Ch. 918.

(*r*) *Robins* v. *Goldingham*, L. R., 13 Eq. 440; 41 L. J., Ch. 813: *Griffiths* v. *Griffiths*, 2 Hare, 587: *Heslop* v. *Metcalfe*, 3 My. & Cr. 183: *Hannaford* v. *Hannaford*, 24 L. T. 86; 19 W. R. 429.

(*s*) *Ryland* v. *Noakes*, 1 Taunt. 342. And see 1 Lil. Pr. Reg. 141: *Ashly* v. *Brown*, 15 Jur. 399, B. C.

(*t*) 1 Lil. Pr. Reg. 137. See *Bradley* v. *Breach*, 2 Keb. 275: *Collins* v. *Arnold*, 1 Bail C. 217.

(*u*) *Taunton* v. *Goforth*, 6 D. & R. 384.

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lata culpa, mentioned in some of the cases, for which he is undoubtedly responsible. He is not answerable for error in judgment upon points of new occurrence or of nice and doubtful construction (*x*). Thus, if a solicitor intrusted to defend an action, suffer judgment by default, he would be guilty of gross negligence, and liable for it; and it would be no answer for him to show that his client had no defence, except indeed to mitigate the damages (*y*). He would not, however, be responsible for disobeying his client's instructions to do any reprehensible act (*z*). Where a party sues or defends on behalf of another under such circumstances as to render an indemnity a prudent and proper precaution to take, it is the duty of the solicitor to advise an indemnity to be taken; and, in the case of a defendant, to obtain such an indemnity as will be sufficient to cover costs, and such damages as may reasonably be anticipated in the event of the defence failing (*a*). A solicitor would be liable for damages for his neglect to procure the usual evidence for the trial of an action (*b*); or for suing in a court of limited jurisdiction for a debt which was contracted out of the jurisdiction (*c*); or for neglecting the duty of explaining to his client the effect of a mortgage (*d*); or to the grantor the effect of a bill of sale (*e*). So a solicitor is guilty of negligence, for which he is liable, if he do not deliver his briefs, or procure the attendance of witnesses in due time; and it is no excuse for him that the action was called on out of its turn (*f*). Where some masters employed a solicitor to take proceedin[illegible] against their apprentices for misconduct, and the solicitor proceeded on an enactment which related to servants and not to appre[illegible]ces, it was held that this was an instance of such want of skill or diligence as to render the solicitor liable (*g*).

On the other hand, as already observed, a solicitor is not chargeable with negligence if he make a mistake in a point of law or practice, where there is a reasonable doubt upon the subject (*h*). A solicitor, in such cases, had better consult counsel, and obtain his opinion on the point, and act on it accordingly; indeed his neglect to do so might render him liable, while, on the other hand, his doing so will, in general, protect him. The opinion, however, will not have this effect where it is on a point which it is within the

(*x*) See *per Cur.* in *Godefroy* v. *Dalton*, 6 Bing. 468: *Reece* v. *Righy*, 4 B. & Ald. 202: *Pitt* v. *Yalden*, 4 Burr. 2060: *Jones* v. *Lewis*, 9 Dowl. 143: *Donaldson* v. *Haldane*, 7 Cl. & F. 762: *Hunter* v. *Caldwell*, 10 Q. B. 69: *Purves* v. *Landell*, 12 Cl. & F. 91: *Parker* v. *Rolls*, 14 C. B. 691: *Lewis* v. *Collard*, 14 C. B. 208; 23 L. J., C. P. 32.

(*y*) See *Godefroy* v. *Jay*, 7 Bing. 413.

(*z*) See *Pierce* v. *Blake*, 2 Salk. 515: *Johnson* v. *Alston*, 1 Camp. 176.

(*a*) *Graham* v. *Lawrence*, 1 F. & F. 285, *Campbell*, C. J.

(*b*) *Godefroy* v. *Dalton*, supra, n. (*x*).

(*c*) *Williams* v. *Gibbs*, 5 A. & E. 208. As to a solicitor's liability for suing in a superior court instead of a county court whereby the plaintiff is unable to recover his costs, see *Lee* v. *Dixon*, 3 F. & F. 744.

(*d*) *Bettyes* v. *Maynard*, 46 L. T. 766; 30 W. R. 793.

(*e*) *Ex p. National Mercantile Bank*, [illegible]es, 15 Ch. D. 42, per *James*, [illegible]72; 49 L. J., Bank. 62.

(*f*) [illegible]y v. *Guilford*, 5 C. & P. [illegible]; *Hawkins* v. *Harwood*, 4 Ex. 503.

(*g*) *Hart* v. *Frame*, 6 Cl. & F. 193.

(*h*) *Pitt* v. *Yalden*, 4 Burr. 2060: *Baikie* v. *Chandless*, 3 Camp. 17; Id. 19: *Laidler* v. *Elliott*, 3 B. & C. 738; 5 D. & R. 635: *Jacks* v. *Bell*, 3 Car. & P. 316: *Kemp* v. *Burt*, 1 N. & M. 262: *Elkington* v. *Holland*, 9 M. & W. 659.

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As already stated

(*i*) *Godefroy* v. *Dal*
112, n. (*x*): *Godefroy* v
413. And see *Kemp* v.
M. 262: *Cates* v. *Inder*
F. 259.

(*k*) *Lowry* v. *Guilfor*
234.

(*l*) *Collins* v. *Griffin*,
Anon., Id. 38: *Ex p. J*
161: *Simmons* v. *Rose*, 3

(*m*) See *Harman* v. *J*
& Bl. 61; 22 L. J., Q.
one partner received mo
on mortgage: *Bourdill*
27 L. J., Ch. 681: *R*
Sm. & G. 375: *Sawyer*
36 L. J., Ch. 578.

(*n*) *Thwaites* v. *Mack*
& P. 341: *Gill* v. *Lough*
170.

solicitor's province to be master of (*i*), and of course the opinion should be taken on a correct statement of facts. He is not liable for the absence, neglect, or want of attention of the counsel engaged by him in an action (*k*).

A solicitor is liable for the negligence of his clerk or of his agent (*l*), or of his partner, when he acts within the limits of his authority (*m*).

Should be acquainted with client's case.

A solicitor is bound to acquaint himself with his client's case, and what proof he has to support it, or to do all that can reasonably be required of him to ascertain it (*n*). A solicitor must also take care to investigate all suspicious transactions, and satisfy himself, before giving his approval of them, that it is for his client's benefit to confirm them (*o*).

Should communicate with him.

A solicitor should communicate personally with his client, and pay attention to his concerns, so that the latter may reap the benefit of the former's advice and judgment (*p*). If the opposite party offer a compromise, the solicitor should in general communicate the fact to his client (*q*).

Should give him proper advice.

A solicitor should give his client proper advice, and not permit him to embark in an improper or hazardous action or defence, without warning him of the consequences (*r*). He is bound to take care that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, or, at all events, that he does not do so until the consequences have been explained to him (*s*).

Must act faithfully.

He is also bound to manage the business intrusted to him with fidelity and good faith. He must keep his client's secrets, and not disclose any privileged communication (*t*). Where it appeared that the same solicitor was employed in an action on both sides, the Court set aside the proceedings, and ordered the solicitor to pay the costs (*u*). But, as the interests of lender and borrower do not necessarily clash, it seems that the same solicitor may sometimes be fairly employed by both parties (*x*).

Cannot aban-

As already stated a solicitor cannot in general retract after he

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(*i*) *Godefroy* v. *Dalton*, ante, p. 112, n. (*x*): *Godefroy* v. *Jay*, 7 Bing. 413. And see *Kemp* v. *Burt*, 1 N. & M. 262: *Cates* v. *Indermaur*, 1 F. & F. 259.

(*k*) *Lowry* v. *Guilford*, 5 Car. & P. 234.

(*l*) *Collins* v. *Griffin*, Barnes, 37: *Anon.*, Id. 38: *Ex p. Jones*, 2 Dowl. 161: *Simmons* v. *Rose*, 31 Beav. 11.

(*m*) See *Harman* v. *Johnson*, 2 El. & Bl. 61; 22 L. J., Q. B. 297, where one partner received money to invest on mortgage: *Bourdillon* v. *Roche*, 27 L. J., Ch. 681: *Re Manby*, 3 Sm. & G. 375: *Sawyer* v. *Goodwin*, 36 L. J., Ch. 578.

(*n*) *Thwaites* v. *Mackerson*, 3 Car. & P. 341: *Gill* v. *Lougher*, 1 C. & J. 170.

(*o*) *Montmorency* v. *Devereux*, 7 Cl. & F. 188.

(*p*) *Hopkinson* v. *Smith*, 7 Moore, 237; 1 Bing. 13.

(*q*) *Still* v. *Thomas*, 8 Car. & P. 762; see cases, ante, p. 103, n. (*l*).

(*r*) *Jacks* v. *Bell*, 3 Car. & P. 316: *Allison* v. *Rayner*, 7 B. & C. 441.

(*s*) *Stannard* v. *Ullithorne*, 10 Bing. 491.

(*t*) Ante, p. 96; Com. Dig. tit. Action on the Case for Deceit (A. 5): *Taylor* v. *Blacklow*, 3 Bing. N. C. 235: *Lawrence* v. *Harrison*, Style, 426. See *In re Holmes*, 25 W. R. 603.

(*u*) *Berry* v. *Jenkins*, 11 Moore, 308: *Reg.* v. *Alderson*, 11 A. & E. 3; 3 P. & D. 2.

(*x*) See per *Tindal*, C. J., *Doe* d. *Peter* v. *Watkins*, 3 Bing. N. C. 424.

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don his client's case.

has once taken upon himself to be solicitor for the party, unless under circumstances where his client will not supply him with money. (*Ante*, p. 108.)

Must take care of papers, &c.

He must keep his client's papers and documents in proper and reasonable order, and in that manner, subject to his lien for costs, deliver them up when duly required (*y*).

A solicitor, who as agent for the vendor of real estate has received a deposit on the signing of a contract of sale, is bound to pay it over to the vendor on demand (*z*).

Consequence of breach of duty.

If a solicitor be guilty of any breach of duty to his client, the latter (*a*) has a remedy by action for damages (*b*); and in some cases which we shall hereafter notice, where the breach is clear, by summary application to the Court, who will punish the solicitor and make him compensate his client (*c*). Besides this, the solicitor has no right to his costs for any work done by him, or for money paid by him (*d*), which is unnecessary for accomplishing the object for which he was employed (*e*), or which has proved wholly useless to his client, from gross negligence, inadvertence or unskilfulness (*f*). And the jury may divide the bill and discard particular items as altogether useless (*g*). But this cannot be done when the work or item has been partly useful (*h*), or where the negligence, inadvertence or unskilfulness, has caused an injury to the client, and not merely ...ased the amount of the bill, in which case the remedy against the solicitor would be by action or counter-claim (*i*); and the same, where it has not been the sole cause of the business becoming useless (*k*). If a solicitor conducting an action commit an act of

Unnecessary or useless work.

(*y*) *North Western R. Co.* v. *Sharp*, 10 Ex. 451. See *Re Catlin*, 18 Beav. 514.

(*z*) *Edgell* v. *Day*, L. R., 1 C. P. 80; 35 L. J., C. P. 7; 1 Harr. & R. 8.

(*a*) See *Robertson* v. *Fleming*, 4 Macq. H. L. Ca. 167, *per Campbell*, C. J., as to a third party not being able to sue. *Fish* v. *Kelly*, 17 C. B., N. S. 194.

(*b*) As to the measure of damages, see *Cockburn* v. *Edwards* (C. A.) 16 Ch. D. 393; 51 L. J., Ch. 46. When negligence is charged against a defendant solicitor, the charge should be clearly stated on the pleadings. *Bettyes* v. *Maynard* (C. A.) 31 W. R. 461; 49 L. T. 389.

(*c*) As to indicting a solicitor for improperly making away with property entrusted to his care, see 24 & 25 V. c. 96, s. 75, noticed post; and ... 24 & 25 V. c. 96, s. 3; 2 Russ. on Crimes, 135, 390.

(*d*) *Lewis* v. *Samuel*, 8 Q. B. 685; 15 L. J., Q. B. 218.

(*e*) *Hill* v. *Featherstonhaugh*, 7 Bing. 569: *In re Barrow*, 24 L. J., Ch. 126.

(*f*) *Hill* v. *Featherstonhaugh*, supra: *Huntley* v. *Bulwer*, 6 Bing. N. C. 111; 8 Sc. 325: *Hopkinson* v. *Smith*, 1 Bing. 13; 7 Moore, 237: *Shaw* v. *Arden*, 9 Bing. 287; 2 M. & Sc. 341: *Symes* v. *Nipper*, 12 A. & E. 377, n.: *Long* v. *Orsi*, 18 C. B. 610; 26 L. J., C. P. 127: *Stokes* v. *Trumper*, 2 Kay & J. 232. See *Montriou* v. *Jefferys*, 2 Car. & P. 113: *Cox* v. *Leech*, 1 C. B., N. S. 617; 26 L. J., C. P. 125, where an action was brought in an inferior Court and a commission to examine witnesses was necessary. *Chapman* v. *Van Toll*, 8 El. & Bl. 396; 27 L. J., Q. B. 1, where a solicitor was held entitled to his costs down to trial, though the matter was referred at the trial, and he could have taken out a summons to have it referred at an earlier stage. *Hatch* v. *Lewis*, 7 H. & N. 867; 31 L. J., Ex. 26.

Shaw v. *Arden*, supra. See *Alderson*, J., 9 Bing. at p. 291. *Fletcher* v. *Winter*, 3 F. & F. 136.

(*i*) *Templer* v. *M'Lachlan*, 2 N. R. 193: *Johnson* v. *Alston*, 1 Camp. 176: *Penmore* v. *Birnie*, 2 Stark. 59. See *Mandel* v. *Steel*, 8 M. & W. 871: *Davis* v. *Hedges*, L. R., 6 Q. B. 687; 40 L. J., Q. B. 276.

(*k*) *Dax* v. *Ward*, 1 Stark. 409.

negligence, by which all the previous steps become useless in the result, he cannot recover for any part of the business done (*l*). Whether or not the work is wholly useless from the negligence is a question of fact (*m*).

Liability for acts of partner.

Liability for acts of Partner.]—A solicitor is liable for the act of his partner within the scope of the partnership business, even although he has no actual notice of them (*n*). One of two solicitors in partnership has no implied authority to bind his partner by a promissory note in the name of the firm, though given for their debt (*o*), or by drawing or indorsing a bill of exchange (*p*). Nor has one solicitor in partnership implied authority to bind the firm by a guarantee (*q*). A solicitor is liable for a fraud or breach of trust committed by his partner (*r*). Formerly this liability was not discharged by bankruptcy (*s*), but now, unless he has been a party to the fraud or breach of trust, it is (*t*).

Stating whether writ issued by him.

Solicitor stating whether Writ issued by him—Names, &c. of Firm.]—By *R. of S. C., Ord. VII. r.* 1, "Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing (*u*) made by or on behalf of any defendant who has been served therewith or who has appeared thereto, declare forthwith in writing whether such writ has been issued by him or with his authority or privity (*x*); and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge." This rule is practically the same as sect. 7 of the *Com. Law Proc. Act*, 1852, except that the provision requiring the solicitor, if he answered in the affirmative, to declare the profession, occupation or quality and place of abode of the plaintiff, has been

(*l*) *Bracey* v. *Carter*, 12 A. & E. 373. See *Bulmer* v. *Gilman*, 4 Sc. N. R. 781; 4 M. & Gr. 108: *Cox* v. *Leech*, supra: *Stokes* v. *Trumper*, 2 Kay & J. 232.

(*m*) *Bracey* v. *Carter*, supra: *Hill* v. *Featherstonhaugh*, supra, n. (*c*).

(*n*) *Cleather* v. *Twisden*, 24 Ch. D. 731; 53 L. J., Ch. 365; 49 L. T. 653; 32 W. R. 198: *Biggs* v. *Bree*, 51 L. J., Ch. 363; 30 W. R. 132, solicitor held liable for misappropriation of deposit by partner. See *Blair* v. *Bromley*, 5 Hare, 542; 16 L. J., Ch. 105; aff. on appeal, Id. 496: *Re Manby*, 3 Jur., N. S. 259; 26 L. J., Ch. 313; nom. *Manby* v. *Cooper*: *Sims* v. *Brutton*, 5 Exch. 802; 20 L. J., Ex. 41, where it was held that one partner was not liable for mortgage money received by the other without authority: *Harman* v. *Johnson*, 22 L. J., Q. B. 297, where one partner received money to invest on mortgage. *Plumer* v. *Gregory*, L. R., 18 Eq. 621; 43 L. J., Ch. 626, where one partner held not liable for money borrowed by another copartner in name of firm. And see *Eager* v. *Barnes*, 31 Beav. 579: *Atkinson* v. *Mackreth*, L. R., 2 Eq. 570; 35 L. J., Ch. 624: *St. Aubyn* v. *Smart*, L. R., 3 Ch. 647: *Chilton* v. *Cooke*, 37 L. T. 607.

(*o*) *Hedley* v. *Bainbridge*, 3 Q. B. 316; 11 L. J., Q. B. 293: *Forster* v. *Mackreth*, 36 L. J., Ex. 94: *Garland* v. *Jacomb*, L. R., 8 Ex. 216.

(*p*) *Garland* v. *Jacomb*, supra.

(*q*) *Haselham* v. *Young*, 5 Q. B. 833; 13 L. J., Q. B. 205.

(*r*) *Cooper* v. *Pritchard*, 11 Q. B. D. 351; 52 L. J., Q. B. 526: *Cleather* v. *Twisden*, 24 Ch. D. 731; 53 L. J., Ch. 365; 49 L. T. 653; 32 W. R. 193.

(*s*) Id.

(*t*) Bank. Act, 1883, s. 30 (1).

(*u*) Chit. F. p. 97.

(*x*) Id. pp. 97, 98.

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omitted. This omission is, however, supplied by the indorsement of address required by *Ord. IV. r.* 1.

By *Ord. VII. r.* 2, "When a writ is sued out by partners in the name of their firm (*z*), the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant (*a*), forthwith declare in writing the names and places of residence of all the persons constituting the firm (*b*) on whose behalf the action is brought. And if the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct (*c*). And when the names of the partners are so declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm."

Proceedings under this rule should be taken at an early stage of the cause, or within a reasonable time after the circumstances which render them desirable have come to the defendant's knowledge. There must be a demand in writing as required by the rule before the Court or judge will grant an order under it (*d*).

As to the plaintiff's solicitor indorsing the plaintiff's address on the writ of summons, &c., see *Ord. IV. r.* 1, *post*, *Ch. XIII.* It seems a solicitor may, where circumstances render it necessary, in general, be compelled to disclose the place of his client's residence, if the application be made in proper time (*e*). It may be added, that, previous to the Statute of Westminster, the plaintiff appeared in person, unless he had a special writ of authority authorizing him to appear by attorney. Then the pleadings were *ore tenus*, and a defendant had the privilege of seeing and knowing who the plaintiff was.

A solicitor is not bound to tell where his client is in order to enable a person to serve him with process (*f*).

If defendant be not satisfied with the information given, he should, in a reasonable time afterwards, apply for an order for better or more ample information (*g*). If the solicitor persist in giving improper information under the order, or give false or fraudulent information, he would be guilty of a contempt of Court, and might be punished accordingly for it by attachment (*h*). It seems, also, that a plaintiff who wilfully causes his solicitor to deliver a false address, the solicitor having been required by a judge's order to declare the place of the plaintiff's abode, is guilty of a contempt of Court, and liable to be punished by attachment (*i*).

(*z*) The power of thus suing is given by Ord. XVI. r. 14.

(*a*) Chit. F. p. 534.

(*b*) Id. p. 535.

(*c*) Id.

(*d*) *Malpass* v. *Mudd*, 3 H. & N. 246; 27 L. J., Ex. 367. See *Brown* v. *Wigens*, 7 L. T. 622.

(*e*) *Johnson* v. *Birley*, 5 B. & Ald. 540; 1 D. & R. 174: *Gynn* v. *Kirby*, 1 Str. 402. See *Heath* v. *Crealock*, 42 L. J., Ch. 455: *Taylor* v. *Harris*, 4 B. & Ald. 93: *Hooper* v. *Harcourt*, 1 H. Bl. 534: *Braceby* v. *Dalton*, 2 Str. 705: *Shindler* v. *Roberts*, Barnes, 126: *Hodson* v. *Gamble*, 3 Dowl. 174, where the information given was insufficient.

(*f*) *Shaw* v. *Neale*, 6 H. L. C. 591.

(*g*) See *Smith* v. *Bond*, 11 M. & W. 326; 1 D. & L. 287.

(*h*) *Neal* v. *Holden*, 3 Dowl. 493.

(*i*) *Smith* v. *Bond*, 13 M. & W. 594; 2 D. & L. 460.

Liabilities of, to third Parties, &c.]—A solicitor will be liable to a third party if he enters into an agreement as principal, though really for his client (*k*). Thus, where the solicitors for plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by plaintiff and defendant, and that costs should be taxed for defendant in a certain manner, it was held that an action would lie against the plaintiff's solicitor to recover the costs when taxed in the mode specified (*l*). Sometimes a question arises upon the construction of the agreement, whether the solicitors have contracted as principals or agents. Where the solicitors of the assignees of a bankrupt tenant, upon whose land a distress had been put by the landlord, gave a written undertaking, that they, "as solicitors" to the assignees, would pay to the landlord such rent as might be due, provided it did not exceed the value of the effects distrained, they were held to be personally liable (*m*). But not so where they entered into a contract, which stated "we hereby, on behalf of the assignees, consent," &c. (*n*). In some cases, however, very similar to this, solicitors have been held personally liable (*o*). A., a solicitor, on obtaining from B., another solicitor, the papers belonging to a former client of B., wrote to B. as follows:—"Out of any monies which I may receive on this or any other proceeding, on her account, I will hand you such balance as may remain due of your bill of costs as settled at 9*l.*:" it was held, that A. was bound, upon this undertaking, to pay over to B. the amount of the costs due to him from the first monies he should receive on account of the client, without deducting therefrom any costs that might be due to himself for recovering such monies or otherwise (*p*). As to what undertakings the Court will enforce in a summary way, *see post*, p. 119. If a solicitor, without authority, enter into a contract on behalf of his client, he cannot be sued as a principal, but he is liable in an action for falsely representing that he had authority (*q*). An action for money had and received is not, under ordinary circumstances, maintainable against a solicitor at the suit of a party other than his client, in respect of money which has come to the solicitor's hands for the benefit of such third party (*r*). Where lands having been mortgaged, were reconveyed to the mortgagor on payment by him of the principal and interest, and, in order to obtain the deeds from

(*k*) *Iveson* v. *Conington*, 1 B. & C. 160: *Hall* v. *Ashurst*, 1 C. & M. 714: *Watson* v. *Murrell*, 1 C. & P. 307: *Prosser* v. *Allen*, Gow, 117: *Kendray* v. *Hodgson*, 5 Esp. 228.

(*l*) *Iveson* v. *Conington*, supra: *Hall* v. *Ashurst*, supra.

(*m*) *Burrell* v. *Jones*, 3 B. & Ald. 47. See *Tanner* v. *Christian*, 4 E. & B. 591; 24 L. J., Q. B. 91: *Lennard* v. *Robinson*, 5 E. & B. 125; 24 L. J., Q. B. 275.

(*n*) *Lewis* v. *Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311.

(*o*) See the cases referred to and observed upon in *Lewis* v. *Nicholson*, supra. Cp. now *Gadd* v. *Houghton*, 1 Ex. D. 357, C. A.: *Hough* v. *Mazaros*, 4 Ch. D. 104: *Ogden* v. *Hall*, 40 L. T. 751: *Long* v. *Millar*, 4 C. P. D. 450.

(*p*) *Tharratt* v. *Trevor*, 21 L. J., Ex. 59; 7 Ex. 161.

(*q*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; 18 L. J., Q. B. 274. See *Collow* v. *Jenkinson*, 6 Ex. 666; 20 L. J., Ex. 321: *Lewis* v. *Nicholson*, supra.

(*r*) See *Stephens* v. *Badcock*, 3 B. & Ad. 354: *Bamford* v. *Shuttleworth*, 11 A. & E. 926. See *Edgell* v. *Day*, L. R., 1 C. P. 80; 35 L. J., C. P. 7: *Milner* v. *Rawlings*, L. R., 2 Ex. 249; 36 L. J., Ex. 250.

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the mortgagee's solicitors, who claimed to have a lien upon them for their bill of costs against the mortgagee, the mortgagor was obliged to pay these costs under protest: it was held, that he might recover them from the solicitors as money had and received to his use (*s*). A contract will not, in general, be implied by law, so as to render the solicitor liable (*t*)—as to pay a witness who has been subpœnaed (*u*)—unless credit be given to him according to the usual course of business, as by a town agent or a special bailiff (*x*). He is personally liable for the ordinary fees payable to the officers of the Court (*y*). As to a solicitor being liable to the sheriff for his charges for executing a writ of execution, *see post, Ch. LXXV.*

Liability of solicitor for a tort.

A solicitor will be liable if he be concerned directly in the commission of a tortious act, and in some cases he is liable though not directly concerned. A solicitor who deliberately directs the execution of a warrant is liable to an action if it prove bad; and although, if the act of the solicitor in handing over the warrant for execution be simply ministerial, and be divested of any further proof of concurrence on his part, he will not, it seems, be liable; yet, if his conduct in or after the performance of such act show a motive beyond the mere wish to discharge his professional duty, it will be otherwise (*z*). An action cannot be maintained against a solicitor, who, being retained to sue a person, by mistake, and without malice, takes all the proceedings to judgment and execution against another of the same name (*a*). Where solicitors conducting the business of a fiat in bankruptcy took out a summons to attend before a commissioner, under 6 *G.* 4, *c.* 16, *s.* 33, which was disobeyed, and afterwards obtained a warrant of the commissioner to arrest and bring before him for examination the party so summoned, which warrant proved invalid, the solicitors were held not to be liable in trespass, they having taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it (*b*). As to a solicitor's liability when a wrong person's goods are taken under a *fi. fa.*, *see post, Ch. LXXV.* One case on this subject may

(*s*) *Wakefield* v. *Newbon*, 6 Q. B. 276, 281; 13 L. J., Q. B. 258: *Davies* v. *Vernon*, 6 Q. B. 443; 14 L. J., Q. B. 30: *Smith* v. *Sleap*, 12 M. & W. 585, 588. See *Harper* v. *Williams*, 4 Q. B. 219, with reference to the degree of privity which may exist between defendant and plaintiff's solicitor.

(*t*) *Robins* v. *Bridge*, 3 M. & W. 114; 5 Dowl. [illegible]: *Hartop* v. *Juckes*, 2 M. & Sel. 3[illegible]: *Russel* v. *Reece*, 2 Car. & K. 669.

(*u*) *Robins* v. *Bridge*, supra. See *Hartop* v. *Juckes*, supra: *Hart* v. *White*, Holt, 376: *Bates* v. *Sturges*, 2 M. & Sc. 172; 7 Bing. 585, as to a promise by the solicitor after the trial. As to the solicitor's liability for refreshments supplied to witnesses, see *Fendall* v. *Nokes*, 7 Sc. 647. He is not in general liable to a skilled witness retained to make surveys, &c.: *Lee* v. *Evecrest*, 26 L. J., Ex. 334: 2 H. & N. 285. See Ch. LXVII.

(*x*) *Scrace* v. *Whittington*, 2 B. & C. 11: *Foster* v. *Blakelock*, 5 B. & C. 328: *Kennedy* v. *Gouveia*, 3 D. & R. 503: *Townshend* v. *Carpenter*, R. & M. 314. See *Becke* v. *Cattell*, 4 Sc. N. R. 246; 3 M. & Gr. 480; ante, p. 32.

(*y*) *Robins* v. *Bridge*, supra, n. (*t*): *per Cur. Ex p. Hartop*, 12 Ves. 352.

(*z*) *Green* v. *Elgie*, 5 Q. B. 99; 14 L. J., Q. B. 162: the warrant in this case was a warrant of commitment by the Court of Review. See *Buchanan* v. *Kinning*, 2 L. M. & P. 526, Ex. Ch.; 20 L. J., C. P. 252: *Eggington* or *Egginton* v. *Mayor of Lichfield*, 5 E. & B. 100; 24 L. J., Q. B. 360.

(*a*) *Davies* v. *Jenkins*, 11 M. & W. 745; 12 L. J., Ex. 386.

(*b*) *Cooper* v. *Harding*, 7 Q. B. [illegible]

be here noticed:—A solicitor indorsed a writ of *fi. fa.* in a cause of G. *v.* D. thus:—"The defendant resides at W. in the county of B. and is an innkeeper, levy," &c. D. the defendant in the cause resided at W. and assisted in conducting the business of A., who was his mother-in-law and kept an inn there, and the goods on the premises were, in fact, her property, D. being in no way interested in them; the sheriff having seized A.'s goods at the inn under the *fi. fa.*, it was held that there was evidence to go to the jury that the solicitor directed the sheriff to seize the goods, so as to make him liable in trespass (*c*). If a solicitor merely hands the precept to the bailiff to be executed, and the bailiff executes it beyond the bounds of his franchise, the solicitor will not be liable to an action for the writ being executed out of the jurisdiction (*d*). If, indeed, the bailiff were to communicate to the solicitor his intention of executing the writ in a particular house, which the solicitor knew to be out of the jurisdiction, his acquiescence in an act illegal within his own knowledge might have the effect of making the solicitor jointly liable as a trespasser (*e*). As to a solicitor's liability for anything done under a writ of execution after it has been set aside, *see post, Ch. LXXIV.* *See Williams* v. *Smith*, 14 C. B., N. S. 596, where on appeal an attachment issued out of Chancery was set aside.

When Court will enforce their undertakings.

Enforcing their Undertakings by Application to the Court or a Judge.]—In general, where a solicitor in an action gives an undertaking in his character of a solicitor, the Court or a judge will enforce such undertaking or punish the breach of it in a summary way.

To appear.

By *Ord. XII. r.* 18, "A solicitor not entering an appearance or putting in bail, or paying money into Court in lieu of bail in an Admiralty action in rem, in pursuance of his written undertaking so to do, shall be liable to an attachment" (*f*). An attachment will not, it seems, be granted against the solicitor for non-compliance with the undertaking, unless he has been first requested to comply with it (*g*); and a judgment signed without such request would be in most cases set aside.

Other undertakings.

So, if a solicitor, in his character and as an incident to his office of solicitor, gives an undertaking in a cause or other proceeding, the Court or a judge will in like manner enforce it or punish the breach of it in a summary way (*h*). Thus, where defendant's solicitor had given an undertaking to pay the debt, in consequence of which plaintiff stayed proceedings, the Court enforced the undertaking,

(*c*) *Rowles* v. *Senior*, 8 Q. B. 677; 15 L. J., Q. B. 231. See *Childers* v. *Wooler*, 29 L. J., Q. B. 129, where under similar circumstances it was held that the solicitor who acted *bonâ fide* was not liable to the sheriff; *Wightman*, J., diss.

(*d*) *Sowell* v. *Champion*, 6 A. & E. 407: *Rundle* v. *Little*, 6 Q. B. 177.

(*e*) *Per Cur.*, 6 A. & E. 417, 418.

(*f*) See the former rule, R. 3, H. T. 1853. As to the mode of obtaining an attachment, see Vol. 2, Ch. LXXXVIII.

(*g*) *Jacob* v. *Magnay*, 12 L. J., Q. B. 93.

(*h*) *In re Woodfin and Wray*, 51 L. J., Ch. 427; 30 W. R. 422. See ante, p. 117, as to when a solicitor is personally liable on his undertaking. As to undertakings to put in bail for defendant, see *Rogers* v. *Reeves*, 1 T. R. 422: *Sedgworth* v. *Spicer*, 4 East, 596; *Lewis* v. *Knight*, 1 Dowl. 261; 1 M. & Sc. 358; 8 Bing. 271.

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although it was void under the 4th section of the Statute of Frauds (*i*). So, where a defendant's solicitor, in order to induce the plaintiff's solicitor to consent to the release of the defendant who was in prison for contempt, gave an undertaking to pay a stated sum for costs of the motion to commit, the Court made an order that the solicitor should pay the sum agreed on and the costs of the motion to compel him to do so (*k*). And where a solicitor was employed to arrange terms for the settlement of an action, and accordingly drew up a promissory note for the amount of the debt and costs, which defendant signed, and the solicitor also gave his own undertaking to pay on default in so doing by defendant, this was held to be an undertaking given in the character of a solicitor: although it appeared that the party giving it was not employed as solicitor in the action, and it was sworn that no charge had been made by him, nor anything paid to him by defendant or on his account for preparing the note and undertaking, and that the solicitor had never previously acted in any matter or proceeding as a solicitor for defendant (*l*). So, where a solicitor attending and prosecuting a commission of lunacy promised the under-sheriff to pay the fees due to him, the commissioners and jury, upon the commission being returned, but failed to do so, the Court of Queen's Bench granted a rule ordering him to pay the amount, upon the ground, that, when his undertaking was accepted, credit was given to him in his professional character (*m*). And where a solicitor received a promissory note from the father of an articled clerk as a fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and the solicitor negotiated it contrary to his undertaking, the Court compelled him to take it up (*n*). The Court enforced an undertaking nearly three years after it was given, repeated applications for payment having been made from time to time (*o*).

When the Court will not interfere.

The Court or a judge, however, will not interfere in a summary way to enforce a solicitor's undertaking if not given in his character and as an incident to his office of solicitor, but will leave the party to his action (*p*). Thus, where a solicitor, as a party in a cause, gave his undertaking to indemnify the sheriff, the Court refused to enforce it (*q*). So they have refused to enforce his undertaking to

(*i*) *Re Hilliard*, 2 D. & L. 919; 9 Jur. 664; 14 L. J., Q. B. 225; *Re Greaves*, 1 C. & J. 374, n.: *Re Paterson*, 1 Dowl. 468: *Evans* v. *Duncombe*, 1 C. & J. 372: *Hellings* v. *Jones*, 10 Moore, 360, where the client died after the undertaking was given.

(*k*) *In re Woodfin and Wray*, supra.

(*l*) *Re Fairthorne*, 3 D. & L. 548; 10 Jur. 287; 1 B. C. Rep. 40; 15 L. J., Q. B. 131: *Re Gee*, 2 D. & L. 997.

(*m*) *Ex p. Bodenham*, 8 A. & E. 959. And see *Ex p. Hughes*, 5 B. & Ald. 482.

(*n*) *Ex p. Gardner*, 2 Dowl. 520.

(*o*) *Titterton* v. *Sheppard* or *Shepherd*, 1 B. C. Rep. 99; 10 Jur. 715; 3 D. & L. 775; 15 L. J., Q. B. 402: *Re Swan*, 15 L. J., Q. B. 402.

(*p*) *Walker* v. *Arlett*, 1 Dowl. 61: *Ex p. Watts*, Id. 512: *Re Greaves*, 1 C. & J. 374, n.: *Re Bateman*, 2 Dowl. 161: *Re Kearns*, 11 Jur. 521, B. C.: *Re Webb*, 2 D. & L. 932; 9 Jur. 538; 14 L. J., Q. B. 244, where a solicitor, who was intrusted by executors with money to pay legacy duty, had given an undertaking so to apply it, but had failed so to do; and the Court refused to exercise its summary jurisdiction to compel him to refund the money, it not appearing that he had been otherwise employed by the executors in his professional character, or that the employment in question was one which it necessarily required a solicitor to perform.

(*q*) *Northfield* v. *Orton*, 1 Dowl. 415.

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breach (*y*).

The application to e
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affidavit of the executi
will suffice (*b*). If att
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the opposite party (*c*).
the notice of motion i
LII. r. 4). See fully a

(*r*) *Ex p. Clifton*, 5 Dow
(*s*) *Ex p. Evans*, 9 Dow
Jur. 991.
(*t*) *Ex p. Deane*, 2 Dowl.
(*u*) *Miller* v. *James*, 8 M
(*x*) *Staite* v. *Haddon*, 9 I
(*y*) *Morris* v. *James*, 6 I
See *Thompson* v. *Gordon*, 15
610; 4 D. & L. 49; 15 L. J.
(*z*) *Ex p. Bodenham*, 8
959. See *Re Aitkin*, 4 B. &

indemnify against costs, in an action where, at his instance, a party allowed his name to be used as plaintiff; for it could not be said that the solicitor was dealt with as such (*r*). And the same where a solicitor, being employed to sue for a debt, gave his own undertaking to pay it to his own client (*s*). And the Court will not compel a solicitor to pay over or account for monies received by him during his clerkship (*t*). Of course, the Court or judge will not interfere where the undertaking has been waived. Thus, where defendants' solicitor, on their being sued by plaintiff, undertook, by letter, to procure their signature to a *cognovit* for payment of debt and costs, which he failed to do, but plaintiff afterwards said he would proceed with the action: it was held, that, as the solicitor's undertaking had been virtually waived, he could not be called on by the Court to perform it (*u*). And where a solicitor undertook to pay the sum which should be awarded to be paid by his client in a particular reference, by which the arbitrator had to make his award by a particular day, but did not do so, and therefore a judge's order for enlarging the time was made after that day by consent, the solicitor acting on that occasion for his client: the Court held, that the solicitor was discharged from his undertaking, he not having recognized it after the original time for making the award had expired (*x*). Though the Court will hold a solicitor strictly to the performance of such undertakings, and punish him for the breach of them, yet it seems that he will not be summarily compelled to indemnify the person to whom such an undertaking has been given against damages arising from its breach (*y*).

To whom application to be made.

The application to enforce the undertaking should be made to a judge at chambers, or to the Court in which the action is pending, where there is one pending (*z*). The application must be made on summons or notice of motion (*a*).

Affidavit.

It must be supported by an affidavit setting out the undertaking and showing such other facts as will induce the Court or judge to interfere. If the undertaking be attested, it is not necessary for the attesting witness to make an affidavit of the execution. The affidavit of some one else as to this will suffice (*b*). If attested by a solicitor, the Court or judge will compel him to make the affidavit, though he may be the solicitor of the opposite party (*c*). A copy of the affidavit must be served with the notice of motion if the application is made to the Court (*Ord. LII. r.* 4). See fully as to attachment, *post*, *Ch. LXXXIII.*

(*r*) *Ex p. Clifton*, 5 Dowl. 218.
(*s*) *Ex p. Evans*, 9 Dowl. 106; 4 Jur. 991.
(*t*) *Ex p. Deane*, 2 Dowl. 533.
(*u*) *Miller* v. *James*, 8 Moore, 208.
(*x*) *Staite* v. *Haddon*, 9 Dowl. 995.
(*y*) *Morris* v. *James*, 6 Dowl. 514. See *Thompson* v. *Gordon*, 15 M. & W. 610; 4 D. & L. 49; 15 L. J., Ex. 341.
(*z*) *Ex p. Bodenham*, 8 A. & E. 959. See *Re Aitkin*, 4 B. & Ald. 47; *Sharp* v. *Hawker*, 3 Bing. N. C. 66; 3 Scott, 396; *In re Garland* or *Garwood*, 6 Dowl. 512. It would appear that the application may now be made to a Master at Chambers.
(*a*) Ord. LIV. r. 2; Ord. LII. r. 1: *In re Copp*, 32 W. R. 25.
(*b*) C. L. P. Act, 1854, s. 26.
(*c*) *Doe* v. *Roe*, 6 Dowl. 518; 2 Jur. 468.

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6. *Their Remuneration, Bills of Costs, Rights, Remedies, and other Matters as to.*

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(a.) *Statutes as to.*

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Restraining proceedings.

Taxation after a month on application of solicitor or party chargeable.

The 6 & 7 *V. c.* 73, *s.* 37, enacts, "That, from and after the passing of this Act, no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one [calendar, sect. 48, *ante*, p. 41] month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill; and upon the application of the party chargeable by such bill *within such month* it shall be lawful, in case the business contained in such bill or any part thereof shall have been transacted in the High Court of Chancery, or in any other Court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of law (*d*) or equity, for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other Court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any judge of either of them, and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator or assignee, thereupon to be taxed and settled by the proper officer of the Court in which such reference shall be made without any money being brought into Court; and the Court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference; and in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or

(*d*) See *Cowdell* v. *Neale*, 1 C. B., N. S. 332; 12 Jur., N. S. 1248; 26 L. J., C. P. 37, where business had been transacted before a magistrate.

solicitor, or the executor, administrator or assignee of the attorney or solicitor, whose bill may have been so as aforesaid delivered, sent or left, or upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the Court or judge making such reference shall think proper; and such Court or judge may restrain such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference upon such terms as shall be thought proper: *Provided always*, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a *verdict* shall have been obtained or a writ of *inquiry executed* in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, or after the expiration of *twelve months* after such bill shall have been delivered, sent, or left as aforesaid, except under *special circumstances*, to be proved to the satisfaction of the Court or judge to whom the application for such reference shall be made; and upon every such reference if either the attorney or solicitor, or executor, administrator or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte;* and in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the *costs* of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; (that is to say), if such bill when taxed be *less by a sixth part* than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall *not be less by a sixth part* than the bill delivered, sent, or left, then the party chargeable with such bill making such application or so attending shall pay such costs; and every order to be made for such reference as aforesaid shall direct the officer to whom such reference shall be made to *tax such costs of such reference* to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference, if payable: *Provided also*, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or judge shall be at liberty to make thereupon any such order as such Court or judge may think right respecting the payment of the costs of such taxation: *Provided also*, that, where such reference as aforesaid shall be made when the same is not authorized to be made except under special circumstances, as hereinbefore provided, then the said Court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference: *Provided also*, that it shall be lawful for the said respective Courts and judges, in the same cases in

Taxation after twelve months or verdict or writ of inquiry.

Ex parte taxation on non-attendance.

Costs of taxation.

Order to direct taxation.

Master may certify special facts.

Costs on such certificate.

Courts may order a de-

PART I.

very of bill, and delivery up of deeds, &c.

which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor, by such Courts or judges respectively, where any such business had been transacted in the Court in which such order was made: *Provided also*, that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, in proving a compliance with this Act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or inclosed in or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent, or left, was not such a bill as constituted a bonâ fide compliance with this Act" (*e*).

Evidence of delivery.

Bills may be taxed upon application of third parties.

By sect. 38, "Where any person not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid: *Provided always*, that, in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the Court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application" (*f*).

(*e*) By 38 & 39 V. c. 79, s. 2, the next proviso in this section is repealed; and by sect. 2, "it shall be lawful for any judge of the superior courts of law and equity to authorise an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, and also to refer his bill of fees, charges and disbursements, and the demand of such attorney and solicitor thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, although one month shall not have expired from the delivery of the bill of fees, charges, or disbursements, on proof to the satisfaction of the said judge that there is probable cause for believing that the party chargeable therewith is about to quit England, or to become a bankrupt or a liquidating or compounding debtor, or to take any other steps or do any other act which, in the opinion of the judge, would tend to defeat or delay such attorney or solicitor in obtaining payment."

(*f*) This section only applies to solicitor and client costs. *Re Grundy & Co.*, 17 Ch. D. 108; 50 L. J., Ch. 467; 44 L. T. 541. C. A.: *In re Cowdell*, 49 L. J., Ch. 246—Fry, J.

Chancellor may direct taxation of bills chargeable on executors, &c.

By sect. 39, "It shall be lawful, in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the Lord High Chancellor or the Master of the Rolls, if in his discretion he shall think fit, upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same, and such attorney's or solicitor's, or executor's, administrator's, or assignee's demand thereupon, to be taxed and settled by the proper officer of the High Court of Chancery, with such directions, and subject to such conditions as such judge shall think fit, and to make such order as such judge shall think fit, for the payment of what may be found due, and of the costs of such reference, to or by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases; and in exercising such discretion as aforesaid, the said judge may take into consideration the extent and nature of the interest of the party making the application: *Provided always*, that, where any money shall be so directed to be paid by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, it shall be lawful for such judge, if he shall think fit, to order the same, or any part thereof, to be paid to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill, he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor had."

Copy of bill to be delivered to person making application for reference for taxation.

By sect. 40, "For the purpose of any such reference, upon the application of the person not being the party chargeable within the meaning of the provisions of this Act, as aforesaid, or of a party interested as aforesaid, it shall be lawful for such Court or judge to order any such attorney or solicitor, or the executor, administrator, or assignee of any such attorney or solicitor, to deliver to the party making such application a copy of such bill, upon payment of the costs of such copy: *Provided always*, that no bill which shall have been previously taxed and settled shall be again referred, unless, under special circumstances, the Court or judge to whom such application is made shall think fit to direct a re-taxation thereof."

No re-taxation.

Taxation after payment.

By sect. 41, "The payment of any such bill as aforesaid shall in no case preclude the Court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such Court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or judge shall seem right, *provided* the application for such reference be made within twelve calendar months after payment" (*g*).

Within twelve months.

(*g*) See post, p. 142.

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Power for taxing officer to request officers of other Courts to tax portions of bill.

By sect. 42, "In all cases in which such bill shall have been referred to be taxed and settled, the officer to whom such reference is made shall be at liberty to request the proper officer of any other Court having such an officer to assist him in taxing and settling any part of such bill, and such officer so requested shall thereupon proceed to tax and settle the same, and shall have the same powers, and may receive the same fees in respect thereof as upon a reference to him by the Court of which he is such officer, and shall return the same, with his opinion thereon, to the officer who shall have so requested him to tax and settle the same; and the officer to whom such reference is made shall not be paid any fee for that portion of the bill which shall have been so taxed and settled by the officer of such other Court at his request."

Applications for taxing bill, how to be made.

Allocatur final.

By sect. 43, "All applications made under this Act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor; and that, upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of Court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the course of the Court in which such reference shall be made; and in case such reference shall be made in any Court of common law, it shall be lawful for such Court or any judge thereof to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such Court or judge shall deem proper."

Judgment may be entered up, or other order made.

(b.) *Agreements as to Costs.*

Attorneys Act, 1870.

By the Attorneys and Solicitors Act, 1870 (33 & 34 *V. c.* 28) (*h*), passed 14th July, 1870, which does not extend to Scotland, it is enacted,—

Interpretation of terms.

Sect. 3. In the construction of this Act, unless where the context otherwise requires, the words following have the significations, hereinafter respectively assigned to them; that is to say,

The words "attorney or solicitor" mean an attorney, solicitor, or proctor, qualified according to the provisions of the Acts for the time being in force, relating to the admission and qualification of attorneys, solicitors, or proctors:

"Person" includes a corporation:

"Client" includes any person who, as a principal or on behalf of another person, retains or employs, or is about to retain or employ, an attorney or solicitor, and any person who is or may be liable to pay the bill of an attorney or solicitor for any services, fees, costs, charges, or disbursements.

(*h*) This statute is not retrospective. *Ward* v. *Eyre*, 15 Ch. D. 130; 49 L. J., Ch. 657. It does not apply to business to which the Solicitors Remuneration Act, 1881, relates. Sect. 9 of the Sol. Rem. Act, 1881.

The remuneration of attorneys and solicitors may be fixed by agreement.

Sect. 4. "An attorney or solicitor may make an *agreement in writing* (*i*) with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed (*k*) by a taxing officer of a Court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require (*l*) the opinion of a Court or a judge to be taken thereon by motion or petition, and such Court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled, and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made.

Amount payable under agreement not to be paid until allowed by taxing officer.

Saving of interests of third parties.

Sect. 5. Such an agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of such costs, unless such person has otherwise agreed: Provided always, that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agree-

(*i*) The agreement must be signed by both parties. *Re Lewis, Ex p. Munn*, 1 Q. B. D. 724; 45 L. J., Q. B. 516: *In re Raven, Ex p. Pitt*, 45 L. T. 742; 30 W. R. 134. In the former case, it was held that a document containing the terms agreed or signed by the solicitor only, and verbally assented to by the client, would not suffice. The dicta of Lord *Coleridge*, in the case as reported, also go as far as to show that both parties must sign their names on one document; but it is submitted that this cannot be necessary. See per *Thesiger*, L. J., *Bewley* v. *Atkinson* (13 Ch. D. at. p. 299). A mere signature to an account containing a lump sum verbally agreed on, stating that the client signing it had examined the account and found it correct, will not suffice. *In re Fernandes* (W. N. 1878, 57, M. R.). An agreement by a solicitor with his client to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him on such action, need not be in writing. *Jennings* v. *Johnson*, L. R., 8 C. P. 425.

(*k*) For form of agreement, see Chit. F. p. 31.

(*l*) The opinion of the Court as to the fairness and validity of the agreement cannot be required before any money is payable under it. *Re Attorneys and Solicitors Act*, 1 Ch. D. 573; 45 L. J., Ch. 47, post, p. 123.

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ment more than the amount payable by the client to his own attorney or solicitor under the same.

Agreements shall exclude further claims.

Sect. 6. Such an agreement shall be deemed to exclude any further claim of the attorney or solicitor beyond the terms of the agreement in respect of any services, fees, charges or disbursements in relation to the conduct and completion of the business in reference to which the agreement is made, except such services, fees, charges or disbursements, if any, as are expressly excepted by the agreement.

Reservation of responsibility for negligence.

Sect. 7. A provision in any such agreement that the attorney or solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such attorney or solicitor, shall be wholly void.

Examination and enforcement of agreements.

Sect. 8. *No action or suit* shall be brought or instituted upon any such agreement (*m*); but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition (*n*) of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges or disbursements in respect of which the agreement is made, by the Court in which the business, or any part thereof, was done, or a judge thereof; or if the business was not done in any Court, then where the amount payable under the agreement exceeds fifty pounds, by any superior Court of law or equity, or a judge thereof, and where such amount does not exceed fifty pounds, by the judge of a County Court which would have jurisdiction in an action upon the agreement.

Improper agreements may be set aside.

Sect. 9. Upon any such motion or petition as aforesaid, if it shall appear to the Court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such Court or judge by rule or order in such manner and subject to such conditions, if any, as to the costs of such motion or petition as such Court or judge may think fit; but if the terms of such agreement shall not be deemed by the Court or judge to be fair and reasonable, the same may be declared void, and the Court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner and according to the same rules as if such agreement had not been made; and the Court or judge may also make such order as to the costs of and relating to such motion or petition, and the proceedings thereon, as to the said Court or judge may seem fit.

Agreements may be re-

Sect. 10. When the amount agreed for under any such agreement has been paid by or on behalf of the client, or by any person charge-

(*m*) This applies only to that part of the agreement which relates to the remuneration, and does not prevent the solicitor from bringing an action for refusal to employ him, or to allow him to do the work pursuant to an agreement. *Rees v. Williams*, L. R., 10 Ex. 200; 44 L. J., Ex. 116.

(*n*) This cannot be done before any money is payable under the agreement. *In re Att. and Sol. Act*, 1870, 1 Ch. D. 573; 45 L. J., Ch. 47. The application may be made by summons at chambers, so held by *Cave*, J. at Ch., March 20th, 1881; and see *Re Lewis*, cited ante, p. 127 (*i*); Jud. Act, 1873, s. 39. See Chit. F. p. 32.

able with or entitled to pay the same, any Court or judge having jurisdiction to examine and enforce such an agreement may, upon application by the person who has paid such amount, within twelve months after the payment thereof, if it appears to such Court or judge that the special circumstances of the case require the agreement to be re-opened, re-open the same and order the costs, fees, charges and disbursements to be taxed, and the whole or any portion of the amount received by the attorney or solicitor to be repaid by him, on such terms and conditions as to the Court or judge may seem just.

opened after payment in special cases.

Where any such agreement is made by the client in the capacity of guardian, or of trustee under a deed or will, or of committee of any person or persons whose estate or property will be chargeable with the amount payable under such agreement, or with any part of such amount, the agreement shall before payment be laid before the taxing officer of a Court having jurisdiction to enforce the agreement, and such officer shall examine the same, and may disallow any part thereof, or may require the direction of the Court or a judge to be taken thereon by motion or petition: and if in any such case the client pay the whole or any part of the amount payable under the agreement, without the previous allowance of such officer or Court or judge as aforesaid, he shall be liable at any time to account to the person whose estate or property is charged with the amount paid, or with any part thereof, for the amount so charged; and if in any such case the attorney or solicitor accept payment without such allowance, any Court which would have had jurisdiction to enforce the agreement may, if it think fit, order him to refund the amount so received by him under the agreement.

Sect. 11. Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action stipulates for payment only in the event of success in such suit, action or proceeding (*o*).

Prohibition of certain stipulations.

Sect. 12. Nothing in this Act contained shall give validity to any disposition, contract, settlement, conveyance, delivery, dealing, or transfer, which may be void or invalid against a trustee or creditor in bankruptcy, arrangement, or composition, under the provisions of the Acts relating to bankruptcy.

Not to give validity to contracts, &c. which may be void in bankruptcy.

Sect. 13. Where an attorney or solicitor has made an agreement with his client in pursuance of the provisions of this Act, and anything has been done by such attorney or solicitor under the agreement, and before the agreement has been completely performed by him, such attorney or solicitor dies or becomes incapable to act, an

Provision in case of death or incapacity of the solicitor.

(*o*) A solicitor made an agreement in writing with some clients to assert their title to certain property for a percentage of ten per cent. on the net value of the property which might be so recovered, with a proviso that in the event of no property being recovered, beyond a certain legacy of £100, the solicitor should receive his costs out of pocket only. *Semble*, the agreement was invalid under sect. 11 of the Attorneys and Solicitors Act, 1870. *In re Attorneys and Solicitors Act*, 1870, 1 Ch. D. 573; 45 L. J., Ch. 47. See *Rees* v. *Williams*, L. R., 10 Exch. 200, where the Court intimated (at p. 206) that an agreement to pay four per cent. commission was valid.

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application may be made to any Court which would have jurisdiction to examine and enforce the agreement by any party thereto, or by the representatives of any such party, and such Court shall thereupon have the same power to enforce or set aside such agreement, so far as the same may have been acted upon, as if such death or incapacity had not happened; and such Court, if it shall deem the agreement to be in all respects fair and reasonable, may order the amount due in respect of the past performance of the agreement to be ascertained by taxation, and the taxing officer in ascertaining such amount shall have regard so far as may be to the terms of the agreement, and payment of the amount found to be due may be enforced in the same manner as if the agreement had been completely performed by the attorney or solicitor.

As to change of solicitor after agreement.

Sect. 14. If, after any such agreement as aforesaid shall have been made, the client shall change his attorney or solicitor before the conclusion of the business to which such agreement shall relate (which he shall be at liberty to do notwithstanding such agreement), the attorney or solicitor, party to such agreement, shall be deemed to have become incapable to act under the same within the meaning of section thirteen of this Act; and upon any order being made for taxation of the amount due to such attorney or solicitor in respect of the past performance of such agreement, the Court shall direct the taxing master to have regard to the circumstance under which such change of attorney or solicitor has taken place; and, upon such taxation, the attorney or solicitor shall not be deemed entitled to the full amount of the remuneration agreed to be paid to him, unless it shall appear that there has been no default, negligence, improper delay or other conduct on his part affording reasonable ground to the client for such change of attorney or solicitor.

Agreements shall be exempt from taxation.

Sect. 15. Except as in this part of this Act provided, the bill of an attorney or solicitor for the amount due under an agreement (*p*) made in pursuance of the provisions of this Act shall not be subject to any taxation, nor to the provisions of 6 & 7 *V.* c. 73, and the Acts amending the same respecting the signing and delivery of the bill of an attorney or solicitor.

Part II.—General Provisions.

Security may be taken for future costs.

Sect. 16. An attorney or solicitor may take security from his client for his future fees, charges and disbursements, to be ascertained by taxation or otherwise.

Interest may be allowed on taxation in respect of disbursements and advances.

Sect. 17. Subject to any general rules or orders hereafter to be made, upon every taxation of costs, fees, charges or disbursements, the taxing officer may allow interest (*q*) at such rate and from such time as he thinks just on moneys disbursed by the attorney or solicitor for his client, and on moneys of the client in the hands of the attorney or solicitor, and improperly retained by him (*r*).

Taxing officer to have regard to character of services.

Sect. 18. Upon any taxation of costs, the taxing officer may, in determining the remuneration, if any, to be allowed to the attorney

(*p*) See *Re Lewis*, ante, p. 127.

(*q*) See *Hartland* v. *Murrell*, 43 L. J., Ch. 94.

(*r*) The statute is not retrospective, so that interest cannot be allowed under the section on disbursements made before July 14th, 1870, when it passed: *Ward* v. *Eyre*, 15 Ch. D. 130; 49 L. J., Ch. 657. This section is not applicable to accounts between the country solicitor and his town agent (10).

or solicitor for his services, have regard, subject to any general rules or orders hereafter to be made, to the skill, labour and responsibility involved.

Revival of order for payment of costs.

Sect. 19. Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen (*s*).

The 20th section is repealed by 40 & 41 *V. c.* 25.

See stat. 38 & 39 *V. c.* 79, *s.* 2, *ante*, p. 124, n. (*e*).

Remuneration Act, 1881, and rules.

The Solicitors' Remuneration Act, 1881 (44 & 45 *V. c.* 44), and the general order made in pursuance of it, contain provisions with reference to the remuneration; but these provisions are confined to remuneration in conveyancing, and do not affect the costs of business in any action or contentious business, and it is therefore unnecessary to do more than refer to them in the present work.

Costs on private bills in Parliament.

By 10 & 11 *V. c.* 69, and 12 & 13 *V. c.* 78, provision is made for the delivery of, and also the taxation and recovery of, bills of costs on private bills in Parliament (*t*).

Probate.

As to taxation of costs for Probate business, *see* 20 & 21 *V. c.* 77, *s.* 96; *and see* 27 *L. J., P. & M.* 95; *Reg.* 25 *and* 26.

Divorce.

As to taxation of costs for Divorce business, *see* 21 & 22 *V. c.* 108, *s.* 13, *and* 28 *L. J., P. & M. Reg.* 6.

(c.) *The Delivery of the Bill.*

Necessity for delivery before action.

The 6 & 7 *V. c.* 73, *s.* 37 (*ante*, p. 122), enacts, that no action shall be brought by any solicitor, or by his executors, administrators or assignees, for the recovery of any fees, charges or disbursements for any business done by him until the expiration of one calendar (*u*) month after the delivery of a bill of such fees, charges and disbursements, to the party chargeable with it. A judge, however, is empowered by stat. 38 & 39 *V. c.* 79, *s.* 2, (*ante*, p. 124, n. (*e*)), under certain circumstances, to authorize the commencement of an action before the expiration of such time.

For what business or disbursements.

This enactment, except in cases where a special valid agreement has been made under 33 & 34 *V. c.* 28 (*s.* 15, *ante*, p. 130), extends to all fees, charges and disbursements for business done by a solicitor, *in his character of a solicitor* (*x*), whether arising in an action

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(*s*) See *Doggett* v. *Eastern Counties R. Co.*, L. R., 6 Ch. 474.

(*t*) See May on the Law and Practice in Parliament, as to the mode of taxation, &c. *Re Strother*, 3 Kay & J. 518; 26 L. J., Ch. 695. See 28 & 29 V. c. 27, empowering Committees of both Houses on Private Bills to award costs: 30 & 31 V. c. 136, as to costs in Court of Referees; and 34 & 35 V. c. 3, empowering Committees on Bills confirming provisional orders to award costs.

(*u*) *Parker* v. *Gill*, 5 D. & L. 21, Q. B.

(*x*) See *Smith* v. *Dimes*, 4 Ex. 32; 7 D. & L. 78; 19 L. J., Ex. 60: *Bush* v. *Martin*, 33 L. J., Ex. 17, where the plaintiff, a solicitor, sought to recover his salary as clerk to improvement commissioners under a local Act.

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or not. It therefore extends to conveyancing business. It does not apply to business done otherwise than as a solicitor (*y*). A bill of fees and charges of a steward of a manor who is a solicitor, but is employed only for the purpose of preparing a surrender and admittance, &c., of a purchaser to lands held of the manor in his character of steward, is not within the Act (*z*); nor is a bill for business done by a solicitor as an advocate (*a*). But where one solicitor requested another to look up some old deeds in the possession of the latter, and offered to pay his costs, it was held that these costs were taxable (*b*). A distinct claim for money lent by a solicitor was held not a "disbursement" within the former Act, 2 *G.* 2, *c.* 23 (*c*), nor was a claim for money paid by him in consequence of his undertaking to pay the debt and costs (*d*); but a claim for money out of pocket expended by the solicitor in the course of legal proceedings was (*e*). These decisions would appear to apply to the present statute. Where a solicitor has a claim against his client for business done or money paid, not requiring the delivery of a bill before action brought, and another claim for business, &c., which requires such delivery, he may recover the former without delivering any signed bill (*f*). The Act applies to a solicitor's bill for agency business (*g*).

Agency business, &c.

Form of

The 2 *G.* 2, *c.* 23, required that the bill should be written in a common legible hand, and in the English tongue (except law terms and names of suits), and in words at length (except times and sums). The 12 *G.* 2, *c.* 13, *s.* 5, allowed of such abbreviations as were commonly used in the English language. The 6 & 7 *V. c.* 73 does not expressly require (*h*) those formalities; but it will be prudent to keep them in view, and, at all events, to use common and intelligible language and abbreviations. Lumping the items together would not be proper:—they should be stated in detail (*i*). It is not sufficient to charge the costs of an action brought by the

(*y*) *In re Inderwick* (C. A.) 25 Ch. D. 279; 50 L. T. 221; 32 W. R. 584.

(*z*) *Allen* v. *Aldridge*, *In re Ward*, 5 Beav. 401; 13 L. J. Ch. 155; 8 Jur. 435; *Re Osborne*, 27 L. J., Ch. 532; 4 Jur., N. S. 296, where solicitors were employed as election agents, and it was held under the circumstances that their bill was taxable. See also *Re Jones*, L. R., 13 Eq. 336; 41 L. J., Ch. 367: *Re Oliver*, 36 L. J., Ch. 261, where solicitors were so employed, and it was held that their bill was not taxable.

(*a*) *Re Simons* or *Simmonds*, 2 D. & L. 500; 14 L. J., Q. B. 41. Since 15 & 16 V. c. 54, s. 10, a solicitor cannot appoint another to act as advocate for him.

(*b*) *Re Bowen*, 41 L. J., Ch. 327.

(*c*) *Hemming* v. *Wilton*, 4 Car. & P. 318: *Smith* v. *Taylor*, 7 Bing. 259; 5 M. & P. 66; 1 Dowl. 212.

(*d*) *Prothero* v. *Thomas*, 6 Taunt. 196; 1 Marsh. 539; see *Sparrow* v. *Johns*, 3 M. & W. 600; 6 Dowl. 554.

(*e*) Per *Bayley*, B., *Latham* v. *Hide*, 1 C. & M. 128; 1 Dowl. 94: *S. C.* nom. *Hyde* v. *Latham*, 3 Tyrw. 143.

(*f*) *Mowbray* v. *Fleming*, 11 East, 285: *Wardle* v. *Nicholson*, 4 B. & Ad. 469; 1 N. & M. 356: *Waller* v. *Lacy*, 1 Sc. N. R. 186; 1 M. & G. 54; 8 Dowl. 563.

(*g*) *Smith* v. *Dimes*, ante, 131, n. (*r*): *Billing* v. *Coppock*, 1 Ex. 15; 16 L. J., Ex. 265; 5 D. & L. 126.

(*h*) *Reynolds* v. *Caswell*, 4 Taunt. 193. The abbreviations "declon., affit., confe., atty.," have been held good: *Froud* v. *Stillard*, 4 Car. & P. 51.

(*i*) See *Re Tilleard*, 32 Beav. 476; 32 L. J., Ch. 765: *Haigh* v. *Ousey*, 7 El. & Bl. 578; 26 L. J., Q. B. 17: *Re Forster*, 1 L. T., N. S. 160, as to stating, where a deed is charged for, the number of folios in it.

solicitor for his client at one sum in the aggregate, although the costs in such action have been taxed at that sum as between party and party (*k*). And if a solicitor seek to recover against his client extra costs, which were not allowed by the Master on taxation against an unsuccessful party in an action which the solicitor has conducted successfully on behalf of his client, before bill should be delivered, giving credit for the taxed costs received, and not merely a bill containing the items of the extra costs (*l*). A mistake in the date of any of the items, not calculated to mislead, does not vitiate the bill (*m*). There are certain disbursements to be noticed hereafter, which a solicitor is not entitled to insert in his bill for the purpose of evading the payment of the costs of taxation. (*See post*, p. 154.) It seems that it ought to appear on the face of it that the solicitor seeks to charge the person whom he intends to sue (*n*). It suffices, however, if the bill is accompanied by a letter, and the letter shows who is charged (*o*). A bill headed "Northampton, Lincoln, and Hull Railway, to Robert Daubney, debtor," was held sufficient to charge a managing committee-man (*p*). It is proper to state in the bill the Court in which the business was done, and the title of the cause or causes (*q*). Where the bill contains items applicable to proceedings in the High Court of Justice, but does not contain any statement whereby it can be inferred in which Court the business was transacted, it is to be presumed to be a compliance with the Act, unless the party charged thereby proves that any further information was practically required for the purpose of taxation, or shows that the name of the Division of the Court in which the business was done would really have been of use to him (*r*). At all events a bill is sufficient if it can be gathered by intendment from it in what Court the business was done (*s*). A solicitor de-

Stating person to be charged.

Name of Court and cause.

(*k*) *Drew* v. *Clifford*, 2 Car. & P. 69: *Philby* v. *Hazle*, 8 C. B., N. S. 647; 29 L. J., C. P. 370, where a bill of costs charging a sum as per agreement without giving the items was held insufficient. See also *Wilkinson* v. *Smart*, 33 L. T. 573; 24 W. R. 42: *Scarth* v. *Rutland*, L. R., 1 C. P. 642.

(*l*) *Waller* v. *Lacy*, 1 Sc. N. R. 186; 1 M. & G. 54; 8 Dowl. 563: *Pigot* v. *Cadman*, 1 H. & N. 837; 26 L. J., Ex. 134.

(*m*) *Williams* v. *Barber*, 4 Taunt. 806.

(*n*) *Manning* v. *Glyn*, 1 Jones, Irish Ex. Rep. 513: *Gridley* v. *Austen*, 16 Q. B. 504; 18 L. J., Q. B. 337.

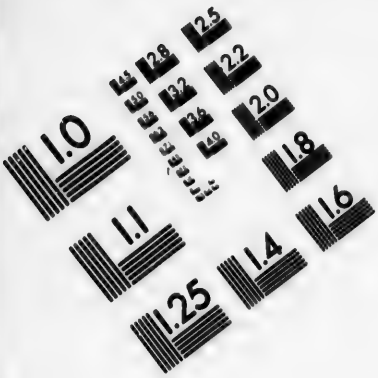
(*o*) *Taylor* v. *Hodson*, 3 D. & L. 115: *Lucas* v. *Roberts*, 11 Ex. 41; 24 L. J., Ex. 227, where the party's name was only on the envelope, and it was held sufficient. See *Champ* v. *Stokes*, 6 H. & N. 683; 30 L. J., Ex. 242.

(*p*) *Daubney* v. *Phipps*, 16 Q. B. 507; 12 Pr. Ch. ii. 514; 18 L. J., Q. B. 338; 13 Jur. 681: *Mant* v. *Smith*, 4 H. & N. 324; 28 L. J., Ex. 234.

(*q*) See *Sargent* v. *Gannon*, 7 C. B. 742; 6 D. & L. 691; 18 L. J., C. P. 220: *Dimes* v. *Wright*, 8 C. B. 831; 19 L. J., C. P. 137: *Anderson* v. *Boynton*, 13 Q. B. 308; 7 D. & L. 25; 19 L. J., Q. B. 42.

(*r*) *Cooke* v. *Gillard*, 1 El. & Bl. 26; 17 Jur. 137; 22 L. J., Q. B. 90: *Cozens* v. *Graham*, 12 C. B. 398; 21 L. J., C. P. 206. As to the form of a bill delivered under 6 & 7 V. c. 73, see *Martindale* v. *Falkner*, 2 C. B. 706; 3 D. & L. 600; 10 Jur. 161: *Engleheart* v. *Moore*, 15 M. & W. 548; 4 D. & L. 60: *Ivimey* v. *Marks*, 16 M. & W. 843; 4 D. & L. 109; 17 L. J., Ex. 165: *Sargent* v. *Gannon*, supra: *Haigh* v. *Ousey*, 7 E. & B. 578; 26 L. J., Q. B. 217. See *Roy* v. *Turner* (Ex.), 3 Jur., N. S. 634; 26 L. T. 150, where it was held that it must appear from the bill whether the business was done in a Court of equity or a Court of law.

(*s*) *Anderson* v. *Boynton*, supra: *Martindale* v. *Falkner*, supra: *Sargent* v. *Gannon*, supra: *Dimes* v. *Wright*, 8 C. B. 831: *Keene* v. *Ward*, 13 Q. B. 515; 19 L. J., Q. B. 46; 7 D. & L. 334: *Cozens* v. *Graham*, 12 C. B. 398.



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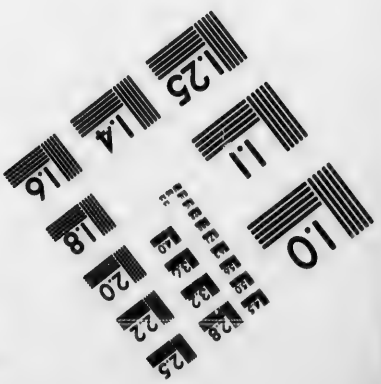

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When bill defective in part only.

livered his signed bill of costs a month before action, but merely mentioned in the bill a claim he had for some extra costs, without giving the items of the same; the taxed costs and other items were properly stated in the bill, but not the claim for the extra costs: it was held by the Court of Exchequer that, as to the extra costs, the bill was not a bill within the statute, and being bad in part was bad altogether, and the plaintiff was not entitled to recover any part of it (*t*).

How signed.

The bill must be subscribed with the proper hand of the solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership (*u*)), or of his executor, administrator or assignee (*x*), or it must be inclosed in or accompanied by a letter subscribed in like manner, and referring to the bill. A bill signed by a clerk cannot be sued on (*y*). A person to whom the solicitor has assigned his costs, and who has given notice to the client of the assignment, may effectually deliver a bill accompanied by a letter signed by himself (*x*).

To whom and how delivered.

The statute requires the bill to be delivered to the party or parties to be charged therewith (*z*), *or* it may be sent by the post to *or* left for him or them at his or their counting-house, office of business (*a*), dwelling-house (*b*), or last known place of abode (*c*). A delivery of a bill to one of several persons jointly chargeable with it would in general be a delivery to all (*d*). In an action by the solicitors of a proposed railway company against A., a member of the provisional committee, for work done by them for the company, before, whilst and after A. was a member, a delivery of a signed bill addressed to the committee, to B. an earlier member of the committee, at *his* place of business, and containing some items incurred before A. became a member, is not a sufficient delivery to charge A. (*e*). A

(*t*) *Pigot* v. *Cadman*, 1 H. & N. 837; 26 L. J., Ex. 134: *Tvimey* v. *Marks*, supra, sed quære. See *Cooke* v. *Gillard* and *Haigh* v. *Ousey*, supra, in which the Court of Queen's Bench, agreeing with the Court of Common Pleas in *Waller* v. *Lacy*, supra, decided that a bill is *not* defective altogether by reason of some of the items in it being improperly stated: and see *Pilgrim* v. *Hirchfelt*, 9 L. T., N. S. 288; 12 W. R. 51, Q. B.

(*u*) See *Owen* v. *Scales*, 2 Dowl., N. S. 304, decided under 2 G. 2, c. 23.

(*x*) *Irgle* v. *McCutchan*, 12 Q. B. D. 518; 53 L. J., Q. B. 311, assignee in writing; *Penley* v. *Anstruther*, 52 L. J., Ch. 367; 48 L. T. 664, firm taking over business; cp. *Pilgrim* v. *Hirchfelt*, supra.

(*y*) *Allen* v. *Murphy*, 9 Ir. C. L. 305.

(*z*) See *Painter* v. *Linsell*, 8 Sc. 453; 8 Dowl. 250. See per *Jessel*, M. R., *Re Grundy & Co.*, 17 Ch. D. at p. 113.

(*a*) See *Blandy* v. *De Burgh*, 6 C. B. 623; 6 D. [illegible] L. 412; 18 L. J., C. P. 2, where the judges differed in opinion whether the delivery of a bill at the office of a provisional committee of a railway company, after abandonment of the scheme, was a delivery at the office of business of the defendant, who was one of the committee: *Daubney* v. *Phipps*, 16 Q. B. 504, affirmed in Ex. Ch., Id. 514: *Spyer* v. *Bernard*, 8 L. T., N. S. 396, where the bill was left at a place where the client directed communications to be addressed to him.

(*b*) See *Macgregor* v. *Keily*, 3 Ex. 794; 6 D. & L. 635.

(*c*) In *Macgregor* v. *Keily*, 18 L. J., Ex. 391, delivery of a bill to client's servant was held good.

(*d*) *Mant* v. *Smith*, 4 H. & N. 324: 28 L. J., Ex. 234: *Crowder* v. *Shee*, 1 Camp. 437: *Finchett* v. *Howe*, 2 Camp. 277: *Oxenham* v. *Lemon*, 2 D. & R. 461: *Eggington* v. *Cumberledge*, 1 Ex. 271; 16 L. J., Ex. 283: *Kiteley* v. *Schofield*, 6 Jur. 1059, Q. B.

(*e*) *Edwards* v. *Lawless*, 6 C. B. 329; 6 D. & L. 105; 13 Jur. 680; 17 L. J., C. P. 293: *Daubney* v. *Phipps*, supra, n. (*a*): *Gridley* v. *Austen*, 16 Q. B.

delivery to any agent expressly or impliedly authorized to receive the bill would be sufficient (*f*). Where a party in an action having changed his solicitor, the second solicitor obtained a judge's order that the former solicitor should deliver his bill, and the bill was accordingly delivered to the second solicitor, the Court considered that this was a sufficient delivery to "the party charged therewith" (*g*). A delivery to the solicitor of a party was deemed sufficient under the former statute if the party himself attended the taxation, or the bill was shown to have come to his hands (*h*). It will suffice to leave it at the client's last known place of abode; and it is no objection to this that he changed his residence previously to the delivery, if that circumstance were not known at the time to the solicitor (*i*). Where a bill has been delivered to a client in his lifetime, it is not necessary to deliver a fresh one to his personal representative (*k*).

Amended bill.

A solicitor cannot, except under special circumstances, such as fraud or mistake, deliver a substituted or amended bill, or, at all events, he cannot do so so as to avoid taxation of the original bill (*l*).

When delivered.

The month limited by 6 & 7 *V. c.* 73, *s.* 37, for the delivery of the bill is, by sect. 48, a calendar month (*m*): and must be reckoned exclusively both of the day of delivering the bill and the day of commencing the action (*n*). Where the six years limited by the Statute of Limitations are nearly expiring, care must be taken to deliver the bill in sufficient time to enable the solicitor to issue a writ after the expiration of the month and before the six years have expired.

Non-delivery no ground for staying proceedings, &c.

Where a solicitor before 6 & 7 *V. c.* 73, commenced his action before the expiration of the month, the Court refused to stay the proceedings, because that fact might be pleaded as a defence (*o*). And where defendant was arrested for a solicitor's bill, after a bill was delivered to him without being signed, the Court refused to discharge him out of custody on that ground (*p*).

Proof of delivery and contents.

A solicitor need not, in the first instance, prove the contents of the bill delivered; all he need prove is the delivery in manner as the Act directs. It is open to defendant to show that the bill

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594: 2 L., M. & P. 180; 18 L. J., Q. B. 337: *Eggington* v. *Cumberledge*, supra, n. (*d*), where the bill was laid before the committee when defendant was present, and the delivery was held sufficient.

(*f*) See *Daubney* v. *Phipps*, ante, p. 134, n. (*a*): *Re Bush*, 8 Beav. 66. In *Re Abbott*, 4 L. T., N. S. 576, delivery of a bill to a client's then solicitor was held insufficient.

(*g*) *Vincent* v. *Slaymaker*, 12 East, 372: *Grose*, *Le Blanc*, and *Bayley*, JJ., diss. Lord *Ellenborough*, C. J.

(*h*) *Daubney* v. *Phipps*, ante, p. 134, n. (*a*). See *Warren* v. *Cunningham*, Gow, C. N. P. 41: *Eicke* v. *Nokes*, M. & M. 303.

(*i*) *Wadeson* v. *Smith*, 1 Stark. 324, and see Gow, C. N. P. 73, n.

(*k*) *Reynolds* v. *Caswell*, 4 Taunt. 193.

(*l*) *Re Holroyd and Smith*, 43 L. T. 722, M. R.: *Re Heather*, L. R., 5 Ch. 694.

(*m*) Ante, p. 41. See *Hurd* v. *Leach*, 5 Esp. 168: *Crook* v. *M'Tavish*, 1 Bing. 167; 8 Moore, 265: *Lacon* v. *Hooper*, 6 T. R. 226.

(*n*) See *Blunt* v. *Heslop* or *Heslop*, 3 N. & P. 553; 8 Ad. & E. 577.

(*o*) *Harper* v. *Leech*, Barnes, 123. The defence must be pleaded specially: *Lane* v. *Glenny*, 7 Ad. & E. 83; 2 N. & P. 258: *Robinson* v. *Rowland*, 6 Dowl. 271; otherwise the solicitor may rely on a contract to charge a specific sum, without producing a bill, and showing charges fair and reasonable amounting to or exceeding the stipulated sum: *Scarth* v. *Rutland*, L. R., 1 C. P. 642.

(*p*) *Tomlinson* v. *Clark*, 4 Moore, 4.

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delivered was not a *bonâ fide* compliance with the Act (*sect.* 37, *ante*, p. 124: and see further *post*, p. 138).

Bill may be proved or set off, or security for sued on, without delivery.

As the statute only requires the delivery of the bill in order to maintain an action for it (*q*), a solicitor may prove his bill under a bankruptcy (*r*), or be a petitioning creditor (*s*), without previously delivering it. If the client gives a promissory note or any other collateral security for the payment of the solicitor's bill of costs, he may bring an action on the security without delivering such bill (*t*). Also, no delivery is necessary for the purpose of setting off the bill in an action brought against the solicitor by his client (*u*). But the Court or a judge may, in any of the above cases, order the delivery of the bill for the purpose of taxation, as in other cases (*x*). A solicitor cannot recover on an account stated in respect of the bill unless it has been duly delivered (*y*).

Charge for drawing bill.

No charge for drawing or copying the bill is allowed on taxation (*z*).

(d.) *Compelling Delivery of Bill.*

Compelling delivery.

By the party or his executors, &c. chargeable.

In the preceding pages we have been considering the case of a voluntary delivery of a bill by a solicitor in order to bring an action on it: the delivery of it may be also, in most cases, compelled (*a*). The 6 & 7 *V. c.* 73, *s.* 37 (*ante*, p. 124), expressly empowers the Courts and judges, in the same cases in which they are respectively authorized to refer a bill for taxation, to make an order for the delivery by the solicitor, or his executor, administrator, or assignee, of such bill to the party chargeable with it (*b*), in the same manner as has heretofore been done as regards such solicitor by such Court or judges respectively where any such business had been transacted in the Court in which such order is made. Independently of this enactment, they have, it seems, common-law jurisdiction to compel a solicitor, as an officer of the Court, to deliver a signed bill to his client, or his personal representative, or trustee in the event of bankruptcy, and this whether the business was in an action, or not (*c*). An action will not lie to compel delivery by a solicitor of his bill of costs (*d*).

(*q*) See *Harrison* v. *Turner*, 10 Q. B. 482; 16 L. J., Q. B. 295.

(*r*) *Ecke* v. *Nokes*, M. & M. 303.

(*s*) *Ex p. Prideaux*, 1 Glyn & J. 28.

(*t*) *Jeffreys* v. *Evans*, 14 M. & W. 210; 3 D. & L. 52. The defendant might apply to the Court to tax the bill and to stay the proceedings, on payment into Court of the sum found to be due on taxation. See per *Pollock*, C. B., Id. In *Jeffreys* v. *Evans* the client gave a promissory note for a definite amount. It is submitted that this decision does not apply to the case of a guarantee for an indefinite amount.

(*u*) *Brown* v. *Tibbits*, 11 C. B., N. S. 855; 31 L. J., C. P. 206. See per *Parke*, B., in *Lester* v. *Lazarus*, 2 C., M. & R. 667; 4 Dowl. 397: *Harrison* v. *Turner*, 10 Q. B. 482; 16 L. J., Q. B. 295. It is submitted that it would be a good answer to a counter-claim, as distinguished from a set-off, to plead no signed bill delivered. See post, Ch. XXI.

(*x*) See *Williams* v. *Frith*, 1 Doug. 199: *Bulman* v. *Birkett*, 1 Esp. 449: *Murpay* v. *Cunningham*, 1 Anst. 198; Tidd, 9th ed. 333, 334.

(*y*) *Brooks* v. *Bockett*, 9 Q. B. 847.

(*z*) See *Jones* v. *Roberts*, 2 Dowl. 374.

(*a*) See Chit. Forms, pp. 33—36.

(*b*) As to who may be such party, see post, p. 140.

(*c*) *Clarkson* v. *Parker*, 7 Dowl. 87: *Ex p. Arrowsmith*, 14 Ves. 209.

(*d*) *Re Spencer, Spencer* v. *Hart*, 51 L. J., Ch. 271; 45 L. T. 645, C. A.

By a party not chargeable.

It will be seen that, by sect. 38 (*ante*, p. 124), a bill may be ordered to be taxed upon the application of a third party, not being the party chargeable with it within the meaning of the Act, but who is liable to pay or has paid it (*e*). And sect. 40 (*ante*, p. 125), enacts that, for the purpose of such reference, upon the application of the party not chargeable with the bill or of a party interested, as mentioned in sect. 38, the Court or a judge may order the solicitor, or his executor, administrator, or assignee, to deliver to the applicant a copy of the bill, upon payment of the costs of such copy.

Time of application for.

The statute does not, it seems, limit the time for making the application by the client or party to be charged with it, and it would seem that it may be made by him at any time, even after payment of the bill (*f*), and though twelve months have elapsed since such payment, for the client may want to know for what he has made such payment, in order to resist any future demand for it; and the statute is an enlarging statute, and does not take away the common-law jurisdiction of the Court to order the delivery. But if the application be made by a party not chargeable with the bill, but interested in it as above mentioned, then it would seem that the application must be made within the time limited for obtaining a taxation of the bill, and which, at all events, cannot be extended beyond twelve calendar months after payment. A solicitor being consulted by a client who was under a charge of criminally assaulting a female child of tender years, obtained from the client 200*l.* to do the best he could for him, but with an understanding that no account of the transaction should be kept or rendered; having succeeded in procuring his discharge, the solicitor was called upon, after the lapse of nearly six years, to deliver a bill of costs; the Court refused to order him to do so, but referred the whole matter to the master, who in the result discharged the rule, but without costs (*g*).

To whom application to be made and how.

The application, if made under 6 & 7 *V. c.* 73, and not at common law, must, it would seem, be made to such Court or judge as pointed out in sect. 37 (*h*), in reference to the application for the taxation of the bill. It is usually made by summons (*i*) to a master at chambers, and it is only in very special cases, or where the order has been refused at chambers that it should be made to the Court. The master may require an affidavit making out a *primâ facie* case to the right to a delivery of the bill, and this more particularly where the application is by a party not directly chargeable with it. The summons should be intituled "In the matter of A. B." (naming the solicitor) (*k*). The order should, as a general rule, name a time (such a time as is reasonably necessary) for the making out and delivery of the bill. If the application be made after payment of the bill, and in due time, the order should be for the delivery before the expiration of twelve months after such payment, otherwise it will be inoperative for the purpose of obtaining a taxation, an order for which cannot be made after that time (*post*, p. 142). The

(*e*) See *Tanner* v. *Lea*, 4 M. & Gr. 617; 5 Scott, N. R. 237. See *Re Norris*, 27 L. T. 554, and Chit. Forms, p. 35.

(*f*) See *Tanner* v. *Lea*, and *Re Norris*, supra.

(*g*) *Re Vann*, 15 C. B. 341.

(*h*) See ante, p. 124, and post, p. 146.

(*i*) Chit. Forms, p. 33.

(*k*) Sect. 43, ante, p. 126. See forms, Chit. Forms.

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statute, it will be seen, authorizes not merely the taxation and settlement of the bill, but of the "attorney's demand thereon," and the judge will by the order require him to give credit for all sums of money which he may have received from or on account of his client (*l*). It would seem, from the wording of sect. 37, that an order for delivery and taxation cannot be obtained under one summons; the statute seems to contemplate a taxation only of bills delivered (*m*). The order should be drawn up and served without delay (*n*).

Order, how complied with and enforced.

The solicitor should, within the time limited by the order served on him, deliver his bill in pursuance of it. The bill should in form contain the requisites, and perhaps, also, it should be signed, as pointed out *ante*, p. 134. If not delivered at all within the specified time, and the delivery be not waived, the order may be enforced by attachment (*o*). In order to obtain an attachment, there should in general be a personal service of the order and a personal demand of the bill by a party authorized to make it (*p*), and an affidavit of such service and demand, and of the non-delivery of the bill (*q*). If the solicitor does deliver a bill, but not in strict compliance with the order either in its form or otherwise, than a fresh order should be obtained, compelling him to deliver a proper bill; and in such case the judge would most probably order him to pay the costs of the application, and impose such terms on him as the case might require (*r*). It may be as well to add, that, if the order be for the delivery of a bill generally, for business done by the solicitor, not specifying any particular business, a bill delivered under such an order, without qualification, would probably be considered as estopping the solicitor from afterwards setting up a claim to any other business done by him as such (*s*). An action cannot be maintained for disobedience of the order (*t*).

(*l*) In some cases he might refuse this: see *Randall* v. *Ikey*, 4 Dowl. 682, post. See form of order for delivery, Chit. Forms.

(*m*) From what was said by *Gurney*, B., in *Clarkson* v. *Parker*, 7 Dowl. 87, decided before 6 & 7 V. c. 73, it would seem that such an order for delivery and taxation might be obtained; but see Tidd, 9th ed. 835. The practice is at all events against it. See *R.* v. *Weston*, 8 Jur. 1122, B. C.

(*n*) See as to the drawing up and service of orders in general, Vol. 2, Ch. CXXIII. As to the indorsement as to liability to attachment, see *In re Gregg*, L. R., 9 Eq. 137; 39 L. J., Ch. 107.

(*o*) *In re Gregg*, supra. As to enforcing an order by writ of attachment, see Ord. XLIV. rr. 1, 2, Ch. LXXXIII.

(*p*) *Re Baster*, 7 D. & L. 296, C. P.: *Re Cattlin*, 6 D. & L. 566; 7 C. B. 136.

(*q*) The party to whom the bill is to be delivered should in general make this affidavit as to the non-delivery: *Potter* v. *Buck*, 8 Dowl. 872.

(*r*) See *Re Chambers*, 34 L. J., Ch. 222, where, after an order for taxation, the M. R., under special circumstances, allowed the solicitor to substitute another reduced bill upon payment of costs up to the time of the delivery of the second bill. A solicitor cannot in general deliver an amended bill so as to avoid taxation. *In re Heather* and *In re Holroyd and Smith*, cited post, p. 140, n. (*i*).

(*s*) See *Loveridge* v. *Botham*, 1 B. & P. 49. See *Beck* v. *Penn*, 7 C. & P. 399.

(*t*) *Dent* v. *Basham*, 9 Ex. 469; 23 L. J., Ex. 161.

(e.) *Taxation of the Bill* (*u*).

When it may be obtained, and of what Bills.]—It was formerly considered that the Courts possessed a general common-law jurisdiction to order the taxation of a solicitor's bill in all cases (*x*): but it seems that it is now settled, that they have no such jurisdiction, except after action brought upon a bill containing some taxable item (*y*), or after such a bill has been made the subject of a set-off in an action brought against the solicitor (*z*). The want of this jurisdiction was first supplied by 2 *G.* 2, *c.* 23; and afterwards by 6 & 7 *V. c.* 73, *s.* 37 (*ante*, p. 122), in the case of an application of the party chargeable with the bill delivered, and sometimes of third parties, to the Courts therein mentioned, or a judge thereof, such Court or judge may refer such bill (*a*), and the solicitor's, or his executor's, administrator's, or assignee's (*b*), demand thereon, to be taxed and settled by the proper officer of the Court.

Common-law right to tax.

By statute.

Only such bills can be referred to taxation as can be compelled to be delivered, and as to which *see ante*, p. 136. But the solicitor may by the form of bill which he delivers preclude himself from objecting to the taxation on this ground (*c*). The costs of an action or bill of costs in respect of an administration action in a County Court when the estate exceeds 20*l.* may be taxed in the High Court (*d*). A bill of costs in respect of proceedings before magistrates may be ordered to be taxed (*e*). It seems a bill must be delivered before it can be ordered to be taxed. A bill not signed may

What bills are taxable.

(*u*) As to when taxation is a condition precedent to the right to recover costs, see *Lear* v. *Botting*, 44 L. T. 58; and see post, Ch. LXVII.

(*x*) *Wilson* v. *Gutteridge*, 3 B. & C. 157; 4 D. & R. 736: *Anon.*, 2 Chit. Rep. 155. And see *Rex* v. *Back*, 9 Price, 349: *Watson* v. *Poston*, 2 C. & J. 370; Tidd, 9th ed. 327; *Harper* v. *Williams*, 3 Sc. N. R. 101, per *Erskine*, J.

(*y*) *Williams* v. *Griffith*, 6 M. & W. 32; 8 Dowl. 414: *Williams* v. *Griffith*, 10 M. & W. 125; 2 Dowl., N. S. 281: *Peters* v. *Sheehan*, 10 M. & W. 213; 1 Dowl., N. S. 943: *Re Lord Cardross*, 5 M. & W. 545: *Slater* v. *Brooks*, 9 Dowl. 349 (where an action was brought against an attorney, and he pleaded a set-off on his bill for business done in equity only, and the Court refused to direct his bill to be taxed). And see *Weymouth* v. *Knipe*, 3 Bing. N. C. 387: *Clutterbuck* v. *Combes*, 5 B. & Ad. 400; 2 N. & M. 209: *Ex p. King*, 3 N. & M. 437: *Dagley* v. *Kentish*, 2 B. & Ad. 411; 1 Dowl. 330: per *Vaughan*, B., 2 Dowl. 658: *Ex p. Boucles' Trustees*, 1 Sc. 583; 1 Bing. N. C. 632: *Doe* d. *Palmer* v. *Roe*, 4 Dowl. 95: *Clarkson* v. *Parker*, 7 Dowl. 87; *Bush* v. *Sayer*, 8 Sc. N. R. 756. See *Cowdell* v. *Neale*, 1 C. B., N. S. 332; 26 L. J., C. P. 377, where it was held that the mere fact that an action is pending upon an attorney's bill did not give a common-law judge jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances. *Et per Cresswell*, J., "I should doubt whether a Court of law could refer a bill for taxation merely because an action is brought upon it therein, if it contains items that are taxable in a Court of equity."

(*z*) *Slater* v. *Brooks*, 1 Dowl. 349.

(*a*) As to taxing costs incurred in the Probate and Divorce business, see ante, p. 131.

(*b*) Before this enactment the Court had no power to order a taxation of a bill delivered by his executor, &c. (see *Doe* v. *Sabin*, 8 Dowl. 468: *Muddiford* v. *Austwick*, 3 M. & Cr. 423); and this even though an action were brought for it (*Williams* v. *Griffith*, 10 M. & W. 125; 2 Dowl., N. S. 281).

(*c*) *In re Jones*, L. R., 13 Eq. 336; 41 L. J., Ch. 367.

(*d*) *Re Worth*, 18 Ch. D. 521; 44 L. T. 462.

(*e*) *Re Lewis*, *Ex p. Munro*, 1 Q. B. D. 724, per Lord *Coleridge*, C. J. at p. 726.

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be referred to taxation (*f*). An agreement to charge only costs out of pocket does not preclude a taxation (*g*). Nor does an agreement (not within the 33 & 34 *V. c.* 28, noticed *ante*, p. 127) that the solicitor is to be paid a gross sum for business done (*h*).

As to the solicitor's bill not being liable to taxation when there has been an agreement under the 33 & 34 *V. c.* 28, *see ante*, p. 130.

Solicitor cannot withdraw bill.

A solicitor who has delivered his bill to the person chargeable therewith cannot afterwards avoid the taxation of the bill by withdrawing it and delivering an amended bill, even though the person chargeable has sent back the original bill with suggested alterations, which have been partially acquiesced in (*i*).

By party chargeable, or his executors, &c.

By whom application to be made.]—The 6 & 7 *V. c.* 73, *s.* 37, expressly names the party chargeable with the bill as the party who may, in all cases, apply for the taxation of it. His personal representative, though not named in it, may also make the application (*k*); whether his trustee in the case of his bankruptcy can do so appears doubtful. At all events he cannot do so, when the solicitor does not press for his costs, without giving an undertaking to pay the whole amount of the bill (*l*).

By party not chargeable.

Before 6 & 7 *V. c.* 73, the Court had no power to compel the taxation of a bill on the application of any other person than the party chargeable with it (*m*). But now, by sect. 38 of that Act (*ante*, p. 124), if a third party be liable to pay (*n*), or has paid the bill, either to the solicitor, or his executor, administrator or assignee, or to the party chargeable with it, he, or his executor, administrator or assignee, may apply to have it taxed, just as if the application were made by the party chargeable; with this proviso, that if the application be made in a case where it can only be made under special circumstances (*o*), then the Court or judge may take into consideration any additional special circumstances

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(*f*) *Re Pendor*, 2 Phillips, 69; 8 Beav. 299; 9 Jur. 339 (M. R.): *Billing* v. *Coppock*, 1 Exch. 14; 5 D. & L. 126: *Young* v. *Walker*, 16 M. & W. 446. See *Gerrard* v. *Arnold*, 6 Dowl. 336: *Russell* v. *York*, 7 Scott, 130: *Biggs* v. *Maxwell*, 3 Dowl. 497.

(*g*) *Re Ransom*, 18 Beav. 220.

(*h*) *Philby* v. *Hazle*, 8 C. B., N. S. 647; 29 L. J., C. P. 370: *Re Newman*, 30 Beav. 196. See *Scarth* v. *Rutland*, L. R., 1 C. P. 642: *Re Ingle*, 25 L. J., Ch. 169: *Wilkinson* v. *Smart*, 33 L. T. 573; 24 W. R. 49.

(*i*) *In re Heather*, L. R., 5 Ch. 694; 39 L. J., Ch. 781: *In re Holroyd and Smith*, 43 L. T. 722; W. N. 1881, 6; 29 W. R. 599. Cp. *Re Chambers*, ante, p. 138, n. (*r*).

(*k*) See *Jefferson* v. *Warrington*, 7 M. & W. 135; 8 Dowl. 880.

(*l*) See *Clarkson* v. *Parker*, 7 Dowl. 87: *In re Elmslie*, L. R., 9 Eq. 72: cp. *In re Leadbitter*, 10 Ch. D. 388; 48 L. J., Ch. 242.

(*m*) See *Langford* v. *Nott*, 1 J. & W. 291: *Sadler* v. *Palfreyman*, 1 A. & E. 717; 3 N. & M. 599: *Painter* v. *Lindsel*, 8 Sc. 453; 6 Bing. N. C. 197; 8 Dowl. 250: *Clutterbuck* v. *Combes*, 5 B. & Ad. 400; 2 N. & M. 209: *Doe d. Palmer* v. *Roe*, 4 Dowl. 95; 1 Harr. & W. 339: *Re Masters*, 1 Harr. & W. 348; 4 Dowl. 18.

(*n*) As to a mortgagor being entitled to tax a bill of costs incurred by a mortgagee, see *Re Massey*, 34 L. J., Ch. 493, overruling *Re Baker*, 32 Beav. 526: and *Re Jessop*, 32 Beav. 406. See also *Re Carew*, 8 Beav. 150: *Re Bracey*, 8 Beav. 338: *Re Fyson*, 9 Beav. 117: *Re Bignold*, Id. 269: *Re Gabriel*, 10 Beav. 45: *Re Philpots*, 18 Beav. 84: *Re Fisher*, 18 Beav. 183: *Re Baker*, 11 W. R. 792; 8 L. T., N. S. 566. As to the enactment extending to a member of a joint stock company, see *Ex p. Bass, Re Stephen*, 17 L. J., Ch. 219.

(*o*) *Re Heritage*, 3 Q. B. D. 726: 47 L. J., Q. B. 509; and see post, p. 142.

applicable to the applicant, although such circumstances might not be applicable to the party chargeable if he was the applicant (*ante*, p. 124).

The enactment does not extend to a mere volunteer, who, without liability, pays the bill (*p*). Nor does it extend to parties who are merely interested in the payment of it (*q*): therefore, when a solicitor has been employed by a surveyor of highways in his character of such surveyor, the parties within the parish who contribute to the highway rate are not persons liable to pay the bill within the meaning of this section, so as to enable them to have it taxed (*r*). The section, however, only applies to solicitor and client costs, and does not, therefore, enable a third party who has given an undertaking to pay costs between party and party to tax the solicitor's bill (*s*). Where a defendant agreed with the plaintiff to pay and paid a lump sum to the latter's solicitors for the costs, it was held that he was not enabled to compel them to deliver a bill or to tax their costs (*t*). The section only entitles a third person to tax in the same manner as the client might have done, notwithstanding that the bill contains items which such third party would not be under any liability to pay (*u*). When a bill cannot be taxed as against the solicitor, the Court cannot order it to be taxed as between the client and a third party (*x*).

By cestui que trust, legatee, &c. (*y*).

Sect. 39 (*ante*, p. 125) further provides that, where trustees, executors and administrators have become chargeable with such bill, the Lord Chancellor or Master of the Rolls may, on the application of a party interested in the property thereby charged, refer the bill to be taxed, subject to such conditions as such judge may think fit. Other provisions are also made in that section to meet such cases (*z*). A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled under this section to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy, by reason merely of his being such trustee (*a*).

By the solicitor.

Before 6 & 7 *V. c.* 73, *s.* 37, the Court had no power to refer a bill for taxation at the instance of the solicitor himself (*b*). But now, by that enactment, *ante*, p. 122, if no application be made for the taxation within one month after the delivery of the bill according to the Act (*c*), the solicitor may make it (*d*); and it may be

(*p*) *Sayer* v. *Wagstaff*, *Re Sanders*, 13 L. J., Ch. 161: *Re Carew*, 14 Id. 160.

(*q*) See *Re Becke and Flower*, 5 Beav. 406: *Re Stevens*, 18 L. J., Ch. 219. See *Re Taylor*, 18 Beav. 165: 23 L. J., Ch. 857. As to the right of a cestui que trust, see *In re Spencer*, *Spencer* v. *Hart*, 51 L. J., Ch. 271; 46 L. T. 645.

(*r*) *Re Barber*, 14 M. & W. 720; 3 D. & L. 244.

(*s*) *Re Grundy & Co.*, C. A., 17 Ch. D. 108; 50 L. J., Ch. 467; 44 L. T. 541, where *Re Hartley*, 30 Beav. 620, is explained and distinguished, on the ground that in that case the undertaking was to pay solicitor and client's costs: *In re Cowdell*, 52 L. J., Ch. 246, *Fry*, J. See *Re Heritage*, supra, n. (*o*).

(*t*) *In re Morris*, 27 L. T. 554; 21 W. R. 192. See *Re Heritage*, supra.

(*u*) *Re Newman*, 36 L. J., Ch. 843. In this case an order was made to tax the bill as between the solicitors and their client. See *Re Brown*, 36 L. J., Ch. 842.

(*x*) *Re Massey*, 34 L. J., Ch. 492.

(*y*) See *Re Drake*, 22 Beav. 438.

(*z*) See *Re Downes*, 13 L. J., Ch. 159.

(*a*) *In re Leadbitter*, 10 Ch. D. 388; 48 L. J., Ch. 242.

(*b*) See *Sayers* v. *Walrond*, 1 S. & S. 97.

(*c*) See *Ryalls* v. *Reg.*, 11 Q. B. 781.

(*d*) Chit. Forms, p. 43.

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frequently advisable for him to do so, especially if there be no ground for disputing the retainer, for in that case he may, after the taxation, obtain an order for its payment or for judgment, and thus prevent the delay and expense of an action. A solicitor, however, has no absolute statutory right to have the amount of his charges ascertained by taxation (*e*).

Within a month after delivery.

Time for applying.]—If the application be made within the calendar month after the delivery, then the order for taxation must, by sect. 37 (*ante*, p. 122), be made without any money being brought into Court, and must also restrain the solicitor, or his executors, &c., from commencing any action or suit touching his demand upon the bill pending such reference (*f*).

After a month or action brought.

If the application be not made within the month, then it may be made either by the solicitor, his executor, &c., or by the party chargeable; but then the judge may, in his discretion, make the order, with such directions, and subject to such conditions as he may think proper. He may also, in his discretion, restrain or stay any action pending the reference, on such terms as he shall think proper (*g*).

After verdict or inquiry, &c. or twelve months after delivery.

But, after verdict or inquiry executed (*h*) in an action on the bill, or after twelve calendar months after its delivery (*i*), the party chargeable with the bill cannot make the application, except under special circumstances, to be proved to the satisfaction of the Court or judge, and in which case they may give any special directions that may be thought proper relative to the costs of the reference (*g*). And in this case, as we have just seen, if the application be made by a third party, and not by the party chargeable, additional special circumstances may be taken into consideration. The bill may be referred under this enactment at any distant period beyond the twelve months, if it has not been paid (*k*). But after the expiration of twelve months from payment whether the bill be signed or not, no order for taxation can be made (*l*). The mere existence of the relation of solicitor and client is not alone a sufficient "special circumstance" to justify a reference (*m*). Gross and exorbitant overcharges may be sufficient special circumstances (*n*).

Special circumstances.

(*e*) *Ex p. Ditton, In re Woods*, 13 Ch. D. 318; 42 L. T. 161.

(*f*) Under certain circumstances the judge may allow the action to be brought within the month, see 38 & 39 V. c. 79, ante, p. 124, n. (*e*).

(*g*) Sect. 37, ante, p. 122.

(*h*) The Courts before the above Act would order a bill to be taxed even after verdict or inquiry, where there were special circumstances to warrant it: *Doe* d. *Thwaites* v. *Roe*, 3 D. & R. 226: *Nuttal* v. *Marr*, 3 D. & R. 33: *Benton* v. *Bullard*, 4 Bing. 561: *Lee* v. *Wilson*, 2 Chit. Rep. 63. In a plaint in a County Court, defendant pleaded a set-off for work and labour done as an attorney: before the day of hearing plaintiff obtained a judge's order to tax the bill; the judge of the County Court, on the hearing, allowed the set-off; the Court of C. P. refused to rescind the order for taxation: *Ex p. Cooper*, 14 C. B. 663.

(*i*) See *Billing* v. *Coppock*, 1 Ex. 14; 5 D. & L. 126: *Cowdell* v. *Neale*, 1 C. B., N. S. 332; 26 L. J., C. P. 37, where an action had been brought on the bill.

(*k*) *Binns' Exors., &c.* v. *Hey*, 1 D. & L. 661; 13 L. J., Q. B. 28.

(*l*) *In re Sutton and Elliott*, 11 Q. B. D. 377; 52 L. J., Q. B. 752; 49 L. T. 436. This also applies to applications under sect. 38: *In re Smith*, 32 W. R. 408.

(*m*) *In re Elmslie & Co.*, L. R., 16 Eq. 326; 42 L. J., Ch. 570.

(*n*) *Re Hook*, 5 L. T. 503: *Re*

Matters of objection appearing on the face of the bill, such as an unusual charge of a large amount, requiring explanation to justify it, may amount to "special circumstances" (*a*). But it would not suffice merely to show that some of the charges would not be allowed on taxation (*p*); and a mere dispute as to the propriety of some of the charges would not be sufficient unless it was shown clearly that they were improper; nor would the mere non-payment of counsel's fees (*q*). But where there was originally a dispute as to the completeness of the bill, it was ordered to be referred (*r*). Outlawry of the party, precluding him from applying during the twelve months, would be a special circumstance (*s*). The mere fact of an action having been commenced for the recovery of the bill would not (*t*). It would seem that even at nisi prius, if the bill had been delivered more than twelve months, the defendant ought to show special circumstances to entitle him to taxation (*u*). A delivery of a bill not signed, and a delivery more than a year afterwards of a *signed* bill, would, it seems, be a special circumstance, which would suffice to obtain order for taxation of the latter bill (*x*). In some cases when a succession of signed bills has been delivered to a client relating to a particular business, the relationship of solicitor and client being continued throughout, each bill will be regarded as an addition to the others, so as to bring the whole series as one single bill down to the date of the latest delivery; but it is undecided whether this can be treated as a *general* rule (*y*). In the case of an agency where bills are delivered from time to time, the date of the delivery of the last bill would, it is apprehended, be the date from which the twelve months would be deemed to run.

After payment.

Notwithstanding the bill (*z*) has been paid, an application for its taxation may be made, if made within twelve calendar months (*a*) after the payment (*b*), and an order for taxation may be obtained if the special circumstances of the case, in the opinion of the Court or judge, appear to require it, subject to such terms, conditions and directions as they may think right (*c*). Also, in this case, as we have just seen, if the application be made by a third party, and

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Strother, 3 K. & J. 518; 26 L. J., Ch. 691: *In re Dickson*, 26 L. J., Ch. 89: *Re Robinson*, L. R., 3 Ex. 4; 37 L. J., Ex. 11: *In re Elmslie*, supra.

(*o*) *Re Robinson*, L. R., 3 Ex. 4; 37 L. J., Ex. 11: *Watson* v. *Rodwell*, 7 Ch. D. 625; 47 L. J., Ch. 418.

(*p*) *In re Elmslie*, supra: *Gretter* v. *Leybourne*, T. & R. 407.

(*q*) *Re Wilton*, 13 L. J., Q. B. 17.

(*r*) *Re Bagshaw*, 2 De G. & Sm. 205.

(*s*) *Re Mander*, 6 Q. B. 871.

(*t*) *Bennett* v. *Hill*, 21 L. T. 101: *Cordell* v. *Neale*, 1 C. B., N. S. 332; 26 L. J., C. P. 37.

(*u*) Per *Campbell*, C. J., *Bennett* v. *Hill*, supra.

(*x*) Per *Alderson*, B., *In re Billing*, 1 Exch. 14; 5 D. & L. 126: *Re Peach*, 2 D. & L. 33.

(*y*) *In re Cartwright*, L. R., 16 Eq. 469; 42 L. J., Ch. 735: *Re Peach*, supra. See *In re Hall and Barker*, 9 Ch. D. 538.

(*z*) See *Re Peach*, 2 D. & L. 33, where several bills were treated as one bill. See *In re Hall and Barker*, 9 Ch. D. 538; 47 L. J., Ch. 621. See *Re Street*, L. R., 10 Eq. 165; and *Re Cartwright*, supra, n. (*y*).

(*a*) But not after twelve months after payment. See supra, n. (*l*).

(*b*) As to what amounts to payment, see supra. As to the effect of the payment of a lump sum for principal, interest and costs, see *In re Griffith, Jones & Co.* (C. A.), 53 L. J., Ch. 302; 32 W. R. 350; 50 L. T. 434.

(*c*) 6 & 7 V. c. 73, s. 41, ante, p. 125. This enactment, allowing a taxation to be made notwithstanding payment of the bill, is not altogether new law; for, before it, the Courts would allow of it, if there were special circum-

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not by the party chargeable, additional special circumstances may be taken into consideration. The giving of a mortgage for the amount would, it seems, be deemed a payment; at any rate it would be so if the mortgage is transferred with the assent of the mortgagor (*d*). The giving of a bill or note, or other such security in payment, might, under circumstances, amount to a payment; but in the absence of such circumstances it would be deemed merely as taken on account of the bill of costs; so that if dishonoured at maturity the client may be sued for the latter (*e*). If such bill, note or security be taken, the twelve months limited for the taxation after payment must be reckoned from the payment of it, unless indeed it was taken as cash, or treated by the parties as actual payment at the time when it was given (*f*). In *Re Peach* (*g*), a payment was not considered such, where at the time it was made only one of several bills had been delivered. If the payment has been by a retainer in a settlement of account, the twelve months will be reckoned from the settlement (*h*); but retainer without a settlement is no payment (*i*). In a case where a solicitor retained the amount of his bill of costs out of money in his hands belonging to his client, and his client, on receiving the balance of the money, but before the bill of costs had been delivered, signed an account in which the total amount of the costs was an item, and gave a receipt for the balance, it was held that there had been no payment of the bill within the meaning of the Act, and that the client was entitled to have the bill taxed more than a year after the retainer of the costs and the signature of the account, and that a special application was, under the circumstances, necessary (*k*).

Special circumstances.

What special circumstances are sufficient to obtain an order for taxation after payment, must of course depend on each particular case (*l*). In general, in order to obtain such an order, there must be what is called undue pressure and overcharge, or overcharge

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stances to warrant the application. (*Sayer* v. *Wagstaff*, 14 L. J., Ch. 116: *Re Carew*, 14 L. J., Ch. 100: *Ex p. Yeatman*, 4 Dowl. 304; 1 Harr. & W. 510.) And see *Ex p. Bass*, *Re Stephen*, 17 L. J., Ch. 219: *Re Wells*, 8 Beav. 416; 14 L. J., Ch. 215: *Re Fyson*, 9 Beav. 117: *Re Lees*, 5 Beav. 410; 13 L. J., Ch. 151: *Re Neate*, 10 Beav. 181: *Re Currie*, 9 Beav. 602: *Re Abbott*, 23 L. J., Ch. 955, where the solicitor for a mortgagor obtained payment of his bill at the time the mortgage was completed, and under the circumstances the Court thought there was such pressure as entitled the client to have the bill taxed after payment. See *Re Pugh*, 32 Beav. 173: *Re Bayley*, 18 Beav. 415: *Grover* v. *Heath*, 2 Dowl. 285: *Manning* v. *Brown*, 3 Dowl. 31: *Wilkinson* v. *Foster*, 7 Moore, 496: *Re Dickson*, 26 L. J., Ch. 89, where a residuary legatee applied for the taxation of a bill incurred by executors. See *Re Strother*, 26 L. J., Ch. 695.

(*d*) *Ex p. Turner*, *Re Boyle*, 5 De G., M. & G. 540; 24 L. J., Ch. 71: *Blagrave* v. *Routh*, 26 L. J., Ch. 86.

(*e*) *Re Harper*, 10 Beav. 284; *Re Currie*, 9 Id. 602: *Hills* v. *Moore*, 17 L. J., Ch. 385: *Re Peach*, 2 D. & L. 33.

(*f*) *Re Harries*, 13 M. & W. 3; 1 D. & L. 1018: *Re Peach*, 2 D. & L. 33: *Sayer* v. *Wagstaff*, 5 Beav. 415; 14 L. J., Ch. 116. And see *Re Wilton*, 13 L. J., Q. B. 17: *Ex p. Turner*, 24 L. J., Ch. 71.

(*g*) 2 D. & L. 33. See *In re Cartwright*, L. R., 16 Eq. 469: *Re Hall and Barker*, 9 Ch. D. 538.

(*h*) *Re Bignold*, 9 Beav. 270: *Re Steele*, 20 L. J., Ch. 562.

(*i*) *Re Ingle*, 21 Beav. 275; 25 L. J., Ch. 169: *Re Bignold*, supra: *Re Nicholson*, 30 L. J., Ch. 585: *Re Angove*, 26 Sol. J. 417, reversing 46 L. T. 280.

(*k*) *Re Street*, L. R., 10 Eq. 165; 39 L. J., Ch. 491. See *Re Hall and Barker*, supra.

(*l*) *In re Fisher*, 42 L. T. 261.

amounting to fraud (*m*). It would, in general, be granted where the payment was made in order to obtain possession of deeds, and an intention was at the same time expressed to have the bill taxed (*n*). And under some circumstances even without any such expression of intention (*o*). Clear errors or gross overcharges in the bill where there has not been ample opportunity for the client to examine it, and discover such errors or overcharges, are in general sufficient special circumstances (*p*). So where the business or part of it was done unnecessarily (*q*). The mere non-payment of fees due to a barrister or pleader would not, it seems, constitute such special circumstances (*r*).

The fact that the client paid under protest will not alone make any difference (*s*), though, coupled with other circumstances, it might (*t*). It seems this application may be made, even when the payment has been made after action brought (*u*). Under no circumstances can an order for the reference be made beyond twelve months after payment (*x*) if a bill has been delivered (*y*), whether signed or not (*z*). Where the payment is made under pressure before the delivery of the bill, as where the amount of the bill is paid at the completion of a mortgage in order to obtain possession of the deeds, and the bill is not delivered until a fortnight afterwards, the bill may be taxed as of course at any time within twelve months (*z*).

No agreement stipulating in the strongest terms that the payment or transaction shall be a final and complete settlement will

After agreement that transactions

(*m*) *Ex p. Walker*, 29 L. J., Ch. 625: *Re Dickson*, 26 L. J., Ch. 89: *Re Rance*, 22 Beav. 177: *In re Newman*, L. R., 2 Ch. 707: *In re Heriage*, 3 Q. B. D. 726; 47 L. J., Q. B. 509: *In re Fielder*, 40 L. J., Ch. 615: *In re Durnford*, W. N. 1883, 59: *In re Lacey & Son* (C. A.), 25 Ch. D. 301; 52 L. J., Ch. 287; 49 L. T. 755; 32 W. R. 233: *Re Munns and Longden*, 50 L. T. 350; 32 W. R. 675; ante, p. 142, note (*n*).

(*n*) *Re Dearden*, 9 Exch. 210; 23 L. J., Ex. 14: *Re Harrison*, 10 Beav. 59; 16 L. J., Ch. 170. See *Re Massey*, 34 L. J., Ch. 493.

(*o*) *Ex p. Toland*, 32 L. J., Ch. 100.

(*p*) *Re Stephen*, 2 Phil. 562; 17 L. J., Ch. 219: *Re Harding*, 10 Beav. 252: *Re Sladder*, Id. 488: *Re Harper*, Id. 284: *Re Drew*, Id. 368. See *Ex p. Walker*, supra: *Watson* v. *Rodwell*, post, n. (*x*).

(*q*) *In re Barrow*, 24 L. J., Ch. 126.

(*r*) *Re Wilton*, 13 L. J., Q. B. 17.

(*s*) *Re Harrison*, 10 Beav. 57: *Re Neate*, Id. 181: *Ex p. Barber*, 4 De G., M. & G. 108. See, however, *In re Dearden*, 9 Ex. 210; 23 L. J., Ex. 14.

(*t*) *Re Pugh*, 4 De G., J. & S. 373; 32 Beav. 173.

(*u*) *Re Wilton*, supra.

(*x*) *In re Sutton and Elliott*, 11 Q. B. D. 377. See per *Patteson*, J., 13 L. J., Q. B. 19: and *Binns* v. *Hey*, 1 D. & L. 661; 13 L. J., Q. B. 28: *Re Downes*, 13 L. J., Ch. 159: *Re Winterbottom*, 15 Beav. 80. But see *Watson* v. *Rodwell* (7 Ch. D. 625; 47 L. J., Ch. 418: aff. on app. 11 Ch. D. 150; 48 L. J., Ch. 209), where an account which had been settled between a client who was an old lady, and her solicitor, including arranged bills of costs, was ordered to be opened and the bills of costs taxed, after the lapse of nearly two years, without actual proof of error or overcharge, on the ground that the client had acted under undue influence, and without sufficient information, and that much of the business done was unnecessary, and ought not to have been done.

(*y*) *Re Street*, L. R., 10 Eq. 165; 39 L. J., Ch. 495: *In re Fielder*, 40 L. J., Ch. 615; 25 L. T. 56, R.

(*z*) *In re Fielder*, supra.

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oust the Court of its jurisdiction to order a taxation of the bill, if the case be within it (*a*).

shall be considered settled.

When a judge at chambers has made an order referring a bill for taxation after payment of the amount, the Court will not review that decision unless the affidavit in support of the application shows what the amount of the bill is; for the Court may not think it worth while to disturb the judge's decision where the whole amount of it is but small, and where consequently the amount in dispute is trifling (*b*).

Reviewing a judge's decision.

To whom the application to be made.

The Application and Order for.]—Before the Judicature Acts, if the business to which the bill related, or any part of it, had been transacted in the Court of Chancery or other Court of equity, or in any matter of bankruptcy or lunacy, or if no part of the business had been transacted in a Court of law (*c*) or equity, then the application had to be made to the Chancellor or Master of the Rolls; and if any part of the business had been transacted in any other Court, then it had to be made to either of the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any judge of either of them (*see sect.* 37, *ante*, p. 122). It was only, therefore, where the business or some part of it had been done in a Court of law, that the Courts of law at Westminster or the judges thereof could order a taxation; and this although an action might be pending therein (*d*). The Court of Exchequer had jurisdiction under the statute to tax a solicitor's bill for business done on the Crown side of the Queen's Bench (*e*); and the superior Courts of law had under the Act a common jurisdiction to refer for taxation a solicitor's bill for business done in any of them (*e*). Under the present system the application is usually made to a Master of the Division in which the matter is pending, or if no matter is pending in any Division, it may be made to any Master. The application is made to a master at chambers; the Court will not entertain it (*f*), unless under special circumstances, or where the order has been refused at chambers.

Summons for.

To obtain the reference:—*Take out a summons, intituled, "In the matter of the taxation of costs. And in the matter of A. B., gentleman, one of the solicitors of the Supreme Court"* (*g*) (*ante*, p. 122), *requiring him to attend upon the application.* If the solicitor be dead, then the summons should be against his executor or administrator; or, if bankrupt, then it should be against his trustee. The summons should contain all the matters it is desired to obtain an order for. No affidavit is as a rule required on attending a summons for taxation, though under some circumstances the master may

(*a*) *Ex p. Bass, Re Stephens*, 17 L. J., Ch. 219: *Tanner* v. *Lea*, 5 Sc. N. R. 237. See *Young* v. *Walker*, 16 M. & W. 446.

(*b*) See n. (*a*) supra.

(*c*) See *Re Andrews*, 22 L. T., O. S. 114, where it was held that the Court of Chancery had jurisdiction where the bill of costs was for attending to conduct the revision of voters on the retainer of the sitting member.

(*d*) *Bush* v. *Sayer*, 8 Sc. N. R. 756; 2 D. & L. 602; *Cowdell* v. *Neale*, 26 L. J., C. P. 37; 1 C. B., N. S. 332, where business had been transacted before a magistrate.

(*e*) *Re Barber*, 3 D. & L. 244; 14 M. & W. 720.

(*f*) *Bassett* v. *Giblett*, 2 Dowl. 6.

(*g*) *Re Hare*, 8 Sc. N. R. 231; 2 D. & L. 269. See form, Chit. Forms.

require one. The applicant, however, should have the bill in readiness to show to the master. When the application is founded on special circumstances, there should be an affidavit showing them; unless dispensed with by the solicitor. Affidavit.

The form and terms of the order, and what directions it may contain, and what terms and conditions it may impose, may be, to a great extent, collected from the preceding observations. If the application be made within a month after the delivery of the bill, then it should not order the payment of any money into Court, and should restrain any action being brought for the bill pending the reference. If made after that time, the judge may make such directions and impose such terms as he may think proper; and in this case also he may, if he think fit, restrain the bringing of an action for the bill, or stay one already brought. The order.

Under 2 *G.* 2, *c.* 23, it was in general a necessary preliminary to the obtaining an order to tax, that the applicant should give an undertaking to pay the whole sum that, upon taxation, appeared to be due; and where there were several parties chargeable with it, the solicitor was entitled to have the undertaking of all of them; at least it could not be dispensed with without a special application to the Court (*h*). It was, however, discretionary in the judge, where an action was brought, to require this undertaking to pay what was due or to impose any other terms (*i*). The 6 & 7 *V. c.* 73, does not require this undertaking, and it is not now generally ordered to be given if there appear to be no object in requiring it, inasmuch as, under sect. 43, the Court or a judge may, as we shall presently see, make an order for entering up judgment, or such other order as they may think fit for the payment of the amount of the allocatur (*j*). The form of order in use in the Court of Chancery contained an undertaking to pay the amount due, but this was not so in the form used in the Common Law Courts, and the forms in the Appendix to the R. of S. C., 1883, do not contain any undertaking to pay. A direction in the order that, "upon payment," &c., the solicitor shall deliver up all deeds, &c., does not amount either to a direction, or to an undertaking on the part of the client, to pay what shall be found due (*k*). Undertaking to pay.

But the judge will, where the application is made after a month from the delivery of the bill, require the amount of it, or part of the amount, to be brought into Court, as a condition to the not bringing or proceeding with an action for it, unless, indeed, there is *bonâ fide* ground for disputing the retainer, or the liability of the party chargeable, or other special circumstances that may induce the judge to dispense with the payment into Court. Bringing money into Court.

A common order to tax admits the retainer for the business, so, if the client denies the retainer, he should not get the bill taxed at all, or else he should procure an order for taxation, specially reserving his right to question the retainer (*l*). It admits, however, When order should leave open the client's liability to pay.

(*h*) *Hobby* v. *Pritchard*, 2 M. & W. 124.

(*i*) *Williams* v. *Griffith*, 6 M. & W. 32; 8 Dowl. 414: *Watson* v. *Postan*, 1 Dowl. 566; 2 C. & J. 370; 2 Tyr. 496.

(*j*) See *In re Elmslie*, L. R., 9 Eq. 72, where the trustee of a bankrupt gave the undertaking.

(*k*) *Price* v. *Philcox*, 7 Dowl. 559.

(*l*) See *Re Pyne*, 5 C. B. 407. In this case, the solicitor was also restrained from bringing an action pending the reference. See *Re Reece*, 18 L. J., Ex. 137: *Nelson* v. *Slack*, 2 M. & Sc. 820: *Mills* v. *Revett*, 1 A.

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a liability only *pro tanto;* so that, if the bill contain charges for several distinct transactions, an order to tax the charges in respect of one transaction does not preclude the client from disputing his retainer for the rest (*n*). The Master, under the common order, cannot enter into any question as to whether the business charged for was agreed to be done for costs out of pocket (*o*), but he may disallow items which have been unnecessarily incurred (*p*). Nor, under the common order, not claiming interest on the face of it, can the solicitor insist on the Master's including it in the taxation; nor can he, it seems, afterwards obtain an order for its being included (*q*).

Interest on bill.

Giving credit.

The order may, in all cases, require the solicitor to give credit for all moneys which he may have received from or on account of his client, or the like, the authority to impose which terms seems to be derived from the Act not merely authorizing the taxation and settlement of the bill, but also of the "attorney's demand thereon" (*r*). It is discretionary with the Court or Master whether or not to add the order for delivery up of papers and documents to the client (*s*). In ordinary cases the order for delivery up is more as a matter of course, but it may be refused under special circumstances (*s*).

Delivery up of papers.

As to costs of taxation.

The 6 & 7 *V. c.* 73, requires that the order shall, in all cases, direct the taxing officer to tax the costs of the reference, and to certify what, upon the reference, shall be found due to or from the solicitor, his executor, administrator or assignee in respect of his bill or demand, and the costs of the reference, if payable (sect. 37); it does not point out the consequences of the order omitting this direction. It cannot direct who shall pay these costs, for they are to be paid, as directed by sect. 37, according to the event of taxation (*t*); unless, indeed, the reference be made in a case where it is not authorized by the statute, except under the special circumstances provided for in that section, in which case the order may, if the Master think fit, give special directions relative to the costs of the reference.

Waiving irregularity.

An irregularity in obtaining the order may sometimes be waived by the solicitor's conduct (*u*).

& E. 856: *Baker* v. *Merryweather*, 2 C. & K. 737: *Re Thurgood*, 23 L. J., Ch. 952. See *Re Bracey*, 8 Beav. 266: *Re Hair*, 10 Id. 187.

(*n*) See *White* v. *Milner*, 2 H. Bla. 357: *Mills* v. *Revett*, supra.

(*o*) *Evans* v. *Taylor*, 2 Dowl. 349. See *Re Eyre*, 17 L. J., Ch. 277: *Drax* v. *Scroope*, 2 B. & Ad. 581: *Re Stretton*, 3 D. & L. 278; 14 M. & W. 806. He could not formerly consider any question of negligence. *Jones* v. *Roberts*, 2 Dowl. 656; 4 Tyr. 310: *Meggs* v. *Binns*, 5 Dowl. 28: *Matchett* v. *Parkes*, 9 M. & W. 767; 1 Dowl., N. S. 924: *The Papa de Rossie*, 3 P. D. 160. See *Re Clarke*, 1 De G., M. & G. 43; 21 L. J., Ch. 20. But see now post, p. 149, n. (*g*).

(*p*) *Williams* v. *Nicholas*, 1 Dowl., N. S. 840: per *Patteson*, J., in *Heald* v. *Hall*, 2 Dowl. 163: *Sollery* v. *Flewker*, 27 L. J., Ex. 11.

(*q*) *Barrington* v. *Philip*, 1 M. & W. 48. As to a Court of equity ordering interest to be paid in certain cases, see 23 & 24 V. c. 127, s. 27. See also as to the Master allowing interests on disbursements, 33 & 34 V. c. 28, s. 17, ante, p. 130.

(*r*) Ante, p. 122. See *Randall* v. *Ikey*, 4 Dowl. 682, a case decided before 6 & 7 V. c. 73.

(*s*) *Ex p. Jarman*, 4 Ch. D. 835. See per *Jessel*, M. R., at p. 838. Cp. forms Nos. 41 and 42 in App. K. to R. of S. C., Chit. F.

(*t*) See *Re Woollett*, 12 M. & W. 504; 1 D. & L. 593; 13 L. J., Ex. 121.

(*u*) See *Re Angell*, 12 Jur. 951, B. C.

The taxation itself.

The Taxation itself.]—In order to proceed with the taxation, attend with the bill to be taxed, and the order for taxation before one of the taxing Masters and obtain an appointment from him. The onus of obtaining this appointment lies on the party who has obtained the order; his neglect, however, to obtain it does not enable the solicitor to treat the order as abandoned, and he himself should proceed with the taxation (*x*). Serve a copy of the order and notice of the taxation on the solicitor. By *Ord. LXV. r.* 16, one day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase (if any), shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor, in all cases where a notice to tax is necessary.

Notice of taxation.

Notice of the appointment may be served at any time before six at night for eleven or later the next morning, but, if the bill be a heavy one, one clear day's notice should be given. Shortly before the time appointed attend with the bill at the bill entering office (room 185). When it has been entered take the bill to the Master who will tax it.

The master may, if either party, after notice, refuse or neglect to attend the taxation, proceed to tax and settle the bill ex parte (*y*); and he may do so after the opposite party has waited half an hour after the appointed time (*z*). As soon as the Master has settled and taxed the bill, and the solicitor's demand upon it, the proper fee for taxation must be affixed to the bill in stamps (*a*) whereupon the Master will make his allocatur, and deliver it to the party in whose favour it is made, and to whom it belongs (*b*).

As to the taxation of costs in general, and what costs are and are not allowed on taxation, *see post, Ch. LXVII.* The Master may upon the taxation receive affidavits or *viva voce* testimony (*c*). According to the practice which is now in force in the Queen's Bench Division (*d*) the Master cannot, without a special order to that effect, enter into the question as to whether or not the solicitor was retained to do the business (*e*), or whether he agreed to do the business for costs out of pocket (*f*); but he may, as to whether or not the items were incurred through negligence (*g*) or ignorance (*g*),

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(*x*) *Sheriff* v. *Gresley*, 4 A. & E. 338.

(*y*) 6 & 7 V. c. 73, s. 37, ante, p. 123.

(*z*) Cp. R. 154, H. T. 1853.

(*a*) See Order as to fees, in Appendix.

(*b*) *Doe* v. *Robinson*, 2 Dowl. 503.

(*c*) Post, Ch. LXVII. See *Noy* v. *Reynolds*, 1 H. & W. 14. See *In re Flux*, 44 L. J., Ch. 375, as to the right to cross-examine the solicitor on an affidavit made by him.

(*d*) *Ex rel. amici.*

(*e*) Ante, p. 147: *In re Thurgood*, 19 Beav. 548; 23 L. J., Ch. 952. But see *In re Bracey*, 14 L. J., Ch. 299: *In re Hare*, 10 Beav. 146; 16 L. J., Ch. 163.

(*f*) *Evans* v. *Taylor*, 2 Dowl. 349. See *Nicholls* v. *Williams*, 11 L. J., Q. B. 190.

(*g*) *In re Massey and Carey*, C. A., 26 Ch. D. 459; 53 L. J., Ch. 705; 32 W. R. 1008. But see *Matchett* v. *Parkes*, 9 M. & W. 767; 1 Dowl., N. S. 924: *Heald* v. *Hall*, 2 Dowl. 163: *The Papa de Rossie*, 3 P. D. 160. See ante, p. 148, n. (*o*). On taxation between party and party, the Master may disallow all costs which appear to him to have been incurred through over-caution, negligence or mistake, or merely by the desire of the party: R. of S. C., Ord. LXV. r. 27, sub-r. 29, post, Ch. LXVII.

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and whether they were necessarily (*h*) or improperly (*i*) incurred. And he may disallow costs which the solicitor is not entitled to because he was uncertificated (*k*). He may consider the legality of the charges (*l*). He is, in general, the sole judge as to the reasonableness and propriety of the amount of the charges. He is not even bound to tax according to a special agreement between the solicitor and his client as to the amount of the charges of the former; but he may exercise his discretion as to allowing charges made in accordance with it (*m*). He may also have regard to the skill, labour and responsibility involved (*n*). In the case of unusual expenses not ordinarily allowed on taxation between party and party—as, for instance, shorthand notes of evidence—it is the duty of the solicitor to tell the client that the costs may not be allowed on taxation, and may have to be paid by the client in any event, and if he does not do so the costs will not be allowed on taxation between solicitor and client (*o*). Where several items in the bill, not for fixed fees, but of a discretionary nature, had no charges set opposite to them, and others were charged, some too low and some too high, and the Master, on taxation, reduced the latter to the proper scale, but declined to increase the former, or to insert the charges omitted altogether, the Court refused to review the taxation (*p*). It may be useful to observe that the 36th section of the County Court Act, 1856, which fixes a limit to costs between solicitor and client when less than 20*l.* is recovered, is confined to County Court actions (*q*). A solicitor cannot make, nor has the Taxing Master any jurisdiction to permit, any alteration or amendment to be made in the bill except by consent (*r*). Where a bill contains charges for business done in various Courts, or business not usually taxable by the Master, as for parliamentary business, or the like, the Master may send the portion of the bill containing these charges to the taxing officer of each of the other Courts with a request to him to tax them, who is thereupon to tax them accordingly, and return the taxation to the Master (*s*). The

Master judge of amount of charges, &c.

Where business done in another Court.

(*h*) *Re Wormsley, Baines* v. *Wormsley*, 39 L. T. 85: *In re Massey and Carey*, supra: *Williams* v. *Nicholas*, 1 Dowl., N. S. 840: *Cliffe* v. *Prosser*, 2 Dowl. 21: *Heald* v. *Hall*, 2 Dowl. 163: *Re Atkinson*, 26 Beav. 153: *Sollery* v. *Flewker*, 27 L. J., Ex. 11: *Re Brown*, 20 Beav. 146.

(*i*) *Re Wormsley*, supra: *In re Clarke*, 1 De G., M. & G. 43; 21 L. J., Ch. 20: *Wiggins* v. *Peppin*, 2 Beav. 266; 3 Jur. 721: *Re Kitton*, 35 Beav. 369: *Sollery* v. *Flewker*, supra.

(*k*) See *Re Angell*, 6 D. & L. 144; 12 Jur. 961. See ante, p. 82.

(*l*) *In re Parker*, 21 Ch. D. 408.

(*m*) *Drax* v. *Scroope*, 1 Dowl. 69; 2 B. & Ad. 581, and cases there cited: *Re Masters*, 4 Dowl. 18. The Master must tax though there was an agreement between the solicitor and client that the former was to be paid a gross sum for the business: *Philby* v. *Hazle*, 8 C. B., N. S. 647; 29 L. J., C. P. 370: *Re Newman*, 30 Beav. 196: *Wilkinson* v. *Swan*, 33 L. T. 573: *Scarth* v. *Rutland*, L. R., 1 C. P. 642. See stat. 33 & 34 V. c. 28, ante, p. 127, under which a valid agreement may be made.

(*n*) See 33 & 34 V. c. 28, s. 18, ante, p. 131.

(*o*) *In re Blyth and Fanshawe, Ex p. Wells*, 10 Q. B. D. 207.

(*p*) *Eyre* v. *Shelley*, 8 M. & W. 154; 1 Dowl., N. S. 83; 10 L. J., Ex. 295. See *Re Tilleard*, 32 L. J., Ch. 765.

(*q*) *In re Copp, Ex p. Drew*, 6 Q. B. D. 607; 50 L. J., Q. B. 233, C. A.: *Re Emanuel*, 9 Q. B. D. 408.

(*r*) *Re Catlin*, 18 Beav. 519. See *Re Tilleard*, 32 L. J., Ch. 765: *Re Chambers*, 34 L. J., Ch. 292, and cases cited, ante, p. 135, n. (*l*).

(*s*) See sect. 42, ante, p. 126: *Re Sudlow*, 11 Beav. 401; 18 L. J., Ch.

Master, however, is not compelled to do this; he may still, it seems, take upon himself the taxation of these items as well as the other parts of the bill (*t*). Also, this taxation by the other officer is, it seems, only for the information of the Master, and he is not bound to follow it; nor does the reference give the Court to which the latter officer belongs any jurisdiction to interfere in the taxation (*u*).

Allowance of interest.

As to the Taxing Master allowing interest on disbursements by the solicitor, and on moneys of the client improperly retained by the solicitor, *see* 33 & 34 *V. c.* 28, *s.* 17; *ante*, p. 130; and Solicitors' Remuneration Act, 1881, sect. 5; and General Order, Rule 7.

The allocatur.

The taxation is not considered as finished until the allocatur is made (*x*). The Master should, according to the order for taxation, tax the costs of the reference, and certify what is due to or from the solicitor, or his executor, administrator, or assignee, in respect of his bill and demand, and the cost of the reference, if payable (*y*). He should also, in other respects, follow the order. He may, in all cases, certify specially any circumstances relating to the bill, and upon which the Court or judge may make such order as they may think right respecting the payment of the costs (*z*). The allocatur is final on all questions within the Master's jurisdiction, unless revised by the Court or a judge (*a*). It does not preclude the Court from going behind it for the purpose of investigating charges of misconduct (*b*).

Reviewing taxation.

Reviewing Taxation.]—As to the mode of and practice on obtaining a review of the Master's taxation, *see post, Ch. LXVII.* Where an application for a taxation is made by a party not chargeable with the bill, the 6 & 7 *V. c.* 73, *s.* 40 (*ante*, p. 125), expressly provides that no bill which has been already taxed and settled shall be again referred, unless, under special circumstances, the Court or judge to whom such application is made shall think fit to direct a re-taxation.

Costs of taxation.

Costs of Taxation.]—By 6 & 7 *V. c.* 73, *s.* 37 (*c*) (*ante*, p. 123), if the reference to taxation be made on the application of the party chargeable with the bill (*d*) or on the application of the solicitor, or his executor, administrator or assignee, and the party chargeable

182, where the Taxing Masters of the Court of Chancery certified that, under the common order to tax a solicitor's bill, the Taxing Masters can tax a bill for parliamentary business upon the scale of parliamentary allowances. As to who is bound to pay the fees to the taxing officer in the House of Lords, in the first instance, on a reference to him, see *Becke* v. *Cattle*, 4 Sc. N. R. 246.

(*t*) See *Wilson* v. *Gutteridge*, 4 D. & R. 736; 3 B. & C. 157: *Hooper* v. *Till*, Doug. 199: *R.* v. *Partridge*, Tidd, 9th ed. 329: *Luxmore* v. *Lethbridge*, 1 D. & R. 511; 5 B. & Ald. 898.

(*u*) *Re Jones*, 1 Dowl. 424.

(*x*) *Cleaver* v. *Hargrave*, 2 Dowl. 689.

(*y*) 6 & 7 V. c. 73, s. 37. See *Phillips* v. *Broadley*, 9 Q. B. 744; 16 L. J., Q. B. 72, as to the effect of the allocatur in evidence. And see *Whalley* v. *Glover*, 3 C. & K. 13.

(*z*) Id.

(*a*) See *Doe* v. *Webber*, 2 A. & E. 448; 1 H. & W. 10; 6 & 7 V. c. 73, s. 43: *Re Lowless*, 5 D. & L. 793; 6 C. B. 123; 17 L. J., C. P. 222.

(*b*) *Ex p. Harper*, *In re Pooley*, 20 Ch. D. 685.

(*c*) See *Doe* d. *Potts* v. *Jinders*, 2 D. & L. 986: *Hodge* v. *Bird*, 7 Sc. N. R. 993.

(*d*) This provision as to the costs only applies to taxation between solicitor and client, and not to those between party and party. *Re Grundy & Co.*, and cases cited ante, p. 124 (*f*).

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attend on the taxation, the costs of the reference shall be paid according to the event of such taxation; that is to say, if the bill when taxed be less by a sixth part than the bill delivered, then the solicitor, his executor, administrator, or assignee, shall pay the costs; but if not less by a sixth part, then the party chargeable with the bill, making such application or so attending, shall pay the costs; and the order of reference (*e*) shall direct the officer to tax the costs of the reference, and to certify what, upon such reference, shall be due to or from the solicitor, or his executor, &c., in respect of the bill and demand, and of the costs of the reference, if payable: but the officer in all cases is at liberty to certify specially any circumstances relating to the bill or taxation, and the Court or judge may make thereupon such order as they may think right respecting the payment of the costs; and the Act also provides that where the reference is made when the same is not authorized to be made, except under special circumstances, then the Court or judge is at liberty to give special directions relative to the costs of the reference. This enactment is imperative, and the costs of taxation follow in all cases as directed by it, and the Court or judge has no discretionary power over them except in the instances specifically named in the Act, viz., where the taxation is granted only under special circumstances, as after verdict or writ of inquiry, or after twelve months after the delivery of the bill, or after payment, or where the Master has certified specially circumstances relating to the taxation (*f*). If a client chooses to have a solicitor's bill taxed,

Statute imperative.

(*e*) See *Re Shaw*, 20 L. J., Q. B. 280.

(*f*) *Ex p. Woollett*, 12 M. & W. 504; 1 D. & L. 593; 13 L. J., Ex. 121.

By 2 G. 2, c. 23, s. 23, if the bill, when taxed, were less by a sixth part than the bill delivered, the attorney had to pay the costs of taxation; but if not less by a sixth, the Court, at discretion, might charge the attorney or client with such costs, according to the reasonableness or unreasonableness of the bill. That enactment, compelling the attorney to pay the costs of taxation in the event of a sixth being taken off, was imperative; and it was not in the discretion of the Court to relieve him therefrom (*Mills* v. *Revett*, 1 A. & E. 856; 3 N. & M. 767: *Higgins* v. *Woolcott*, 5 B. & C. 760; 8 D. & R. 589, nom. *Dickens* v. *Woollcott: Featherstonehaugh* v. *Reece*, 1 C. & M. 495; 2 Dowl. 30: *Swinburn* v. *Hewett*, 7 Dowl. 314: *Russell* v. *Yorke*, 7 Sc. 130). Where, however, the attorney had delivered a bill a month before he brought an action, and the client waited until the action was brought without taxing the bill, he was not entitled to the costs of such taxation made after action brought, although more than a sixth was taken off (*Harbin* v. *Miles*, 9 B. & C. 755: *Coates* v. *Nash*, Id. 757, n.: *Benton* v. *Ballard*, 4 Bing. 561: *Jay* v. *Coakes*, 8 B. & C. 635; 3 M. & R. 35: *Wilson* v. *Knapp*, 8 Dowl. 426: *Robinson* v. *Powell*, 5 M. & W. 479); unless where the action was evidently brought to avoid these costs (*Toomer* v. *Fuller*, 2 Dowl. 195), or under some other special circumstances. And where the client had agreed to waive the delivery of a signed bill, it was held that he would not be entitled to the cost of taxation, even though more than one-sixth was taken off (*Gerrard* v. *Arnold*, 6 Dowl. 336. And see *Russell* v. *Yorke*, 7 Scott, 130). And the costs were in the discretion of the Court in all cases where the order for taxation was by virtue of the common law jurisdiction as to it (*Peters* v. *Sheenan*, 10 M. & W. 213; 1 Dowl., N. S. 943).

Where *less* than a sixth was disallowed by the Master, the Court generally obliged the client to pay the costs of taxation, though it was in their discretion to do otherwise (*Hurst* v. *Dixon*, Barnes, 118: *Hindle* v. *Shackleton*, 1 Taunt. 536. See *Yea* v. *Yea*, 2 Anst. 494: *Webb* v. *Stone*, 1 Anst. 260: *Gale* v. *Pakington*, 1 M'Clel. & Y. 354: *Wilson* v. *Knapp*, 8 Dowl. 430, per *Patteson*, J.: *Barker* v. *Bishop of London*, Barnes, 147:

reserving to himself a right to dispute the retainer or the like, he is liable for the costs of such taxation, whatever may be the result of the question so reserved (*g*). Under the common order to tax, if the client do not attend the taxation he cannot be made to pay the costs of it (*h*). The solicitor cannot, in order to avoid paying the cost after a sixth has been taxed off his bill, rely on a previous offer to take less than the amount found to be due (*i*). If, pending the taxation, the solicitor petitioned for and obtained his discharge under the Insolvent Debtors Act, and more than a sixth was taken off, he was personally liable for the costs of the taxation, notwithstanding his discharge (*k*).

Effect of insolvency of solicitor.

Any deduction made by the Master, either by reducing the amount of an item or items, or by striking out an item or class of items, must be deemed a sum taxed off the bill (*l*). But, according to some decisions under 2 *G.* 2, *c.* 23, it would seem that it is not every deduction that will receive that construction; and where the deduction arose not from the taxation of particular items, but by a whole branch of the bill being disallowed, because the client was not the party liable for it, and that some other party was, it was held not to be a deduction from the bill within the meaning of that Act (*m*). But in a more recent case in the Exchequer, where the Master decided that one of the actions in which the costs had been incurred had been improperly brought, and on that ground deducted the costs, the Court decided that the deduction was within the meaning of it (*n*). There certainly does not appear to be any

What is a reduction by a sixth.

Elwood v. *Pearce*, 8 Bing. 83; 1 M. & Sc. 159; 1 Dowl. 251: *Davison* v. *Allen*, 8 Dowl. 673: *Mills* v. *Revett*, 1 A. & E. 856; 3 N. & M. 767: *Baker* v. *Mills* (or *Wells*), 2 Dowl. 382; 2 C. & M. 415: *Newton* v. *Harland*, 3 Sc. N. R. 230; 9 Dowl. 641; 2 M. & Gr. 886).

(*g*) *Re Shaw*, 20 L. J., Q. B. 280. See *Laurie* v. *Bartlett*, 1 D. & L. 730; 13 L. J., Q. B. 145, where there was a compromise between the parties, and the allocatur was founded on the agreement.

(*h*) *In re Upperton*, 30 W. R. 840.

(*i*) *Re Paull* (C. A.) 32 W. R. 940; affg. *S. C.*, 50 L. T. 585; 32 W. R. 801. See *In re Carthew* (C. A.) 32 W. R. 940, where the bill amounted to 83*l.*, and the words "say 78*l.*" were added, and the bill taxed at 66*l.*, and the solicitor was held liable to pay the costs.

(*k*) *Whalley* v. *Williamson*, 6 M. & Gr. 269; 6 Sc. N. R. 948. As to when the assignees of a bankrupt solicitor were personally liable for the costs of taxation, see *Re Peers*, 21 Beav. 520.

(*l*) In *Ex p. Inman*, Buck, B. C. 129, it was held that the attorney ought to pay the costs, the reduction being caused by the disallowance of a sum he had paid for extra fees to the commissioners of bankruptcy for travelling expenses. Where, on the taxation of a solicitor's bill, the Master disallows some items, and adds others, in order to apply the rule as to the one-sixth, the bill delivered is to be increased by the sum added, and then reduced by the sum disallowed; *Re Hartley*, 2 Jur., N. S. 448; and see *R.* v. *Eastwood*, 6 El. & Bl. 285.

(*m*) *Mills* v. *Revett*, 1 A. & E. 856; 3 N. & M. 767: *White* v. *Milner*, 2 H. Bl. 357. See *Woollison* v. *Hodgson*, 2 Dowl. 360: *Newton* v. *Harland*, 2 M. & G. 286; 4 Sc. N. R. 769: *Marshall* v. *Oxford*, 5 Sim. 456.

(*n*) *Morris* v. *Parkinson*, 2 C., M. & R. 178; 3 Dowl. 774: *Parke*, B., there observed, "It is not necessary to say whether the decision in *White* v. *Milner* be right or wrong, because this is distinguishable from that case. There the sum was struck out because the defendant was not chargeable with it, and it ought to have been charged to another person. In the present case, the sum in question was disallowed because the attorney ought not to have charged this item at all, and therefore it ought never to have been inserted in the bill."

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sound reason for these distinctions, and the question, it is submitted, ought to be, whether the bill delivered and ordered to be taxed has been taxed off, no matter how or by what means the Master came to a conclusion (*o*), to less by a sixth; and if it has, the solicitor should pay the costs of the taxation, unless the judge has made some special order as to those costs, or the Master has certified some special circumstances, showing that he ought not to be called on to pay them.

Non-taxable items not to be calculated.

If any of the items in the bill are not taxable, the Master will not tax them; and they should not be taken into account when calculating whether the bill has been taxed off by a sixth or not (*p*). Thus, a solicitor employed to defend an action and receiving from his client the debt and costs, for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill, so as to increase the amount of it (*q*). But he has a right to introduce into his bill disbursements made by him for his client of money paid by his client to him, although he has no discretion as to their amount, unless his client paid the money to him specifically on account of those disbursements (*r*). And where he paid a proctor's bill for his client, it was held, he might include it in his own bill as a disbursement (*s*). And where a sum of 65*l.* 10*s.* was given by the client to the solicitor, at the trial of a cause, and after the briefs had been delivered, to be disbursed in fees to counsel, and actually applied in that manner, it was held that such fees were properly inserted in the bill as disbursements (*t*). Costs in a suit were taxed as between party and party, and the residue, amount due on taxation, paid to the solicitor of the successful party; the solicitor afterwards delivered his bill to his client, under an order of Court for such delivery, and for a general reference of the bills for taxation; they included, among other matters, the above costs as reduced on taxation, for which credit was given; it was held, that he was entitled to insert the reduced, and not the original, amount of costs, and that, on taxation of the bills, the client could not add the sum formerly deducted from these costs to the sum taxed off from the general amount of the bills, in order to make the whole reduction exceed one-sixth of such amount (*u*).

Remedy for costs of taxation.

Under the common order to tax, in which, as we have seen (*ante*, p. 148), nothing is said as to who is to pay the costs of the taxation, the remedy for the amount of these costs will be the same as the remedy for the non-performance of any other order as to the payment of money, such payment being by the order impliedly ordered to be made according to the event of the taxation, as pointed out by the Act (*x*). The same remedy is also open to the party where the order expressly directs who shall pay these costs. But where the party seeks to obtain them upon special circum-

(*o*) See *Swinburn* v. *Hewitt*, 7 Dowl. 314.

(*p*) See *Re Bedson*, 9 Beav. 5: *Re Remnant*, 11 Beav. 603.

(*q*) *Woollison* v. *Hodgson*, 2 Dowl. 360: *Hays* v. *Trotter*, 5 B. & Ad. 1106; 3 N. & M. 174.

(*r*) *Harrison* v. *Ward*, 4 Dowl. 39.

(*s*) *Franklin* v. *Featherstonehaugh*, 3 N. & M. 779; 1 Ad. & E. 475. See *Re Morris*, 2 A. & E. 582.

(*t*) *Hindle* v. *Shackleton*, 1 Taunt. 535: *Re Metcalfe*, 30 Beav. 406.

(*u*) *Mills* v. *Revett*, 1 A. & E. 856; 3 N. & M. 767. And see *Hays* v. *Trotter*, 3 N. & M. 174; 5 B. & Ad. 1106.

(*x*) As to the remedies to compel the performance of orders in general, see post, Ch. LXXIV.

stances which the Master has certified on the taxation, then he must apply to the Court or a judge for them; and, if ordered to be paid, his remedy then will be upon that order. It was held, under 2 *G.* 4, *c.* 23, that the costs of taxation could not be recovered by action, nor be the subject of a set-off (*y*). Where a client gave his acceptance for the amount of a bill of costs, but afterwards had the bill taxed, and more than one-sixth was deducted, the bill having been dishonoured, the Court allowed the solicitor to pay the costs of taxation to the holders in part payment of the bill, instead of paying them to the client (*z*).

Remedy by client for over-payment.

Remedy by Client for Over-payment.]—If the allocatur be in favour of the party chargeable with the bill, and the order of reference contain the usual clause ordering the solicitor to refund the surplus, the remedy for that surplus is by obtaining a Master's order for the payment of the same, and enforcing the same by execution in the usual way (*a*).

(*t.*) *Their Remedies for their Bills.*

Remedy for bill.

A solicitor may bring an action for his bill whether it has been taxed or not. If it has been taxed, then he may proceed if he thinks proper by execution, as mentioned *post*, p. 159. We have seen (*ante*, p. 128) that an action will not lie on an agreement for costs made under the 33 & 34 *V. c.* 28. A solicitor has no absolute statutory right to have the amount of his charges ascertained by taxation (*b*).

By action.

Action for.]—We have already seen that, except by leave of a judge, which may be granted in certain cases (*ante*, p. 124, n. (*e*)), no action can be brought for the bill until the expiration of a calendar month after it has been duly delivered (*c*).

Action pending taxation.

The right to bring or proceed with an action pending a reference for taxation depends on the order for it. If the order be obtained within a month after the delivery of the bill, it expressly restrains an action, and if such action were brought, the proceedings might be set aside (*d*). If an action were brought clearly for the purpose of vexation after a summons taken out for a reference and before its return, probably the judge would give the defendant the same benefit as if no action had been brought, and perhaps set aside the

(*y*) *Field* v. *Bezant*, 5 B. & Ad. 357: *Phillips* v. *Broadley*, 9 Q. B. 744; 15 L. J., Q. B. 72.

(*z*) *Woollison* v. *Hodgson*, 2 Dowl. 360. See 3 Dowl. 178. See *Thomas* v. *Mayor of Swansea*, 11 M. & W. 83; 2 Dowl., N. S. 1003: *Wilson* v. *Knapp*, 8 Dowl. 426, as to allowing, before the 6 & 7 V. c. 73, the costs of taxation as costs in the cause.

(*a*) See post, Ord. LXXIV.: *Peace* v. *Jones*, 8 Dowl. 314. As to an action lying for the surplus, see *Gower* v. *Popkin*, 2 Stark. 85: *Phillips* v. *Broadley*, 9 Q. B. 744; 16 L. J., Q. B. 72.

(*b*) *Ex p. Ditton, In re Woods*, 13 Ch. D. 318; 42 L. T. 161.

(*c*) 6 & 7 V. c. 73, s. 37, ante: *Lane* v. *Glenny*, 7 A. & E. 83; 2 N. & P. 258: *Robinson* v. *Roland*, 6 Dowl. 271. In the absence of a plea of no signed bill delivered, it is competent to a solicitor to rely on a contract to pay a specific sum for business done, without producing a bill or showing charges fair and reasonable amounting to or exceeding the stipulated sum: *Scarth* v. *Rutland*, L. R., 1 C. P. 642.

(*d*) *Sheriff* v. *Gr* ", 5 N. & M. 491; 4 A. & E. 338

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proceedings; at least, this would have been done before 6 & 7 *V.* c. 73 (*e*). We have seen that the delay of the party in proceeding with the taxation does not warrant the solicitor in commencing an action; his course in such a case is for himself to proceed with it (*f*). As soon as the taxation is completed the action may be brought if a month has elapsed since the delivery of the bill, and the solicitor need not delay commencing it on account of an application concerning the costs of the reference or to review the taxation, unless indeed an order has been obtained expressly restraining it (*g*).

Proofs, &c. Retainer.

If the defendant dispute the retainer, the plaintiff will have to prove it. If it were in writing, it must be produced, and proved in the ordinary way. If by parol, it may be proved by the plaintiff himself or any one present on the occasion when it was given, or by defendant's admissions. Proof of defendant having given directions about the business will be evidence of it, if the business were for his benefit. The production of an order obtained by defendant to tax the bill, and the Master's allocatur thereon, will be sufficient evidence of the retainer, unless the order expressly reserves to defendant the right to contest it; they will also be evidence of the business having been done, and the reasonableness of the items (*h*). The plaintiff must, under a defence denying same, prove

(*e*) See *Toomer* v. *Fuller*, 2 Dowl. 195.

(*f*) Ante, p. 149.

(*g*) See *Hewett* v. *Bellott*, 2 B. & Ald. 745.

(*h*) *Lee* v. *Jones*, 2 Camp. 496: *Whalley* v. *Glover*, 5 C. & K. 13. As to these proofs in general, see Rosc. on Evid. Where lessor's solicitor draws a lease to be paid for by lessee, the solicitor must look, in the first instance, to lessor, who may afterwards recover from lessee the amount paid for the lease (see *Grissell* v. *Robinson*, 3 Bing. N. C. 10; 3 Scott, 29). But where lessor and lessee, in the presence of lessor's solicitor, signed an agreement that a lease should be prepared by lessor's solicitor, and paid for by lessee, the lease was prepared accordingly; but lessor, who had only a life estate, dying, the lease was never executed: it was held that lessor's solicitor was entitled to recover of lessee the charge for drawing the lease (*Webb* v. *Rhodes*, 3 Bing. N. C. 732: *Smith* v. *Clegg*, 29 L. J., Ex. 300). As to counterparts of leases, see *Jennings* v. *Mayor*, 8 C. & P. 61. A., wishing to borrow money on a mortgage of land, delivered the title deeds to B., the intended mortgagee, for examination, and said that he would pay all expenses: B. handed the deeds to his own solicitors to be investigated; the negotiation went off, and the solicitors, being requested by A. to return his deeds, refused to do so till he paid their bill of costs. On assumpsit brought by A. against the solicitors, to recover back the money so paid, it was held that the defendants could not be considered as having acted for both parties in the negotiation, and, therefore, had not a lien against A. as his solicitors: that, supposing A. liable to B. for the costs incurred, B. could not communicate to his own solicitors a lien upon A.'s deeds by handing them to the solicitors for investigation: that the undertaking of A. to B., if it amounted to a promise to pay these costs, did not entitle B.'s solicitors to detain the deeds, as it established no privity between them and A., and that A. might have brought trover for the deeds, and was entitled to recover in this action. (*Pratt* v. *Vizard*, 5 B. & Ad. 808; 2 N. & M. 455: see *Wilkinson* v. *Grant*, 25 L. J., C. P. 233.) See *Helps* v. *Clayton*, 17 C. B., N. S. 553; 34 L. J., C. P. 1, as to the husband being liable for the wife's solicitor's costs of preparing a marriage settlement. See *Ladd* v. *Lynn*, 2 M. & W. 265, as to the husband's liability for the expenses of a deed of separation. As to the husband's liability for the costs of a judicial separation or decree, see ante, p. 101. As to the expenses of a deed of appointment, see *Hayward* v. *Fiott*, 8 Car.

that the work and disbursements charged for were respectively done and laid out. If the bill has been taxed, this would be sufficiently proved by the production of an office copy of the order for taxation, and of the allocatur. Proof of the main items in the bill will, in general, suffice, if it would follow, as of course, that the rest were incurred, without going into proof in detail of each item (*i*). It is no defence that the business was done on a Sunday (*k*). When the business which plaintiff engaged to do for the defendant is a complete work in itself it is a defence that it has not been completed by the plaintiff; as, that an action or suit in which he was employed for defendant is still undetermined, and that the plaintiff improperly abandoned it (*l*). So the defendant may, as we have already seen, set up as a defence that the business charged for was *wholly* useless to him, by reason of the plaintiff's negligence or improper conduct (*m*). No evidence need in general be given that the charges are reasonable, for, if the bill have not been taxed, their reasonableness is admitted by the defendant not procuring such taxation (*n*), and if taxed, the allocatur will be conclusive evidence of their being reasonable (*o*). But, when not taxed, it is proper to give some general evidence of the reasonableness of the charges, or else of the delivery of the bill a month before action. The delivery of a bill is strong evidence against an increase of charge in a subsequent bill for any of the items contained in the first bill, and presumptive evidence against any additional items (*p*). The defendant may set up as a defence that the plaintiff agreed to charge nothing for his trouble (*q*); that he

On Sunday.

Business not finished.

Negligence of plaintiff.

Reasonableness of charges.

Agreement to charge

& P. 59. As to the expenses of deeds between vendors and purchasers, see Dixon on Title-deeds, pp. 462 et seq.; Sugden's Vend. and Purch. p. 247. It may be added that a solicitor is not in general entitled to charge for business done as a trustee: *Re Sherwood*, 3 Beav. 338. And see *Gilbert* v. *Dyneley*, 3 Sc. N. R. 364: *Broughton* v. *Broughton*, 5 De G., M. & G. 160; 25 L. J., Ch. 250: *Re Taylor*, 23 L. J., Ch. 857, where a solicitor, a trustee, employed another solicitor to act for him on agency terms: *Harbin* v. *Darby*, 28 Beav. 325; 29 L. J., Ch. 622, where the solicitor was an executor: *Pollard* v. *Doyle*, 6 Jur., N. S. 1139. The rule that a trustee shall make no profit of his trust does not extend to his partner: therefore, where a trustee, being a solicitor, employed his partner professionally in the matter of the trust, upon the terms of such partner being alone entitled to the profits, *Wood*, V.-C., allowed the professional charges: *Clack* v. *Carlon*, 30 L. J., Ch. 639.

(*i*) *Phillips* v. *Roach*, 1 Esp. N. P. C. 10.

(*k*) *Peate* v. *Dicken*, 1 C. M. & R. 422; 3 Dowl. 171.

(*l*) See ante, p. 108.

(*m*) Ante, p. 114.

(*n*) *Anderson* v. *May*, 2 B. & P. 237: *Williams* v. *Frith*, 1 Dougl. 198: *Hooper* v. *Till*, Id. But see *Ex p. Ditton*, *In re Woods*, 13 Ch. D. 318; per *James*, L. J., at pp. 319, 320, where, however, the above authorities were not cited (so far as appears from the report) in answer to the question of the Lord Justice.

(*o*) *Lee* v. *Jones*, supra: *Beck* v. *Cleaver*, 9 Dowl. 111.

(*p*) *Leveridge* v. *Botham*, 1 B. & P. 49.

(*q*) *Ashford* v. *Price*, 3 Stark. 185. See *Re Stretton*, 14 M. & W. 806: *Turner* v. *Tennant*, 10 Jur. 429, n., Q. B.: *Jones* v. *Reade*, 5 Ad. & E. 529: *Jennings* v. *Johnson*, L. R., 8 C. P. 425. Before 33 & 34 V. c. 28 (ante, p. 126), a contract between a solicitor and client that the solicitor should advance money for carrying on a law suit to recover possession of an estate, and that the client should, if the suit were successful, pay the solicitor, over and above his legal costs and charges, a sum according to the benefit to the client from possession of the estate, was void on the ground of maintenance. *Earle* v. *Hopwood*, 30 L. J., C. P. 217: *Price* v. *Beattie*, 32 L. J., Ch. 734, where, before the 33 & 34 V. c. 28, the soli-

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nothing, or only money out of pocket.

Plaintiff not admitted or qualified.

Uncertificated.

No signed bill delivered.

agreed to charge only costs out of pocket, and that defendant has paid same (*r*). The defendant may also set up as a defence, if specially pleaded (*s*), that the plaintiff was not duly admitted and enrolled as a solicitor (*t*), or that the business was done wholly or in part for an unqualified person (*u*), or that the plaintiff was uncertificated at the time of doing the business (*x*). The onus of proving either of these three defences rests on the defendant (*y*). The defendant may also set up as a defence, if specially pleaded (*z*), that no signed bill was delivered before action brought, or that a calendar month after delivery had not elapsed before action brought (*a*). In such a case the onus of proving the delivery of the bill rests on the plaintiff, and he must prove that a bill signed or inclosed in or accompanied by a letter signed and referring to it, in the manner required by the Act (*b*), was delivered, sent or left, as therein directed. It is not necessary for the purpose of this proof to establish the contents of the bill (*c*). The defendant should be required in this case, by the usual notice, to admit the delivery of the bill, or the costs of the proof may not be allowed. The defendant should be required by notice to produce the bill and letter (if any) accompanying and referring to it; and the service of this notice should be proved if not admitted by the defendant. It has, however, been decided that the bill may be proved by a copy, without giving notice to produce the original (*b*). It has also been held that it is not requisite that the parties who examined the bill should read the two bills alternately (*d*). In general the Statute of Limitations does not begin to run against the costs of a suit until it is terminated (*e*).

Statute of Limitations.

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citor stipulated for 5 per cent. commission on the gross amount of property recovered, and the agreement was held illegal. See *Anon.* 1 Ch. D. 573; 45 L. J., Ch. 47; and *Grell* v. *Levy*, 16 C. B., N. S. 73, where the agreement was entered into in France. See *Churchyard* v. *Watkins*, 27 L. J., Ex. 13, where the solicitor had authority to compromise, upon condition that he secured a net sum for his client.

(*r*) See note (*q*), ante, p. 157.

(*s*) See *Hill* v. *Sydney*, 7 A. & E. 956: *Williams* v. *Jones*, 2 Q. B. 276; 1 G. & D. 649: *Nash* v. *Goode*, 9 Dowl. 929.

(*t*) 37 & 38 V. c. 68, s. 12; 23 & 24 V. c. 127, s. 26; 6 & 7 V. c. 73, s. 36, ante, p. 93. See *Latham* v. *Hyde*, 2 C. & M. 128: *Humphreys* v. *Harvey*, 1 Bing. N. C. 62; 4 M. & Sc. 530; 2 Dowl. 803.

(*u*) Id. See *Hopkinson* v. *Smith*, 1 Bing. 13.

(*x*) 6 & 7 V. c. 73, s. 26; ante, p. 82. See *Eyre* v. *Shelley*, 6 M. & W. 269; 8 Dowl. 185: *Middleton* v. *Chambers*, 1 Sc. N. R. 99; 8 Dowl. 545.

(*y*) See *Berryman* v. *Wise*, 4 T. R. 367: *Pearce* v. *Whale*, 5 B. & C. 38; 7 D. & R. 512.

(*z*) *Lane* v. *Glenny*, 7 A. & E. 83; 2 N. & P. 258: *Robinson* v. *Roland*, 6 Dowl. 271. See *Wilkinson* v. *Page*, 6 M. & Gr. 1012; 1 D. & L. 913; 13 L. J., C. P. 121: *Holmes* v. *Grant*, 1 Gale, 59: *Beck* v. *Mordaunt*, 2 Bing. N. C. 140: *Scarth* v. *Rutland*, L. R., 1 C. P. 642.

(*a*) Ante, p. 122.

(*b*) *Colling* v. *Treweek*, 6 B. & C. 394: *Anderson* v. *May*, 5 Esp. 167; 2 B. & P. 237: *Phillipson* v. *Chase*, 2 Camp. 110: *Fyson* v. *Kemp*, 6 Car. & P. 71.

(*c*) Ante, p. 126.

(*d*) *Fyson* v. *Kemp*, 6 Car. & P. 71.

(*e*) See *Martindale* v. *Falkner*, 2 C. B. 706: *Phillips* v. *Broadley*, 9 Q. B. 744, where it was held that a transaction was not one in which the solicitor's employment was continuous, and that the latter items did not draw after them the previous ones, so as to take them out of the Statute of Limitations. See also *Harris* v. *Quine*, L. R., 4 Q. B. 653; 38 L. J., Q. B. 331: *Baile* v. *Baile*, L. R., 13 Eq. 497, 509; 41 L. J., Ch. 300: *Re Hall*, 9 Ch. D. 538; 47 L. J., Ch. 621, and note, ante, p. 108.

Execution for.]—When the bill has been taxed and the allocatur is in the solicitor's favour, he may enforce payment by execution under 6 & 7 *V. c.* 73, s. 43 (*ante*, p. 126), which enacts, that the allocatur shall be final unless altered by decree or rule of Court, and that payment of the amount certified to be due, and directed to be paid, may be enforced according to the course of the Court in which such reference shall be made; and if the reference be in a Court of common law, the Court or judge may order judgment (*f*) to be entered up for the amount, with costs, unless the retainer shall be disputed (*g*), or the Court or a judge may make such other order as they may think fit (*h*). The affidavit in support of an application for an order for judgment under this section should be intituled in the matter of the solicitor (*i*). It seems that the payment of the amount found due by the allocatur, either to the client or solicitor, might also be enforced by obtaining a judge's order for payment of the same and issuing execution on such order (*k*). Execution for.

(g.) *Securities and Lien for Bill.*

Securities for.]—Before the 33 & 34 *V. c.* 28, s. 16 (*ante*, 130), the Court would not allow a solicitor to take any security whatever for costs to be incurred (*l*). But a security might be given for costs already incurred (*m*). By the above enactment a solicitor may take security from his client for his future fees, charges and disbursements, to be ascertained by taxation or otherwise (*n*). Securities for costs.

Lien for.]—A solicitor, or his personal representative in case of death (*o*), has a lien for his general balance (*p*) upon all deeds and Lien for, on deeds and papers.

(*f*) See the form of judgment, Chit. Forms.

(*g*) See *Re Lowless*, 6 C. B. 123; 17 L. J., C. P. 222, where, at the request of both parties, the Master decided the question of retainer, and it was held that the solicitors were entitled to judgment under this section.

(*h*) See this section, ante, p. 126. *Griffiths* v. *Hughes*, 16 M. & W. 809; 4 D. & L. 719.

(*i*) *Re Hair*, 8 Sc. N. R. 231; 7 M. & Gr. 510: *Re Vallance*, 8 Sc. N. R. 232.

(*k*) *Re Woodhouse*, 2 C. B. 290. See R. of S. C., Ord. XLII. r. 20, post, Ch. LXXIV. As to enforcing an order, see Ch. CXXII.

(*l*) *Jones* v. *Tripp*, Jacob, C. C. 322; *Newman* v. *Payne*, 4 Bro. C. C. 350; 2 Ves. jun. 199: *Ex p. Laing*, 2 Mon. & Ayr. 381: *Re Foster*, 29 L. J., Ch. 625: *Persons* v. *Spooner*, 15 L. J., Ch. 155: *Jones* v. *Hunter*, 1 Dowl. 462: *Jeffreys* v. *Evans*, 14 M. & W. 210; 3 D. & L. 52.

(*m*) *Pearson* v. *Benson*, 28 Beav. 598: *Morgan* v. *Higgins*, 1 Giffard, 270; 5 Jur., N. S. 236: *Thomas* v. *Cross*, 10 Jur., N. S. 1163: *Holdsworth* v. *Wakeman*, 1 Dowl. 532: *Williams* v. *Pigott*, Jac. 598: *Re Whitcombe*, 8 Beav. 140: *Parsons* v. *Spooner*, 5 Hare, 102: *Blagrave* v. *South*, 2 Kay & J. 509; 26 L. J., Ch. 86: *Watts* v. *Blayney*, 1 D. & L. 203: *Anderson* v. *Radcliffe*, 29 L. J., Q. B. 128, where a plaintiff in ejectment assigned the property sought to be recovered to his solicitor as a security for past advances, and it was held that it was not void under the statutes against maintenance and champerty.

(*n*) See *The General Share and Trust Co.* (*Limited*) v. *Chapman*, 46 L. J., C. P. 79; 36 L. T. 179, where, after certificates of shares had been deposited with a solicitor as security for costs, the shares were afterwards assigned by the client.

(*o*) *Redfearn* v. *Sowerby*, 1 Swanst. 84.

(*p*) Where a solicitor has a lien upon his client's deeds, for costs incurred, and the client, upon application, refuses to pay them, and the

PART I.

In general.

papers belonging to his client (*q*) which have come to his hands in the course of, and with reference to, his professional employment (*r*), even although deposited with him for a particular purpose only (*s*), unless there has been some agreement or understanding to the contrary (*t*). Thus, where a mortgagee placed the title-deeds of the mortgaged estate in his solicitor's hands, and the estate was sold, it was held that the solicitor might detain the title-deeds from the purchaser, until costs due to him from the mortgagee were satisfied (*u*). He has also a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the commencement of the bankruptcy proceedings, to recover the amount of his bill (*x*). And an agent for a solicitor dying intestate and insolvent pending a suit wherein he was plaintiff has a lien for his costs upon a postea, of which the agent has obtained possession after the death of the intestate (*y*). A town clerk has a lien on papers of the corporation, with respect to which he has done work as a solicitor (*z*). So has the clerk to a local board (*a*). The solicitor appointed by a trustee in bankruptcy has a lien on all documents in his possession belonging to the estate (*b*). A solicitor has no lien on the private deed of one partner in respect of business done for the firm (*c*).

Must have come to him as a solicitor,

But this right of lien does not attach on deeds, papers, &c., which came to the solicitor otherwise than in his professional character; therefore a town clerk, though a solicitor, has no lien for work

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solicitor is driven to an action for their recovery, the lien extends to the costs of the action (*Gray* v. *Graham*, 26 L. T., O. S. 111, H. L. 14 Aug. 1855).

(*q*) *Sheffield* v. *Eden*, 10 Ch. D. 291: *Ex p. Fuller*, *In re Long*, 16 Ch. D. 617; 50 L. J., Ch. 448.

(*r*) *Stevenson* v. *Blakelock*, 1 M. & Sel. 535: *Howell* v. *Harding*, 8 East, 362: *Astley* v. *Fisher*, 6 C. B. 572: *Re Broomhead*, 5 D. & L. 52: The lien only extends to debts due to him in his professional character (*Worrell* v. *Johnson*, 2 J. & W. 214: *Balch* v. *Symes*, 1 Turn. & R. 87). It arises out of an implied contract, 3 C. B. 826, per *Maule*, J. See per the Lord C. B., *Oxenham* v. *Esdaile*, 2 Y. & J. 499: *Ex p. Bryant*, 1 Mad. 49: *Ex p. Nesbitt*, 2 Sch. & Lef. 278: *Mereweather* v. *Mellish*, 13 Ves. 161: *Ex p. Pemberton*, 18 Ves. 282: *Gray* v. *Graham*, H. L. 14 Aug. 1855; 26 L. T., O. S. 111.

(*s*) *Colmer* v. *Ede*, 40 L. J., Ch. 185; 23 L. T. 884: *In re Messenger*, 3 Ch. D. 317.

(*t*) *Ex p. Sterling*, 16 Ves. 258.

(*u*) *Ogle* v. *Story*, 1 N. & M. 474; 4 B. & Ad. 735. See *Ex p. Fuller*, *In re Long*, supra, where the mortgagee's solicitor acted for a mortgagor in attempting to sell. As to the lien of a solicitor acting for both mortgagor and mortgagee, see also *In re Snell*, 6 Ch. D. 105; 46 L. J., Ch. 627: *In re Mason*, 10 Ch. D. 729; 48 L. J., Ch. 193: *In re Nicholson*, *Ex p. Quinn*, 53 L. J., Ch. 302; 49 L. T. 811: *In re Messenger*, 3 Ch. D. 317; 45 L. J., Bk. 134: *Sheffield* v. *Eden*, 10 Ch. D. 291.

(*x*) *Stevenson* v. *Blakelock*, 1 M. & Sel. 535. And see *Esdaile* v. *Oxenham*, 3 B. & C. 225: *Oxenham* v. *Esdaile*, 2 Y. & J. 493: *Ex p. Lee*, 2 Ves. 285: *Lambert* v. *Buckmaster*, 4 D. & R. 125; 2 B. & C. 616: *Crofton* v. *Poole*, 1 B. & Ad. 568: *Jones* v. *Turnbull*, 2 M. & W. 601; 5 Dowl. 591: *Re Sharpe*, 1 Dowl. 432.

(*y*) *Taunton* v. *Goforth*, 6 D. & R. 384.

(*z*) *Rex* v. *Sankey*, 5 A. & E. 423; 6 N. & M. 839. See *Re Phœnix Life Ass. Co.*, 1 H. & M. 433, where costs had been incurred in respect of business transacted by the directors of a company *ultra vires*.

(*a*) *Newington Local Board* v. *Eldridge*, 12 Ch. D. 349.

(*b*) *Ex p. Valder*, *In re Austin*, 4 Ch. D. 129; 46 L. J., Bk. 59. As to the case of a solicitor employed by an official liquidator, see *In re Lime, Cement and Brick Co.*, L. R., 4 Ch. 627; 26 L. T. 240; 20 W. R. 361.

(*c*) *Turner* v. *Deane*, 3 Ex. 836; 18 L. J., Ex. 343.

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The right of lien
client (*n*); and if th

(*d*) *Rex* v. *Sankey*, su
v. *Johnson*, 2 J. & W. 2
(*e*) *Campernoun* v. *S*
93.
(*f*) *Hollis* v. *Clarid*
807: *Ex p. Fuller*, *In*
Ch. D. 617; 50 L. J., B
see *Re Sharpe*, 1 Dowl
v. *Vizard*, 2 N. & M.
Ad. 808: *Ridgeway* v. *I*
Ch. 584.
(*g*) *Balch* v. *Symes*,
87.
(*h*) *Stevenson* v. *Blak*
S. 535.
(*i*) *Belaney* v. *Ffren*
Ch. 918; 43 L. J., Ch.

done in his official capacity (*d*); nor has a solicitor such lien on papers delivered to him as steward of a manor (*e*). And where a person gave deeds to another for the purpose of satisfying him as to their sufficiency to secure an annuity to be granted by him, and the other gave them to a third person for the purpose of investigating the title, but the treaty for the annuity afterwards went off for some reason not connected with any objections to the title; it was held that the third person could not retain the deeds for his costs of investigating the title, for he was not employed by the party to whom the deeds belonged (*f*). And where the client handed to her solicitor a deed, merely that he might show it to a third party to satisfy him that the client had made provision for the payment of her debts, it was held, that, not being delivered for the purposes of business, the deed did not become the subject of lien (*g*). But where the client handed a sum of money to his solicitor to pay off a judgment, and the latter on making the payment ascertained that a lease had been deposited as a collateral security for the debt, which he took back, it was held, that, though he had no instructions to take the lease, yet that it was his duty to do the same for his client as the latter would have done himself; and having, therefore, obtained the lease in the course of business, he was entitled to retain it for his whole bill against the assignees of the client (*h*). Solicitors for the trustees of an estate which is under the administration of the Court have not, after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by the receiver for the management of the estate (*i*).

and not as a mere bailee, &c.

The lien does not exist where the right to it is inconsistent with the solicitor's employment. Thus, it does not hold upon an original will of personalty, given to him to prove (*k*); nor upon an instrument prepared by the solicitor for inrolment or registration. And it has even been held, that where a solicitor prepares a deed, and that deed is afterwards executed, he cannot, after execution, retain the deed for his costs of preparing it (*l*). But the client cannot in any way, by his own act, divest the solicitor of his lien; and, as against a person claiming under the client, the lien remains (*m*).

No lien when inconsistent with the employment.

The right of lien is commensurate only with the right of the client (*n*); and if the right of the client be limited to a certain

Lien only commensurate with client's right.

(*d*) *Rex* v. *Sankey*, supra: *Worrall* v. *Johnson*, 2 J. & W. 214.

(*e*) *Campernoun* v. *Scott*, 6 Mad. 93.

(*f*) *Hollis* v. *Claridge*, 4 Taunt. 807: *Ex p. Fuller*, *In re Long*, 16 Ch. D. 617; 50 L. J., Bk. 448. And see *Re Sharpe*, 1 Dowl. 432: *Pratt* v. *Vizard*, 2 N. & M. 455; 5 B. & Ad. 808: *Ridgeway* v. *Lees*, 25 L. J., Ch. 584.

(*g*) *Balch* v. *Symes*, 1 Turn. & R. 87.

(*h*) *Stevenson* v. *Blakelock*, 1 M. & S. 535.

(*i*) *Belaney* v. *Ffrench*, L. R., 8 Ch. 918; 43 L. J., Ch. 312: *In re Boughton*, *Boughton* v. *Boughton*, 23 Ch. D. 169; 48 L. T. 413. As to winding-up proceedings, see *In re Capital Fire Insurance Association*, C. A., 24 Ch. D. 408; 53 L. J., Ch. 71; 49 L. T. 697; 32 W. R. 260.

(*k*) *Lord* v. *Wormleighton*, Jac. 580: *Georges* v. *Georges*, 18 Ves. 294: *Balch* v. *Symes*, 1 Turn. & R. 87.

(*l*) *Anon.*, 1 Ld. Raym. 738. But see *Green* v. *Farmer*, 4 Burr. 2218: *Wilkins* v. *Carmichael*, 1 Doug. 100.

(*m*) *Ogle* v. *Story*, 4 B. & Ad. 735; 1 N. & M. 474: *Hide* v. *Wigmore*, Moseley, 12.

(*n*) *Oxenham* v. *Esdaile*, 2 Y. & J. 493: *Ex p. Fuller*, *In re Long*, 16

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extent, the solicitor has a lien to the same extent only (*o*): so, if the right of the client to the subject of the lien ceases, the lien ceases also. If, therefore, the client have only a life estate in the premises, the title-deeds to which form the subject-matter of the lien, on the death of the client the lien ceases (*p*). So, if an estate be recovered from the client by title paramount, the lien on the title-deeds is destroyed (*q*). So, if a defendant be decreed to deliver up deeds, his solicitor's lien on them is lost (*r*). The bankruptcy of the client prevents any subsequent claim by way of lien attaching on his title-deeds in the hands of his solicitor (*s*), and a judgment against the client has the same operation (*t*).

When it ceases or is lost.

The lien, of course, ceases on payment of the costs, and the solicitor is bound, on such payment, to deliver up the papers to the client, and cannot refuse on the ground that third parties claim an interest in them (*u*). The lien may also be waived or lost in the same way that any other lien may. If, therefore, the solicitor take a security for his costs, such security being payable at a distant day, without an express reservation of his lien, the lien is gone (*x*), though it would be revived if default be made in payment (*y*). So, it may be lost if the solicitor come to some new arrangement for the payment of his costs in a particular manner; but the client having a set-off will not destroy it (*z*), nor will the Statute of Limitations (*a*). A solicitor acting for mortgagee, as well as mortgagor, in the preparation of a mortgage, thereby loses his lien on the title-deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor (*b*). And the lien continues though the solicitor takes his client on a *ca. sa.* on a judgment obtained for the costs (*c*). A solicitor allowed himself to be arrested for debt and detained in prison; a client for whom he was acting in a suit presented a petition for delivery up of her papers, upon which he claimed to have a lien for costs:—it was held, that he was not entitled to any such lien, although he alleged, and there was reason to believe, that his

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Ch. D. 617; 50 L. J., Ch. 448. A solicitor employed by an executor has a lien as against a subsequent administrator *de bonis non*: *Re Watson*, 50 L. T. 205; 53 L. J., Ch. 305.

(*o*) *Hollis* v. *Claridge*, 4 Taunt. 807: *Solly* v. *Rathbone*, 2 M. & S. 298: *Wakefield* v. *Newbon*, 6 Q. B. 276: *Francis* v. *Francis*, 2 De G., Mac. & G. 73.

(*p*) *Lightfoot* v. *Keane*, 1 M. & W. 745.

(*q*) *Ex p. Nisbett*, 2 Sch. & Lef. 279. See *Simms* v. *Blake*, 4 Dowl. 263, as to the effect of the client's conviction for felony; and see 33 & 34 V. c. 23.

(*r*) *Bell* v. *Taylor*, 8 Sim. 216.

(*s*) *Ex p. Lee*, 2 Ves. jun. 285: *Re Dean*, 2 M., D. & De Gex, 438: *Watson* v. *Lyon*, 7 De G., Mac. & G. 288: *Ex p. Jabet*, 6 Jur., N. S. 387.

(*t*) *Blunden* v. *Desart*, 2 Dru. & War. 405.

(*u*) *In re Emma Silver Mining Co., Ex p. Turner*, 24 W. R. 54, V.-C. M.

(*x*) See *Cowell* v. *Simpson*, 16 Ves. 275: *Hewison* v. *Guthrie*, 2 Bing. N. C. 755.

(*y*) *Stevenson* v. *Blakelock*, 1 M. & Sel. 535.

(*z*) See *Pinnock* v. *Harrison*, 3 M. & W. 532.

(*a*) *Spears* v. *Hartly*, 3 Esp. 81: *Higgins* v. *Scott*, 2 B. & Ad. 413: *Re Broomhead*, 5 D. & L. 52; 16 L. J., Q. B. 355.

(*b*) *In re Snell*, 6 Ch. D. 105; 46 L. J., Ch. 627; *In re Nicholson, Ex p. Quinn*, 53 L. J., Ch. 302; 49 L. T. 811: *In re Mason*, 10 Ch. D. 729; 48 L. J., Ch. 193. See *In re Messenger*, 3 Ch. D. 317; 45 L. J., Bk. 134.

(*c*) *O'Brien* v. *Lewis*, 3 De G., J. & S. 606; 32 L. J., Ch. 665; 4 Giff. 396.

imprisonment had arisen from the default of the client to pay expenses out of pocket which she had agreed to do (*d*). As to the effect of an order to change solicitors, *see ante*, p. 111.

If the lien exists, the Court will not order the solicitor to deliver up the deeds, &c., until it is satisfied; nor can he be compelled to give any copies of them (*e*). But, as the lien is limited to the extent of his client's right over the papers, if the client would be bound to produce them, so would he (*f*). We have seen, that, where he withdraws from the business in which he has been employed, he may be compelled to produce the papers necessary for carrying it on (*g*). So he may be compelled to produce them where there is a charge of improper conduct on his part in reference to them (*h*). So he is bound to produce the documents for the inspection of the trustee in bankruptcy of his client (*i*). The Court will not stay the progress of a cause till the solicitor's costs have been paid (*k*). The lien upon papers cannot be actively enforced. They can only be held as a security (*l*). Rights under.

A solicitor has also a lien for his bill upon all monies of his client which come to his hands in the course of and with reference to his employment; and he may retain so much of them as will satisfy his bill of costs (*m*), though he cannot appropriate them without the assent of the client to any particular part of his bill (*n*). Even the official assignee of a client had no right to money in a solicitor's hands without satisfying his lien (*o*). But a solicitor has no lien on his client's money in his hands beyond the amount in which the latter is indebted to him (*p*). And this lien does not exist where the money does not come to him in his professional character (*q*). Nor can this lien exist where it is inconsistent with an agreement or understanding between the parties, or with the objects for which the money has been received; as when the money is paid to him On monies.

(*d*) *Re Williams*, 6 Jur., N. S. 908; 28 Beav. 465. As to the effect of bankruptcy of solicitor, see *Re Moss*, 35 L. J., Ch. 554.

(*e*) *Lord* v. *Wormleighton*, Jac. 580: *Magrath* v. *Lord Muskerry*, 1 Ridg. P. C. 477.

(*f*) Ante, p. 161: *Furlong* v. *Howard*, 2 Sch. & Lef. 115: *Ley* v. *Barlow*, 17 L. J., Ex. 105. Where a solicitor who had prepared a deed for a client, upon which he had a lien for his costs of preparing it, was served with a *subpœna duces tecum* in a suit between other parties, to produce this deed, it was held that his lien did not protect the solicitor from producing the deed as evidence on the issue raised between the parties to the suit; but this order was without prejudice to the question, whether the deed could be produced without notice to the parties, to whom, subject to the lien, the same belonged. *Hope* v. *Liddell*, 7 D., M. & G. 338; 24 L. J., Ch. 691; *In re Boughton*, *Boughton* v. *Boughton*, 23 Ch. D. 169; 48 L. T. 413. See *Doe* v. *Ross*, 7 M. & W. 102: *Re Cameron's Coalbrook R. Co.*, 25 Beav. 1: *Lockett* v. *Cary*, 10 Jur., N. S. 144.

(*g*) Ante, p. 111. See *Fowler* v. *Fowler*, 50 L. J., Ch. 686; 44 L. T. 799.

(*h*) *Balch* v. *Symes*, 1 Turn. & R. 87.

(*i*) *In re Toleman and England*, *Ex p. Bramble*, 13 Ch. D. 885; 42 L. T. 413.

(*k*) *Magrath* v. *Lord Muskerry*, 1 Ridg. P. C. 477: *Twart* v. *Dayrell*, 13 Ves. 195.

(*l*) See *Bozon* v. *Bolland*, 4 Myl. & Cr. 354.

(*m*) *Welch* v. *Hole*, 1 Doug. 238. See *Williams* v. *Vines*, 6 Q. B. 355.

(*n*) *Waller* v. *Lacy*, 1 Sc. N. R. 186; 1 M. & Gr. 54; 8 Dowl. 563.

(*o*) *Ex p. Bowden*, 2 D. & Chit. 182: *Jones* v. *Turnbull*, 5 Dowl. 563.

(*p*) *Miller* v. *Atlee*, 3 Ex. 799.

(*q*) *Wickens* v. *Townsend*, 1 Ry. & M. 361, and cases supra, p. 160.

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for the purpose of paying a composition, so that he holds it as trustee for the creditors (*r*). A solicitor received from his client a sum of money to pay off a mortgage; he did not so apply it, but claimed a lien on it for his costs; the Court ordered him to repay the amount to his client (*s*).

On judgments, orders, or awards, &c.

A solicitor has also, independent of the statute 23 & 24 *V. c.* 127, *s.* 28 (which *see post*, p. 166), a lien for his costs upon a judgment recovered by his client (*t*), or upon money or costs awarded or ordered to be paid to him (*u*) in a cause in which the solicitor was employed; and this even though the client had previously become a bankrupt (*x*). This lien, however, is in truth merely a claim to the equitable interference of the Court, who may order the judgment, &c. to stand as a security for his costs, and that payment of the amount of it, or such an amount of it as will cover them, be made to the solicitor in the first instance (*y*): and in clear cases of collusion, they might allow the solicitor to proceed in the action for the recovery of them. The Court will exercise this equitable interference where the solicitor has given the opposite party, or his solicitor, notice of his lien, and that he claims the amount payable to his client, to be paid to him in the first instance; in which case the opposite party will, at his peril, pay the client or release the claim, or compromise it without the assent of the solicitor (*z*). So the Court will exercise it, though no such notice has been given, in cases where it is clearly made out that there has been some collu-

After notice of lien.

Collusion between parties.

(*r*) *In re Clark, Ex p. Newland*, 4 Ch. D. 515; 35 L. T. 916.

(*s*) *Re Cullen*, 27 Beav. 51.

(*t*) Per *Pollock*, C. B., *Wilson* v. *Hood*, 3 H. & C. at p. 151: per *Jessel*, M. R., *Hamer* v. *Giles*, 11 Ch. D. at p. 947: *Middleton* v. *Hill*, 1 M. & Sel. 240: *Glaister* v. *Hewer*, 8 T. R. 69: *Randle* v. *Fuller*, 6 T. R. 456: *Mitchell* v. *Oldfield*, 4 T. R. 123. See *Streeton* v. *London & N. W. Ry. Co.*, 16 C. B. 40, where defendants on the trial agreed to give plaintiff a sum of money without admitting a liability on their part.

(*u*) *Ormerod* v. *Tate*, 1 East, 464. And see *Irving* v. *Viana*, 2 Y. & J. 70: *Davies*, dem. *Lowndes*, ten., 3 C. B. 823: *Holeroft* v. *Manby*, 8 Sc., N. R. 473, where the client became bankrupt after the award was made: *Lloyd* v. *Mansell*, 22 L. J., Q. B. 110, where plaintiff became insolvent; and it was held the solicitor was not entitled to a rule calling on defendant to pay the money awarded: *Breary* v. *Kemp*, 24 L. J., Q. B. 310, where it was held that plaintiff's solicitor had a right to a lien on an amount awarded for his costs in a reference superior to a claim of defendant's to a set-off. But this is not so now. See Ord. LXV. r. 14, post, p. 166. See *Lloyd* v. *Jones*, 40 L. T. 514; 27 W. R. 655.

(*x*) *Griffin* v. *Eyles*, 1 H. Bl. 122.

(*y*) *Mercer* v. *Graves*, L. R., 7 Q. B. 499; 41 L. J., Q. B. 212: *Barker* v. *St. Quintin*, 1 D. & L. 542; 12 M. & W. 441: 13 L. J., Ex. 144: *Slater* v. *Mayor of Sunderland*, 33 L. J., Q. B. 37: *Read* v. *Dupper*, 6 T. R. 361: *Ormerod* v. *Tate*, 1 East, 464: *Moore* v. *Angell*, 11 Jur. 455, B. C.: *Hough* v. *Edwards*, 1 H. & N. 171; 26 L. J., Ex. 54, where a judgment debt was attached: *Simpson* v. *Lamb*, 7 El. & B. 84; 26 L. J., Q. B. 121, where it was held that a purchase by plaintiff's solicitor, after verdict and before judgment, of plaintiff's interest in the verdict could not be sustained. As to the priority of the lien over garnishee proceedings, see post, p. 169, n. (*x*). See *Anderson* v. *Radcliffe*, 29 L. J., Q. B. 128, where an assignment, as a security only, was held good.

(*z*) *Sullivan* v. *Pearson*, L. R., 4 Q. B. 153; 9 B. & S. 960; 38 L. J., Q. B. 65: *Welch* v. *Hole*, 1 Doug. 238: *Read* v. *Dupper*, 6 T. R. 361: *Ormerod* v. *Tate*, 1 East, 464: *Gould* v. *Davis*, 1 Dowl. 288; 1 C. & J. 415; 1 Tyr. 380: *Slater* v. *Mayor of Sunderland*, 33 L. J., Q. B. 37, where defendant was ordered to pay money over to plaintiff's solicitor.

sion or fraudulent conspiracy between the parties to cheat the solicitor of his costs (*a*). But, unless such notice be given, or there has been such collusion or fraudulent conspiracy, the client, although he sues *in formâ pauperis* (*b*), may compromise with the other party, and give him a release, without the intervention of his solicitor; and the solicitor in such a case can afterwards look to his client only for payment (*c*), and cannot proceed in the action (*d*). Even after such notice, the parties may, it seems, compromise before verdict or judgment, without regard to the solicitor's claim for costs (*e*). The solicitor also has no power over an execution on a judgment, so as to carry it into effect against the orders of his client, even though the latter and the opposite party collude to deprive him of his lien (*f*); nor has he any power to prevent his client from discharging the opposite party out of custody (*g*), or from entering satisfaction on the roll (*h*), or from entering a *stet processus*, or the like (*i*). And where plaintiff, after charging defendant in execution, died, and defendant's wife took out administration, the Court held that plaintiff's solicitor had no longer any

When client may compromise without solicitor's consent.

Solicitor's power over cause.

(*a*) *Swain* v. *Senate*, 2 New Rep. 99: *Graves* v. *Eades*, 5 Taunt. 429; 1 Marsh. 113: *Nelson* v. *Wilson*, 6 Bing. 568; 4 M. & P. 385. And see *Martin* v. *Francis*, 2 B. & Ald. 402; 1 Chit. Rep. 241: *Young* v. *Redhead*, 2 Dowl. 119: *Jordan* v. *Hunt*, 3 Dowl. 666: *Wyllie* v. *Phillips*, 3 Bing. N. C. 776: *Baber* v. *Harris*, 7 Dowl. 589. Where the parties collusively settled an action without the knowledge of plaintiff's solicitor, by defendant giving a bill for 24*l.*, of which 19*l.* was for debt, and 5*l.* for costs, although the latter actually amounted to 24*l.*, the bill having been deposited in the hands of a third party, the Court upon application ordered it to be delivered up to plaintiff's solicitor in satisfaction of his costs; see *Gould* v. *Davis*, 1 Tyrw. 380; 1 Dowl. 288; 1 C. & J. 415.

(*b*) *Francis* (*a pauper*) v. *Webb*, 7 C. B. 731: *Jones* v. *Bonner*, 2 Ex. 230: *Wright* v. *Burroughs*, 3 C. B. 344.

(*c*) *The Hope* (C. A.), 8 P. D. 144; 52 L. J., P. 63; 32 W. R. 269: *In re Sullivan and Pearson, Ex p. Morrison*, L. R., 4 Q. B. 153: *Welch* v. *Hole*, 1 Doug. 238: *Chapman* v. *Hawe*, 1 Taunt. 341: *Re Oliver*, 1 Har. & W. 79: *Brumsdon* v. *Allard*, 2 El. & El. 19; 28 L. J., Q. B. 306.

(*d*) *Clark* v. *Smith*, 13 L. J., C. P. 97; 6 M. & Gr. 1051; 1 D. & L. 960: *Quested* v. *Callis*, 10 M. & W. 18; 1 Dowl., N. S. 888: *Jordan* v. *Hunt*, 3 Dowl. 666: *Macpherson* v. *Alsopp*, 8 L. J., N. S., Ex. 262: *Charlewood* v. *Berridge*, 1 Esp. 345: *Graves* v. *Eades*, 5 Taunt. 429; 1 Marsh. 113: *Rooke* v. *Wasp*, 5 Bing. 190; 2 M. & P. 304: *Nelson* v. *Wilson*, 6 Bing. 568; 4 M. & P. 385: *Wyllie* v. *Phillips*, 3 Bing. N. C. 776.

(*e*) *Ex p. Hart*, 1 B. & Ad. 660; 1 Dowl. 324: *Quested* v. *Callis*, 10 M. & W. 18; 1 Dowl., N. S. 881: *Verety* v. *Wild*, 28 L. J., Ch. 561: *Slater* v. *Mayor of Sunderland*, 33 L. J., Q. B. 37.

(*f*) *Barker* v. *St. Quintin*, 13 L. J., Ex. 144; 12 M. & W. 441; 1 D. & L. 542. In a case before the Jud. Acts, after declaration, plaintiff executed a release to defendant, and gave his own solicitor notice not to proceed; the release was pleaded; to this plea there was a replication confessing the release; judgment was signed for costs and writ of execution issued: notice was then given to the sheriff by plaintiff not to execute process on peril of being treated as a trespasser, and thereupon plaintiff's solicitor obtained an order calling on plaintiff "or defendant" to pay his costs:—Held, that this was a proper case for the interference of the Court, and that the form of the order was good. *Ex p. Games, Re Williams and Lloyd*, 3 H. & C. 296; 33 L. J., Ex. 317. See *Sullivan* v. *Pearson*, L. R., 4 Q. B. 153; 38 L. J., Q. B. 65: *Mercer* v. *Graves*, L. R., 7 Q. B. 499; 41 L. J., Q. B. 212.

(*g*) *Marre* v. *Smith*, 4 B. & Ald. 466. And see *Bloomfield* v. *Blake*, Id. 272: *Martin* v. *Francis*, 2 B. & Ald. 402: *Langley* v. *Headland*, 34 L. J., C. P. 183.

(*h*) *Abbott* v. *Rice*, 3 Bing. 132; 10 Moore, 489.

(*i*) *Quested* v. *Callis*, supra.

PART I.

lien on the judgment for his costs, and ordered defendant to be discharged out of custody (*k*). The lien has priority over a garnishee order nisi (*l*).

Priority over garnishee order nisi.

By *R. of S. C., Ord. LXV. r.* 14, "A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." This rule directly reverses the Common Law Practice under *r.* 63, *H. T.* 1853 (*m*).

Set-off of damages or costs allowed to the prejudice of solicitor.

As to the practice of setting off one judgment, &c. against another, without reference to the solicitor's lien, *see post, Ch. LXXIII.*

(h.) *Charging Orders on Property recovered or preserved.*

The statute.

By 23 & 24 *V. c.* 127, *s.* 28, "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit, matter or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, charges and expenses is barred by any Statute of Limitations" (*n*).

The application, to whom made.

To obtain a charging order under this section special application is necessary. The application must be made to the Court or judge before whom the action, matter or proceeding has been heard or is depending (*o*). If there has been a trial it must be made to the judge before whom such trial took place (*p*). If there has been no trial it may be made to a judge at chambers (*q*). In the Chancery

(*k*) *Pyne* v. *Erle*, 8 T. R. 407: *Camp* v. *Pote*, 8 C. B. 375. See *Cox* v. *Prichard*, 2 L. M. & P. 298; 20 L. J., Q. B. 353.

(*l*) See cases cited post, p. 169, n. (*x*).

(*m*) *Pringle* v. *Gloag*, 10 Ch. D. 676; 48 L. J., Ch. 380.

(*n*) See *In re Cunning*, 2 De G., F. & Jo. 376; 30 L. J., Ch. 29: *Baile* v. *Baile*, L. R., 13 Eq. 497, 509.

(*o*) *Heinrich* v. *Sutton*, *In re Fiddey*, L. R., 6 Ch. 865; 40 L. J., Ch. 518.

(*p*) *Higgs* v. *Shroeder*, 3 C. P. D. 252; 47 L. J., Q. B. 426: *Heinrich* v. *Sutton*, supra: *Owen* v. *Henshaw*, 7 Ch. D. 385; 47 L. J., Ch. 267. See *Wilson* v. *Hood*, 3 H. & C. 148; 33 L. J., Ex. 204 (which does not appear consistent with the above decisions): *Catlow* v. *Catlow*, infra.

(*q*) *Clover* v. *Adams*, 6 Q. B. D. 622.

Division it must be made to the judge to whose Court the action is attached (*r*), or to whom it has been transferred (*s*), except in cases where it has been tried before a judge at the Assizes (*t*). When the action had been brought in the Court of Common Pleas at Lancaster the application was held rightly made to the Common Pleas Division (*u*).

How made.

In the Queen's Bench Division the application may be made either at the trial (*x*) or by summons (*y*) at chambers (*z*). In the Chancery Division it may be made either by summons or petition (*a*). The summons should be intituled in the action (*b*), and also in the matter of the statute and of the solicitor, though this latter is not essential (*c*). It should be supported by an affidavit (*d*) stating the facts, showing that the solicitor is entitled to the order, unless these are apparent on the face of the proceedings. Only the client and the parties directly interested in the property need be served (*e*). Substituted service of the summons may be ordered (*f*).

When made.

The application may be made as soon as the solicitor's right to the order accrues. It may be made before any bill of costs has been delivered (*g*) or taxed (*h*). It may be made after a change of solicitors (*i*), even although the solicitor has refused to proceed with the action, provided such refusal be not wrongful or improper (*i*). It may be made after the action is determined, as, for instance, when it is dismissed (*k*).

By whom made.

The solicitor himself (*l*) or his personal representative (*m*) may make the application. A town agent may obtain a charge for the costs due to him from the country solicitor (*n*).

In what actions.

It appears that the Act only applies to actions commenced by persons *sui juris*, so that the charge cannot be obtained in an action commenced by the next friend of an infant (*o*). But when the

(*r*) *Heinrich* v. *Sutton*, *In re Fiddey*, supra.

(*s*) *Porter* v. *West*, 50 L. J., Ch. 231; 43 L. T. 569.—*Fry*, J.

(*t*) *Owen* v. *Henshaw*, supra.

(*u*) *Catlow* v. *Catlow*, 2 C. P. D. 362.

(*x*) Cp. *Higgs* v. *Shroeder*, supra.

(*y*) Chit. Forms, p. 48.

(*z*) *Clover* v. *Adams*, 6 Q. B. D. 622: *Hamer* v. *Giles*, 11 Ch. D. 942, at p. 948. In *Catlow* v. *Catlow*, 2 C. P. D. 362, a rule nisi was applied for, and granted, but it is submitted that this was not the correct course. The application has, in some cases, been granted ex parte, but this, it is submitted, is wrong.

(*a*) *Hamer* v. *Giles*, 11 Ch. D. 942; 48 L. J., Ch. 508; *Brown* v. *Trotman*, 12 Ch. D. 880; 48 L. J., Ch. 862.

(*b*) *Hamer* v. *Giles*, supra: *In re Keane*, 19 W. R. 429, V.-C. S.: *Heinrich* v. *Sutton*, *In re Fiddey*, L. R., 6 Ch. 865, at p. 868.

(*c*) *Hamer* v. *Giles*, supra.

(*d*) Chit. Forms, p. 50.

(*e*) *Brown* v. *Trotman*, supra.

(*f*) *Hunt* v. *Austin*, 9 Q. B. D. 589; 51 L. J., Q. B. 455.

(*g*) Per *Bacon*, V.-C., *Pilcher* v. *Arden*, 7 Ch. D. at p. 320.

(*h*) *Charlton* v. *Charlton*, 53 L. J., Ch. 971; 49 L. T. 267; 32 W. R. 90.

(*i*) *Clover* v. *Adams*, 6 Q. B. D. 622: *Pilcher* v. *Arden*, *In re Brook*, 7 Ch. D. 318.

(*k*) *Jones* v. *Frost*, *In re Fiddey*, L. R., 7 Ch. 773; 42 L. J., Ch. 47: *Heinrich* v. *Sutton*, *In re Fiddey*, supra.

(*l*) See the section supra.

(*m*) *Baile* v. *Baile*, L. R., 13 Eq. 497; 41 L. J., Ch. 300.

(*n*) *Tardrew* v. *Howell*, 3 Giff. 381; 31 L. J., Ch. 57; 10 W. R. 32; 5 L. T., N. S. 276.

(*o*) *Bowser* v. *Bradshaw*, 30 L. J., Ch. 159; 9 W. R. 229; 3 L. T., N. S. 545, V.-C. S.: *Pritchard* v. *Roberts*, L. R., 17 Eq. 222; 43 L. J., Ch. 129. But see *Baile* v. *Baile*, L. R., 13 Eq. 497; 41 L. J., Ch. 300; and *In re Keane*, infra.

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infant afterwards attains his majority the order may be made (*q*). A solicitor acting for a married woman may obtain an order (*r*). The costs of a married woman incurred by her in the defence to a suit by her husband to set aside a post-nuptial settlement, whereby funds were assigned to trustees to secure an annuity to her separate use, without power of anticipation, were charged on the annuity, notwithstanding the restraint on anticipation (*r*). The statute extends to proceedings in the Admiralty Court (*s*).

In respect of what costs.

The charge is confined to the costs, charges and expenses properly incurred (*t*) in the particular action or matter in which the property is recovered (*u*). The order should be expressly limited to these costs (*t*).

In respect of what property.

All property (*x*) of whatsoever nature, tenure or kind, whether real estate (*y*), personal property (*z*), a chose in action (*a*) or otherwise (*x*), which has been recovered or preserved through the instrumentality of the solicitor, may be charged.

Property "recovered or preserved."

The words "recovered or preserved" have been interpreted liberally (*b*). They have been held to extend to the case of money paid into Court (*c*), even although accompanied by a defence denying all liability (*d*); to a case where a receiver was appointed on an interlocutory application (*e*); to a friendly suit on behalf of an infant when a guardian and receiver were appointed (*f*); to an action of detinue by an administrator when the plaintiff recovered a verdict and judgment and was unable to levy, but the proceeds of the goods were brought into Court on an administration suit, so that they ultimately came into his hands (*g*); to a suit for the removal of a valueless incumbrance, which was a cloud on the plaintiff's title (*h*); to a successful defence to a foreclosure action (*i*);

(*q*) *Bowser* v. *Bradshaw*, 4 Giff. 260; 9 L. T., N. S. 195.

(*r*) *In re Keane, Lumley* v. *Desborough*, L. R., 12 Eq. 115; 40 L. J., Ch. 617.

(*s*) *The Phillippine*, L. R., 1 Adm. 309, 312.

(*t*) *Emden* v. *Carte*, 19 Ch. D. 311; 51 L. J., Ch. 371: *Charlton* v. *Charlton*, 52 L. T. 971; 49 L. T. 267; 32 W. R. 90: *Jackson* v. *Smith*, 51 L. T. 72. An order will not be made when the real object is to enable the client to get the difference between party and party costs, and solicitor and client costs. *Harrison* v. *Cornwall Minerals R. Co.*, 50 L. T. 452; 53 L. J., Ch. 596; 32 W. R. 748.

(*u*) Id.: *Ex p. Thompson*, 3 L. T., N. S. 317, Q. B.: *Wilson* v. *Round*, 4 Giff. 416; 9 L. T., N. S. 765; 12 W. R. 402.

(*x*) Per Lord *Coleridge*, C. J., *Birchall* v. *Pugin*, L. R., 10 C. P. at p. 399.

(*y*) *Wilson* v. *Hood*, 3 H. & C. 148; 33 L. J., Ex. 204. Before this statute, real estate was not affected by the solicitor's lien: *Shaw* v. *Neale*, 6 H. L. C. 581; 27 L. J., Ch. 444.

(*z*) *Birchall* v. *Pugin*, L. R., 10 C. P. 397, 399.

(*a*) *Birchall* v. *Pugin*, supra.

(*b*) Per *Wickens*, V.-C., *Baile* v. *Baile*, L. R., 13 Eq. at p. 508; per Lord *Selborne*, L. C., *Pinkerton* v. *Easton*, L. R., 16 Eq. p. 492; per Lord *Romilly*, M. R., *Scholefield* v. *Lockwood*, L. R., 7 Eq. at p. 87.

(*c*) *Clover* v. *Adams*, 6 Q. B. D. 622. But not to money paid into the Court of Bankruptcy or a debtor summons to abide the event of an action in the Queen's Bench Divison. *Pearson* v. *Knutsford Estates Co. Limited* (C. A.) 32 W. R. 451; 53 L. J., Q. B. 181.

(*d*) *Emden* v. *Carte*, 19 Ch. D. 311; 51 L. J., Ch. 371.

(*e*) *Twynham* v. *Porter*, L. R., 9 Eq. 181; 40 L. J., Ch. 30.

(*f*) *Baile* v. *Baile*, L. R., 13 Eq. 497; 41 L. J., Ch. 300.

(*g*) *Catlow* v. *Catlow*, 2 C. P. D. 362.

(*h*) *Jones* v. *Frost, In re Fiddey*, L. R., 7 Ch. 773, 777.

(*i*) *Scholefield* v. *Lockwood*, L. R., 7 Eq. 83, 87; 38 L. J., Ch. 232.

to a successful claim for wages, though the amount recovered was exceeded by a counter-claim (*k*). But the action must relate to the property itself. The section does not extend to actions relating to rights in the nature of easements (*l*). It does not extend to an action for infringement of light, though a mandatory injunction is prayed for and obtained (*m*). It does not extend to a case where an administration decree is made and a new trustee appointed, without some further proof that property has been recovered or preserved (*n*).

Against whom.

The right to the charge created by the statute is in the nature of a salvage claim (*o*) and exists irrespective of the interest in the property recovered of the client by whom the solicitor was employed (*o*), and even though he has in fact no interest (*o*), or is not the beneficial owner (*p*), or is only interested in part of the property recovered (*o*). The right is effectual against everyone except a purchaser for valuable consideration without notice (*q*). Thus, it has been held to attach against an assignee (*r*), a mortgagee (*s*) and a volunteer (*t*). Where an undischarged bankrupt brought an action and money was paid into Court, the bankrupt's solicitor was held entitled to the order in respect of all costs incurred up to the date when the bankrupt's trustee intervened (*u*).

Extent of charge.

The order for a charge has priority over a garnishee order nisi (*x*),

(*k*) *The Phillippine*, L. R., 1 Adm. 309.

(*l*) Per *Mellish*, L. J., L. R., 9 Ch. at pp. 660, 663.

(*m*) *Foxon* v. *Gascoigne*, L. R., 9 Ch. 654; 43 L. J., Ch. 729.

(*n*) *Pinkerton* v. *Easton*, L. R., 16 Eq. 490; 42 L. J., Ch. 878. See *Smith* v. *Winter*, *Ex p. Hartley*, 18 W. R. 447, V.-C. J.

(*o*) *Green* v. *Young* (C. A.) 24 Ch. D. 545; 52 L. J., Ch. 915; *Charlton* v. *Charlton*, 52 L. J., Ch. 971; 49 L. T. 267; 32 W. R. 90: *Bailey* v. *Birchall*, 2 H. & M. 371; 11 Jur., N. S. 57: *Bulley* v. *Bulley*, 8 Ch. D. 479; 47 L. J., Ch. 841, C. A., per Lord *Selborne*, L. C., in *Pinkerton* v. *Easton*, L. R., 16 Eq. at p. 492. But in *Berrie* v. *Howitt*, L. R., 9 Eq. 1, it was held that the charge only extended to the property of his own client, and not to that of other persons. This decision was doubted by *Jessel*, M. R. (8 Ch. D. at p. 488, and at p. 490), and conflicts with *Green* v. *Young* and *Bailey* v. *Birchall* (supra), and it is submitted that it must be confined to the particular facts of the case.

(*p*) *Bulley* v. *Bulley*, supra.

(*q*) Per *Bacon*, V.-C., 7 Ch. D. at p. 320. See the section itself, ante, p. 166. The solicitor of a party to a suit has, independently of the above enactment, a paramount lien for his costs of suit upon the interest of that party in a fund brought into Court, through the solicitor's exertions: and, semble, notwithstanding the doubt suggested by the terms of the statute, this lien must prevail, even against an assignee for value without notice. Where, therefore, a plaintiff in a suit, to whom a defendant had been ordered to pay costs, obtained a charging order *nisi* upon a share of funds in Court belonging to defendant:—Held, that it could only be made absolute, subject to the lien for the taxed costs of defendant's solicitor. *Haymes* v. *Cooper*, *Cooper* v. *Jenkins*, 33 L. J., Ch. 488; 33 Beav. 431, a case decided before the Jud. Acts: *The Heinrich*, L. R., 3 Adm. & Ecc. 505. See *Re Fiddey*, infra, n. (*r*).

(*r*) *Pilcher* v. *Arden*, *In re Brook*, 7 Ch. D. 318: *Jones* v. *Frost*, *In re Fiddey*, L. R., 7 Ch. 773, 777.

(*s*) *Faithfull* v. *Ewen*, 7 Ch. D. 495.

(*t*) *Baile* v. *Baile*, L. R., 13 Eq. 497, 509.

(*u*) *Emden* v. *Carte*, 19 Ch. D. 311; 51 L. J., Ch. 371.

(*x*) *Dallow* v. *Garrold*, 13 Q. B. D. 513; 53 L. J., Q. B. 527: *Shippey* v. *Grey*, 49 L. J., C. P. 524; 42 L. T. 673: *Hamer* v. *Giles*, 11 Ch. D. 943: *Faithfull* v. *Ewen*, supra: *Birchall* v. *Pugin*, L. R., 10 C. P. 397; 44 L. J., C. P. 278: *The Jeff Davis*, L. R., 2 Ad. 1. See *The Leader*, L. R., 2 Ad. 314.

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Priority over garnishee order, &c.; how enforced.

over a claim for wages (*y*), but not over a claim for salvage services (*z*). In a partnership action the order will not be made in priority to the claim of creditors unless they are before the Court (*a*).

The order may be enforced by an order for taxation of the solicitor's bill, and if the property is a fund in Court by an order for payment out of that fund of the amount found to be due (*b*), or, in other cases, by an order for the sale of the property and payment to the solicitor out of the proceeds (*c*). The order will not generally be enforced until the action relating to the property is ended (*d*).

(i.) *Delivery up of Documents, Monies, &c.*

Compelling delivery up of papers.

It is the duty of the solicitor, if required, on having his lien satisfied, to deliver up to his client all deeds, documents, papers, monies, &c. belonging to the client in his hands (*e*). This duty will be summarily enforced by the Court or a judge, although no suggestion of fraud is made (*f*). The Court has always exercised a summary jurisdiction over a solicitor to compel him to deliver up his client's papers and monies, upon satisfaction of his bill, and any lien he may have on them. And by 6 & 7 *V. c.* 73, *s.* 37 (*ante*, p. 123), "It shall be lawful for the said respective Courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery, by any solicitor, or the executor, administrator, or assignee of any solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done, as regards such solicitor, by such Courts or judges respectively, where any such business had been transacted in the Court in which such order was made."

Solicitor must have obtained them as such.

The Court will not interfere in this way unless the papers or monies came into the solicitor's hands in a business in which he was employed as a solicitor. They will not interfere where they could not have referred his claim to taxation; as to which *see ante*, p. 139, &c. Where an administrator employed a solicitor, as his solicitor and agent, to get in the debts due to the intestate's estate, the Court in a case before 6 & 7 *V. c.* 73, granted a rule calling upon him to furnish a bill for the business thus done, and also an account of the money received and paid by him on account of the administrator; to pay over the balance, and to deliver up all deeds, papers, &c.; although he had not been employed by the administrator in prosecuting or defending any action or other law pro-

(*y*) *The Heinrich*, L. R., 3 Adm. 505.

(*z*) *The Livietta*, 8 P. D. 209; 52 L. J., P. 81; 49 L. T. 411.

(*a*) *Jackson* v. *Smith*, 51 L. T. 72.

(*b*) *Hunt* v. *Austin*, 9 Q. B. D. 588; 51 L. J., Q. B. 455, where an order for substituted service of the summons was made.

(*c*) See the section, ante, p. 166; 11 Eq. 188; 2 C. P. D. 368; 8 Ch. D. 487, 488.

(*d*) *In re Green, Green* v. *Green* (C. A.), 26 Ch. D. 16; 50 L. T. 513; 32 W. R. 373.

(*e*) A solicitor is bound to deliver up letters received from third parties exclusively relating to the client's business; but semble, the solicitor is entitled to keep letters written to him by the client himself: *Re Thomson*, 20 Beav. 545; 24 L. J., Ch. 599: *Re Wheatcroft*, 6 Ch. D. 97; 46 L. J., Ch. 669.

(*f*) *Ex p. Edwards*, 8 Q. B. D. 262; 51 L. J., Q. B. 108.

ceeding (*g*). A
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(*g*) *Re Aitkin*,
And see *Re Lord*
W. 545; 7 Dowl. 86
ham, 8 A. & E. 959;
10 M. & W. 28; 1 I
"Some judges have
case of *In re Aitki*
but though I do no
think the principle o
not to be extended;
J., in *Re Webb*, 14 I

(*h*) *Ex p. Cripwel*

(*i*) *Ex p. Corpus*
Taunt. 105: *Rawes*
624.

(*k*) See *Ex p. Fai*
Allen v. *Aldridge*, 1
ante, p. 132: *Re B*

ceeding (*g*). And where a solicitor was employed to prepare mortgage-deeds, and the mortgage-money was paid to him, out of which he paid several debts at the instance of the mortgagor, leaving a balance in his hands, he was ordered to pay over the balance to his client and to deliver up all deeds and papers, &c. (*h*). And the Court have exercised this summary jurisdiction even where a solicitor, as steward of a manor, had court-rolls and other muniments in his hands, and refused to deliver them up to his employer (*i*). But from a more recent case it seems that the mere fact of a steward being a solicitor at the time of his receiving the papers will not warrant the Court in thus interfering against him; and that, if the papers come into his hands simply as steward, they will not interfere (*k*). Nor will they interfere in this way, where the solicitor holds the papers merely as trustee (*l*). And where the motion was, not only that he should deliver up papers which he held as receiver of an estate, but also that he should give an account on oath of his receipts and payments in respect of a certain mortgaged estate, the Court refused to grant an order (*m*). Where a solicitor advanced money on a deposit of bills to a much greater amount than the advance, and he afterwards received the amount of them, a rule was refused to make him pay over the balance (*n*). So, where a solicitor, for the purpose of securing the payment of a balance due to him from a client, effected a policy of insurance on the client's life, with his consent, and charged the premiums to him, and on the client's death received the amount of the policy, the Court refused to compel the solicitor to account with the administrator of the client, and on payment of the balance due to deliver up the policy (*o*). Where a solicitor was directed to employ a proctor to obtain probate of a will, this was held not to be such an employment of him in the character of a solicitor as would enable the Court to compel him to refund money received by him to pay the proctor (*p*). Where a solicitor who was entrusted by executors with a sum of money to pay certain legacy duties had given an undertaking so to apply it, but had failed to do so, the Court refused to compel him to refund the money; it not appearing that he had been otherwise employed by the executors in his professional character, or that the employment in question was one which it necessarily required a solicitor to perform (*q*). Where a party

(*g*) *Re Aitkin*, 4 B. & Ald. 47. And see *Re Lord Cardross*, 5 M. & W. 545; 7 Dowl. 861: *Ex p. Bodenham*, 8 A. & E. 959: *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl., N. S. 669. "Some judges have thought that the case of *In re Aitkin* went too far: but though I do not say that, yet I think the principle of that case ought not to be extended:" per *Coleridge*, J., in *Re Webb*, 14 L. J., Q. B. 244.

(*h*) *Ex p. Cripwell*, 5 Dowl. 689.

(*i*) *Ex p. Corpus Christi College*, 6 Taunt. 105: *Rawes* v. *Rawes*, 7 Sim. 624.

(*k*) See *Ex p. Faith*, 9 Dowl. 973: *Allen* v. *Aldridge*, 13 L. J., Ch. 155; ante, p. 132: *Re Bowen*, 41 L. J., Ch. 327.

(*l*) *Pearson* v. *Sutton*, 5 Taunt. 364. And see *Duncan* v. *Richmond*, 7 Taunt. 391; 1 Moore, 99: *De Voolf* v. ——, 2 Ch. Rep. 68. See *Re Blanchard*, 30 L. J., Ch. 516.

(*m*) *Cocks* v. *Harman*, 6 East, 404; 2 Smith, 409.

(*n*) *Ex p. Schwalbanker*, 1 Dowl. 182.

(*o*) *Re Lord Cardross*, 5 M. & W. 545; 7 Dowl. 861. And see *Re Chitty*, 2 Dowl. 421.

(*p*) *Ex p. Cowie*, 3 Dowl. 600; 1 H. & W. 211, nom. *Ex p. Cohen*.

(*q*) *Re Webb*, 2 D. & L. 932; 14 L. J., Q. B. 244.

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after successfully resisting an action by a solicitor for costs, on the ground of not having retained him, afterwards applied to have certain documents delivered up by the solicitor, which had come to his hands in the course of the transactions in which the costs were incurred; *Coleridge*, J., held that, as the party had already treated the solicitor as not being employed by him, he could not then be permitted to allege that he was, in order to compel him to deliver up these documents, and accordingly he refused the rule (*r*). Where a solicitor in the country, to whom a writ of summons, &c. were transmitted for the purpose of service, afterwards became the solicitor for defendant in the cause, it was held that his employment by plaintiff was not such as to constitute him his solicitor, and render him summarily amenable in that character (*s*). The Court will not thus interfere where the papers or monies came into the solicitor's hands when he was not a solicitor (*t*). Where a client applied for a rule calling on his solicitor to deliver up letters which were written to him by the client in order to enable him to support an action against the solicitor for negligence, the Court refused the rule (*u*).

Must be no dispute as to lien.

The Court will not interfere in this way against a solicitor unless upon satisfaction of his lien, if he have any (*x*). Nor will they interfere where he *bonâ fide* claims a lien, and the client disputes it (*y*), either on the ground of negligence (*z*), or because he agreed to take costs out of pocket only (*a*), or the like. In such or the like cases the Court will in general leave the case for a jury to decide. But in cases of pressing necessity the Court might interfere and order the delivery up of the document on payment into Court of a sum sufficient to satisfy the lien claimed (*b*). The solicitor cannot, however, defeat the application simply by setting up a title to the papers or monies as his own, unless it be derived from his client; nor can he in general set up the title of a third party to them (*c*); but the solicitor may show that he does not hold the papers for the applicant alone, but for other persons as well, and, in that case, no order will be made (*d*). Therefore he cannot defeat the claim of an executor to papers entrusted to him as solicitor by the latter, though his wife takes an equitable interest under the trusts of the will (*e*). The Court will not interfere to compel a

Solicitor cannot set up title to papers.

(*r*) *Ex p. Maxwell*, 4 Dowl. 87: *Re Marshall*, 13 Jan. 1857 (Q. B.).

(*s*) *Cole* v. *Grove*, 1 Scott, N. R. 30. In this case, the defendant paid to the solicitor a sum of money, and the Court refused to compel the solicitor, on plaintiff's application, to pay the money over to him, the solicitor never having admitted that he had received the same for the express purpose of paying it to plaintiff.

(*t*) *Ex p. Deane*, 2 Dowl. 533.

(*u*) *Lewis* v. *Briggs*, 4 Hodg. 4. As to a solicitor being entitled to keep letters written to him by his client, see ante, p. 170, n. (*e*).

(*x*) *Goring* v. *Bishop*, 1 Salk. 37: *Russell's case*, Say. 125: *Strong* v. *Howe*, 1 Str. 621; 8 Mod. 339: *Anon.*, 12 Mod. 516: *Ex p. Lowe*, 8 East, 237: *Duncan* v. *Richmond*, 7 Taunt. 391; 1 Moore, 99: *De Woolf* v. ——, 2 Chit. Rep. 68: *Re Broomhead*, 5 D. & L. 52; 16 L. J., Q. B. 355.

(*y*) *Ex p. Millard*, 1 Dowl. 140.

(*z*) *Brazier* v. *Bryant*, 2 Dowl. 600.

(*a*) *Hodgson* v. *Terrall*, 2 Dowl. 264. And see *Re Philp*, 6 Jur. 1024: *Beal* v. *Langstaff*, 2 Wils. 371.

(*b*) *In re South Essex Equitable Investment, &c. Co.*, 46 L. T. 280, *Chitty*, J.

(*c*) *Re Walmsley*, 2 A. & E. 575. And see *Sibley* v. *Leicester*, 2 Dowl. 234.

(*d*) *Ex p. Cobeldick*, C. A., 12 Q. B. D. 149.

Where solicitor bankrupt.

solicitor to pay over money, where, after the receipt of it, he has become bankrupt and obtained his order of discharge (*e*), unless where there is fraud on his part (*f*), or where the bankruptcy was concocted for the purpose of evading the payment (*g*), or where the claim for the money cannot be proved as a debt under the bankruptcy. As to applying against his assignees to compel the delivery up of papers, see *post*, p. 174. The Court will not in general interfere where, by delivery up of the deeds, &c., the solicitor would be brought into contempt of another Court (*h*).

Where the delivery would be a contempt.

It seems that it is only on the application of the client (*i*), or his executor, administrator, or assignee, or of some one claiming under him, that the Court will interfere (*k*). Where a party to a deed gave it to a solicitor for the purpose of getting it executed by his client, the Court refused to order him to deliver it up (*l*). So, where a man in his will made his housekeeper sole legatee, and afterwards gave the will to his solicitors for the purpose of destroying, it but died before the solicitors had actually done so, and his son took out letters of administration, the Court refused to order the will to be delivered to the legatee (*m*). The Court have refused to order a bankrupt solicitor to deliver up to his solvent partner the papers of a client, on the application of such partner (*n*). So, the Court have refused to compel a solicitor of an executor who, in his account with the client, had taken credit for the legacy duty, to pay over such duty at the instance of the Stamp-office (*o*). So, where a solicitor had received the title-deeds of an estate from the devisee named in a will, the validity of which was disputed, and given an undertaking for them, and a third party had recovered the estate by ejectment, the Court refused to order the solicitor to deliver up the deeds to the latter (*p*). Where the solicitor with whom his own marriage settlement had been deposited for safe custody, was allowed to retain it until after the only child of the marriage, who was entitled to the property settled, had come of age, the Court refused to order him to deliver the settlement up to the trustee (*q*). If the solicitor receive the papers, &c. from two parties, one alone, it seems, cannot apply to have them delivered up (*r*). And where a solicitor was employed by certain *cestuis que*

Who may apply.

(*e*) *Culliford* v. *Warren*, 8 B. & C. 220: *Re Bonner*, 4 B. & Ad. 811; 1 N. & M. 555. See *Barron* v. *Marshall*, 9 D. & R. 390: *Rex* v. *Edwards*, 9 B. & C. 652.

(*f*) *Re Bonner*, 4 B. & Ad. 811. See *Ex p. Burgin*, 1 Dowl., N. S. 292; the Bank. Act, 1883 (46 & 47 V. c. 52, s. 30): and *Jenkins* v. *Fereday*, L. R., 7 C. P. 358; 41 L. J., C. P. 152.

(*g*) *In re Newbery*, 4 A. & E. 100; 5 N. & M. 419.

(*h*) *Re Walmsley*, 1 H. & W. 88; 4 N. & M. 543.

(*i*) If a party instructs a solicitor to bring an action for his benefit in the name of another, the former is the client. See *Clark* v. *Dignam*, 3 M. & W. 478.

(*k*) See *Miers* v. *Evans*, 3 Jur. 170, Q. B.: *Dixon* v. *Wilkinson*, 4 De G. & J. 508; 5 Jur., N. S. 1063.

(*l*) *Ex p. Smart*, 1 H. & W. 526. But see the judgment of *Tindal*, C.J., in *Cole* v. *Grove*, 1 Sc. N. R. 30, from which it would appear, that, if a defendant give money to his solicitor for the purpose of paying to the plaintiff, and the solicitor admit that he has so received it, the Court will compel him to pay it over to the plaintiff, on his application.

(*m*) *Ex p. Crisp*, 2 Dowl. 455.

(*n*) *Davidson* v. *Napier*, 1 Sim. 297.

(*o*) *Re Fenton*, 3 A. & E. 404; 5 N. & M. 239; 1 H. & W. 310.

(*p*) *Re Thornton*, 2 Dowl. 156.

(*q*) *Ex p. Moxon*, 1 Dowl. 6.

(*r*) *Duncan* v. *Richmond*, 7 Taunt. 391; 1 Moore, 99. See *Ex p. Bretter*, 1 H. & W. 212.

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trustent, the Court refused to compel him to deliver up deeds to one of several trustees, one of such trustees objecting to the application (*s*).

Against whom to apply.

The application should, of course, be made against the solicitor who withholds the papers or monies. When money was paid to the London agent of a country solicitor, the Court, on the application of the client, ordered the agent to pay it over (*t*). Where money was paid by a client to one of two solicitors, in the course of their business as solicitors, for a particular purpose, and he, instead of applying it to such purpose, applied it to the use of the firm, the Court ordered both the solicitors to refund the amount (*u*). Formerly, the Court had no power to interfere in this way against the personal representative of the solicitor (*x*) or his assignees (*y*) in case of his bankruptcy, where deeds, documents or papers came into their hands; but this is now remedied by 6 & 7 *V. c.* 73, *s.* 37 (*ante*, p. 124), and the application may now be made against these parties.

Time for applying.

There does not appear to be any time limited for making the application. The fact of the papers or money having come to the solicitor's hands upwards of six years ago will not of itself bar it. But if the application is made after a great lapse of time, some reason should be given accounting for the delay, or the application may be refused (*z*).

To whom application to be made and proceedings in.

The application may be made to the Court or at chambers. It is now usually made to a master at chambers by a summons, intituled "In the matter of A. B. (*the solicitor*) gent., one, &c." for an order that he should deliver up the papers or monies in question (*a*). It cannot be made part of the same order, that, in case the papers, &c. are not delivered up, an attachment shall issue against him (*b*). As a general rule, if the solicitor has any lien on the papers, &c. for his bill of costs, the same should be paid or tendered before making the application, and, if necessary, the delivery of the bill may be compelled, as mentioned *ante*, p. 136, and taxed, as mentioned *ante*, p. 139 (*c*).

The affidavit.

The affidavit in support of the application may be intituled in the matter of the solicitor, though the money which the solicitor is called on to pay over was received in a cause (*d*). It should, besides showing all the facts necessary to give the judge jurisdiction, show that the solicitor was such at the time of the receipt of the papers, and in what character and the

(*s*) *Re Gregory*, 6 Jur. 282, per *Williams*, J., C. P.

(*t*) *Ex p. Edwards*, 8 Q. B. D. 262; 51 L. J., Q. B. 108.

(*u*) *Re Ford and Thomas*, 8 Dowl. 684. See *Re Lawrence*, 23 L. J., Ch. 791, where the Court, under the circumstances, refused to compel the firm to pay over money paid to one partner, who had applied it to his own use, upon the ground that the client had dealt solely with such partner. As to applying against a surviving partner to refund moneys paid on articles of clerkship, see ante, p. 60.

(*x*) *Re Nicholls*, 2 Dowl., N. S. 423; 12 L. J., Q. B. 103.

(*y*) *Ex p. Roy*, 1 H. & W. 669; 4 Dowl. 573.

(*z*) *Ex p. Sharp*, K. B. June 1, 1836: *Ex p. Yeatman*, 4 Dowl. 304; 1 H. & W. 510: *Ex p. Sharpe*, 5 Dowl. 717.

(*a*) Cp. *In re Copp*, 32 W. R. 25.

(*b*) *Roscoe* v. *Hardman*, 5 Dowl. 157: *Twiss* v. *Fry*, 5 Dowl. 157.

(*c*) As to compelling a solicitor to refund money overpaid him where an order for the taxation of his bill is obtained, see ante, p. 155.

(*d*) *Ex p. Randall*, 17 L. J., Q. B. 232: *Re Wood*, 6 D. & L. 154.

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(*e*) *Ex p. Hore*, 3 D
(*f*) *Fenn* v. *Wild*,
see ante, p. 130.
(*g*) *Ex p. Horsfall*,
1 Man. & R. 306: *Ex*
4 Bing. N. C. 386.
(*h*) *Ex p. Willand*,
See *Rawlinson* v. *Mos*
797: *Re Williams*, 30
5 De G., F. & J. 104, w
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circumstances under which he received them; the payment or tender of the amount of his bill, if any, or the applicant's readiness to pay what is due, and the solicitor's refusal to deliver up the papers, &c. It is usual to insert an allegation that he is a solicitor of the Supreme Court (*e*). If the application succeed, the solicitor will, in general, be ordered to pay the costs of it. If it fail, and there was no ground for making it, the applicant will be ordered to pay the costs; but not so if there was reasonable and probable cause for making it. The solicitor would not, in general, before the 33 & 34 *V. c.* 28, be ordered to pay interest on money retained by him (*f*).

Costs of.

Interest.

As to the mode of proceeding to enforce obedience of orders, *see post, Ch. LXXIV. Vol.* 2, *Ch. CXXII.* The order, if for the payment of money, is usually enforced by execution, or if for the delivery of documents by execution or attachment. If the order be to deliver up papers, the solicitor must deliver up the drafts and copies of deeds, &c. for which he has charged and been paid, as well as the deeds, &c. themselves, and all papers and documents which have come to his hands from or on account of the client in the course of his employment (*g*). An order having been made directing a solicitor to deliver up certain deeds, the Court granted an attachment against him for refusing to deliver them up unless the client would pay for a schedule thereof to be kept by the solicitor (*h*).

Obeying the order and enforcing it.

Default by a solicitor in payment of a balance found due from him upon taxation of his bill of costs under the common order for that purpose, is default in payment of a sum of money ordered to be paid by the solicitor in his character of an officer of the court within the meaning of the *Debtors Act*, 1869, *s.* 4, *sub-s.* 4, and an attachment may be issued against him (*i*). So is default in payment of a sum of money found to be due from the solicitor to a client, and which the Court has ordered him to pay to the client (*k*). But default by a solicitor in payment of the costs of an unsuccessful appeal against an order to tax his bill of costs which has been obtained by his client is not (*l*).

(*e*) *Ex p. Hore*, 3 Dowl. 600.

(*f*) *Fenn* v. *Wild*, 1 Dowl. 498; see ante, p. 130.

(*g*) *Ex p. Horsfall*, 7 B. & C. 528; 1 Man. & R. 306; *Ex p. Holdsworth*, 4 Bing. N. C. 386.

(*h*) *Ex p. Willand*, 11 C. B. 544. See *Rawlinson* v. *Moss*, 30 L. J., Ch. 797: *Re Williams*, 30 L. J., Ch. 610; 5 De G., F. & J. 104, where a counsel and a law stationer retained papers for fees and charges due to them after an order made for the delivering up of papers by a solicitor. See as to attachment, post, Ch. LXXXIII.

(*i*) *In re Rush*, L. R., 9 Eq. 147; L. R., 10 Eq. 442; 39 L. J., Ch. 159; *Re White*, 19 W. R. 39; 23 L. T. 387; *Re Barfield and Rush*, 19 W. R. 466; 24 L. T. 248. *Re Bale*, L. R., 8 C. P. 104, contra, was based on *Re Robinson*, a case decided before the Act.

(*k*) *In re Dudley* (C. A.), 12 Q. B. D. 44; 53 L. J., Q. B. 66; 49 L. T. 739; 32 W. R. 264.

(*l*) *In re Hope*, L. R., 7 Ch. 523; 41 L. J., Ch. 797.

PART I.

7. *Remedies against for Misconduct, Negligence, &c.*

(a) *Summary Remedy by Application to Court* . . . 176
(b) *Order to pay Costs of Proceedings* 184

(a) *Summary Remedy by Application to Court* (*m*).

Summary remedy against for misconduct, &c.

Besides the ordinary proceedings by action for any breach of duty and by indictment for any crime, there is a mode of proceeding against solicitors by an application to the summary jurisdiction of the Court, which jurisdiction is exercised according to law and conscience, and not by any technical rules (*n*). The Court or a judge will, in general, compel the solicitor specifically to perform his duty, if practicable, and will punish him for its breach (*o*). The mode of punishment is either by fine, attachment (*p*), suspension from practice, or (in very gross cases, where enough is shown to prove that the solicitor is unfit to be a member of the profession) by striking him off the roll (*q*). In some cases it is thought sufficient to make him pay the costs incurred by the parties by reason of his misconduct (*r*). It may be added, that the Court or judge will thus interfere, though the solicitor may have ceased to be such, if he was a solicitor at the time the crime or misconduct complained of took place (*s*). If the agent of a solicitor does not perform his duty, the client can make a summary application against the former (*t*): and the agent is, like other solicitors, liable to be summarily punished for misconduct. The Court or judge will not interfere where there is another proceeding by action or otherwise pending against the solicitor for the same act, unless that proceeding be dropped (*u*). The Court will not, in the exercise of its summary jurisdiction, prevent a solicitor from pleading the Statute of Limitations (*x*).

The Court or judge will in some cases order the solicitor personally to pay the costs of proceedings (*y*). If this is done the solicitor may appeal (*z*).

(*m*) As to compelling a solicitor to deliver up papers, moneys, &c., see ante, p. 170.

(*n*) *Ex p. Bayley*, 9 B. & C. 691. By Jud. Act, 1873, s. 87, noticed ante, p. 39, the Supreme Court and the High Court of Justice and the Court of Appeal respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of solicitors as any one of her Majesty's superior courts of law or equity might, previously to the passing of the Act, have exercised.

(*o*) They will, however, only interfere in this manner when it is shown that the relationship of solicitor and client existed. *Re Bryant*, V.-C. B., 50 L. T. 450. The Court will not on motion compel a solicitor to pay counsel his fees, although the solicitor has received them. *Re Angell*, 29 L. J., C. P. 227.

(*p*) But an attachment will not in general be granted for the disobedience of a rule or order, ordering the solicitor to pay money. *Re Robinson*, 10 B. & S. 75. See *Re Turner*, L. R., 8 C. P. 103. As to when it will be granted, see Ch. LXXXIII.

(*q*) See *Re Smith*, 1 B. & B. 522; 4 Moo. 319. See *Ex p. Hague*, 7 Moore, 64; 3 B. & B. 257: *Ex p. Yates*, 9 Bing. 455; 1 Dowl. 724.

(*r*) *Blundell* v. *Blundell*, 1 D. & R. 142; 5 B. & Ald. 533.

(*s*) *Simes* v. *Gibbs*, 6 Dowl. 310.

(*t*) *Ex p. Jones*, 2 Dowl. 161: *Gray* v. *Kirby*, Id. 601.

(*u*) See *Anon.*, 5 Jurist, 678.

(*x*) *Ex p. Edwards*, 8 Q. B. D. 282; 51 L. J., Q. B. 108. But see *Re Triston*, 1 Pr. Rep. 74.

(*y*) See post, p. 184: *Upton* v. *Brown*, 20 Ch. D. 731.

(*z*) *In re Milton* (C.A.), 53 L. J., Q.B. 65; 32 W. R. 238: *S. C.*, in Div. Court, nom. *In re Bradford*, 11 Q. B. D. 373.

The cases in which this summary jurisdiction is most frequently exercised may conveniently be reduced to three classes: *viz.* 1*st*, crimes and misdemeanors; 2*ndly*, gross misconduct; 3*rdly*, negligence and ignorance. These will now be considered, and having noticed them, we shall point out how the application should be made, and the proceedings upon and subsequent to it.

Crimes and misdemeanors (*a*).

For Crimes and Misdemeanors.]—The Court will not call upon a solicitor to answer the matters of an affidavit, where the misconduct complained of amounts to an indictable offence, as barratry, champerty, conspiracy, maintenance, perjury, or the like (*b*); for he cannot, more than any other person, be called upon to answer criminating matter, as his answer would afterwards be evidence against him (*b*), and *nemo tenetur prodere seipsum* (*c*). But the Court will strike a solicitor off the roll for an indictable offence involving much criminality, where the offence has reference to a proceeding in Court, and it is clearly made out against him (*d*). They will also entertain such application, whether the offence has reference to a proceeding in Court, or not, where he has been convicted of it (*e*), or where enough appears, on his own admission, to make the intervention of a jury unnecessary (*f*). Where a solicitor had been convicted of larceny, the Court ordered him to be struck off the roll, although the conviction had taken place five years before, and no subsequent misconduct was attributed to him; for they held, that the conviction rendered him an unfit person to practise as a solicitor (*g*). But a conviction for a conspiracy is not of itself sufficient ground for striking a solicitor off the roll, unless the conspiracy was of an aggravated nature (*h*). Nor is a verdict against him in an action for a libel (*i*). By 12 *G.* 1, *c.* 29, *s.* 4, if any person convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney, solicitor or agent in any Court of law or equity in England, the judge may transport the offender for seven years (*k*) by such ways and under such penalties as felons.

For gross misconduct.

For gross Misconduct.]—The Court will, in general, interfere in this summary way and strike a solicitor off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of an action, or other regular and ordinary business of a solicitor, but where it has arisen in any

(*a*) As to misappropriation of monies or securities, see 24 & 25 V. c. 96, s. 75 to s. 87; *Reg.* v. *Newman*, 31 L. J., M. C. 87.

(*b*) *Anon.*, 5 B. & Ad. 1088: *Re Knight and Hall*, 1 Bing. 142: *Short* v. *Pratt*, 7 Moore, 424; 1 Bing. 102: *Ex p. Anon.*, 2 Dowl. 110, per *Abinger*, C. B.: *Stephens* v. *Hill*, 10 M. & W. 28: *Anon.*, 12 L. J., Q. B. 331: *Robertson* v. *Wills*, 1 Dowl., N. S. 772.

(*c*) *Hinde's case*, 3 Bulst. 50.

(*d*) *Stephens* v. *Hill*, 10 M. & W 28; 1 Dowl., N. S. 669.

(*e*) *Ex p. Brownsall*, Cowp. 829: *Re King*, 8 Q. B. 129, where the attorney was struck off the rolls, though the judgment had been arrested. *Re Garbett*, 18 C. B. 403.

(*f*) *In re* ——, 3 N. & P. 389.

(*g*) *Ex p. Brownsall*, Cowp. 829. See also *Rex* v. *Vaughan*, 1 Wils. 22.

(*h*) *Anon.*, 1 Dowl. 174.

(*i*) *Anon.*, 2 Dowl. 117. See *Re Hawdone*, 9 Dowl. 970.

(*k*) Not less than five nor more then seven years' penal servitude is now substituted, 20 & 21 V. c. 3; 27 & 28 V. c. 47; 1 Russ. on Crimes, by Prentice, 72.

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other matter so connected with his professional character as to afford a fair presumption that he was employed in or entrusted with it in consequence of that character (*l*). Where a solicitor sent letters to a person threatening him with a prosecution, in order to extort money from him, the Court ordered him to be struck off the roll, the misconduct having been in his business of an attorney (*m*). If a solicitor sign the name of a barrister without his knowledge or assent, or hire sham bail in an action (*n*), or practise any other fraud on the Court, they may strike him off the roll or otherwise punish him. So, if a solicitor be guilty of misconduct in obtaining a rule *nisi* on suggestions which were groundless, the Court may order him to pay the costs (*o*). Where a solicitor, without any corrupt or unworthy motives, prepared a special case, in order to take the opinion of the Court upon the will of a testator, and suggested several facts which had no foundation, he was holden to be guilty of a contempt, and fined 30*l*. for his offence (*p*). Where the solicitor of a plaintiff, upon being applied to for the address of his client, and not knowing it himself except from two letters he had received from him, the one dated from Bridport, the other from Lynn, incautiously gave the address "Bridport;" and that being found to be erroneous, he then gave the address "Lynn," which was also erroneous; the Court made him pay all the costs occasioned by his conduct, as he had not made proper inquiries as to the real address of his client (*q*). Where a lady had, in an action of ejectment under the old practice, obtained judgment against the casual ejector, and the solicitor for the landlord afterwards called upon her, and, in the absence of her solicitor, obtained her signature to a paper, whereby she agreed to abandon her judgment, and to allow the title to be tried between her and the landlord, the Court ordered the solicitor to give up the

(*l*) Tidd, 9th ed. 86: *Re Aitkin*, 4 B. & Ald. 47. And see *Re Woolf* v. ——, 2 Chit. Rep. 68: *Re Knight*, 1 Bing. 91: *Ex p.* ——, 2 Dowl. 110: *Ex p. Bodenham*, 8 A. & E. 959: *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl., N. S. 669: *Anon.*, 19 L. J., Ex. 219: *Ex p. Stratford*, 7 Jur. 512. See *Belcher* v. *Goodered*, 4 C. B. 472, where the solicitor improperly appeared for a party. It seems that the Court will sometimes interfere where the misconduct arises in a transaction in which the solicitor was not strictly acting in his professional character. *Wallace* v. *The Judge of the Supreme Court of Nova Scotia*, 36 L. J., P. C. 119: *Re Blake*, 3 Ell. & Ell. 34; 30 L. J., Q. B. 32, in this case the solicitor was only suspended from practising for a certain time. See *Re Hill*, L. R., 3 Q. B. 543; 37 L. J., Q. B. 295, where a solicitor, acting as managing clerk to a firm of solicitors, misappropriated some purchase-money received on sale of property belonging to a client, but upon discovery of the fraud repaid an equal amount, he was struck off the roll. As to striking a solicitor off the roll for misconduct as a trustee, see *Re Chandler*, 22 Beav. 253; 25 L. J., Ch. 396: *Thompson* v. *Finch*, 28 L. T. 279, Lords Justices: *Thorndike* v. *Hunt*, 5 Jur., N. S. 879: *Re Blake* and *Re Hill*, supra: *Re Wright*, 12 C. B., N. S. 705.

(*m*) *R.* v. *Southerton*, 6 East, 143.

(*n*) *Smith* v. *Mathan*, 4 D. & R. 738: *Dicas* v. *Warne*, 2 Dowl. 812: *Clifford* v. *Parker*, 5 Dowl. 226.

(*o*) *Rolfe* v. *Rogers*, 4 Taunt. 191. And see *Gruggen* v. *White*, Id. 881; and see, in general, when the Court would compel a solicitor to pay the costs of a rule, *R.* v. *Borron*, 3 B. & Ald. 432: *R.* v. *Dodson*, 9 A. & E. 704: *Clarke* v. *Gorman*, 3 Taunt. 492.

(*p*) *Re Elsam*, 5 D. & R. 389; 3 B. & C. 597.

(*q*) See *Neal* v. *Holden*, 3 Dowl. 493: *Blundell* v. *Blundell*, 5 B. & Ald. 533; 1 D. & R. 142, where bail were misdescribed.

instrument to the lady, and obliged him to pay the costs (*r*). Where a promissory note of 200*l.* was given to a solicitor by the father of an articled clerk as a premium, the solicitor undertaking not to negotiate it for five years; at the end of eighteen months, however, the solicitor and the articled clerk separated, it being found that, from the articles not being stamped at the beginning of the clerkship, the time thus served would not be reckoned in the five years; the solicitor then negotiated the note, and the father was arrested upon it; upon application, the solicitor was ordered to take up the note, and to pay the costs of the application (*s*). Where a solicitor executed a bond to a client upon a wrong stamp, the Court upon motion compelled him to have a proper stamp put upon it (*t*). Where the solicitor of a defendant induced a witness, subpœnaed by the opposite party, to absent himself from the trial, the Court of Exchequer prohibited the solicitor from practising in their Court (*u*). In one case, the Court of C. P. committed a solicitor to prison and struck him off the roll for accepting a retainer on both sides (*x*); but the Court would not interfere to this extent at the present day, unless there were some gross misconduct by him in the business. In a more recent case where a solicitor acted for both sides, deluding the parties and preventing them from communicating with each other, the Court set aside the proceedings, and made him pay the costs (*y*). It is no ground for warranting the Court thus to interfere against a solicitor, that he had advised his client to hand him over money which the Insolvent Court subsequently considered as a misappropriation, and for doing which the client was remanded (*z*). Nor will the Court thus interfere upon the ground of a solicitor acting as a common informer, or that he has brought several *qui tam* actions, and made an offer to defendants to compromise them (*a*); though it might be otherwise if he made a threat to bring them, for the purpose of extortion or the like (*a*). Where an action for goods sold was brought against a solicitor, and he pleaded a plea of accord and satisfaction, which plaintiff swore was in every respect false, the Court refused to allow plaintiff to sign judgment for want of a plea (*b*). It seems that, if a solicitor keeps out of the way in order to avoid service of a notice of motion for an attachment, the Court may strike him off the roll (*c*); but the mere disobedience of a rule or order is, in general, no ground for striking a solicitor off the roll (*d*). Excessive and extortionate charges in a bill of costs as

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(*r*) *Re Oliver*, 2 A. & E. 620; 4 N. & M. 471; 1 H. & W. 79.

(*s*) *Ex p. Gardner*, 2 Dowl. 520.

(*t*) *Gwilliam* v. *Barnet*, 2 Smith, 155.

(*u*) *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl., N. S. 669. The rule was made absolute in the above form, on account of the solicitor not being a solicitor of the Court of Exchequer.

(*x*) See *Mason's case*, Freeman, 74.

(*y*) *Berry* v. *Jenkins*, 3 Bing. 423. As to his disclosing confidential communications, &c., see ante, p. 95.

(*z*) *Smith* v. *Tower*, 2 Dowl. 673.

(*a*) *Smith* v. *Gillett*, 3 Dowl. 364. And see *Re Warren*, 1 H. & W. 113.

(*b*) *Merington* v. *Becket*, 2 B. & C. 81. As to calling on a solicitor to show cause why he put a sham plea on the record, see *Pierce* v. *Blake*, 2 Salk. 516: *Merington* v. *Becket*, supra: *Fortescue* v. *Holt*, 1 Vent. 213, per *Hale*, C. J.

(*c*) *Anon.*, 1 D. & R. 529: *Re* ——, 10 Jur., Q. B. 198.

(*d*) See *Ex p. Townley*, 3 Dowl. 39: *Ex p. Grant*, Id. 320: *Re Holmes*, 12 Jur., Q. B. 657: *Guildford* v. *Sims*, 13 C. B. 370.

PART I.

between solicitor and client, form no ground for a summary application against a solicitor, in the absence of evidence of wilful fraud, the suitor being sufficiently protected by the taxation of the bill (*e*). We have seen, that, by 6 & 7 *V. c.* 73, *s.* 32, *ante*, p. 91, if a solicitor knowingly suffers his name to be used by an unqualified person, or knowingly acts as agent for such person, the Court may strike him off the roll, and he will for ever after be disabled from practising as a solicitor.

For negligence or unskilfulness.

For Negligence or Unskilfulness.]—We have already considered, *ante*, p. 111, in what cases a solicitor is liable for negligence and want of skill, and the remedy by action, or defence to an action on his bill, that the client has for it. Where the negligence or ignorance complained of is very gross (*f*), and very clearly established by affidavit (*g*), but not otherwise, the Court or judge will interfere and compel him to compensate his client, or to pay costs (*h*). Where a solicitor discharged a person in custody at his client's suit, upon receiving from him a security which he knew at the time to be worth nothing, the Court ordered him to pay his client the debt and costs (*i*). Where he had neglected to fee counsel, whereby his client was nonsuited, the Court awarded an attachment against him, but ordered it to lie in the office a few days, in order to give him an opportunity to make satisfaction (*k*). So, where a cause was called on and tried as an undefended cause, in consequence of defendant's solicitor neglecting to deliver his briefs, the Court granted a new trial, and ordered the solicitor to pay the costs as between solicitor and client (*l*).

The application, to whom made.

The Application, how made, and Proceedings on it.]—An application to strike a solicitor off the roll, or to compel him to answer the matters of an affidavit, is usually made to a Divisional Court (*m*). It would appear that it might be made to a judge at chambers (*n*). When the misconduct occurs in the course of a trial, the judge before whom the case is tried may entertain the application (*o*).

How made—notice of motion.

The application must be made on notice of motion (*p*). The notice of motion must state in general terms the grounds of the application (*q*). It should be intituled "In the matter of , a solicitor of the Supreme Court, Ex parte ." The notice

(*e*) *Meux* v. *Lloyd*, 2 C. B., N. S. 409. See *Re Eyre*, 1 C. B., N. S. 151.

(*f*) *Pitt* v. *Valden*, 4 Burr. 2060: *Barker* v. *Buther*, 2 W. Bl. 780: *Bordeca* v. *Solomon*, Say. 172: *Adlington* v. *Appleton*, 2 Camp. 410: *Rex* v. *Fielding*, 2 Burr. 654: *De Roufigny* v. *Peale*, 3 Taunt. 484: *Harrington* v. *Jennings*, Lofft, 188. The Court will not interfere where there is anything like a reasonable doubt, see *Dixon* v. *Wilkinson*, 4 De G. & J. 508; 5 Jur., N. S. 1063. See *Clark* v. *Girdwood*, L. R., 7 Ch. 9.

(*g*) *Meggs* v. *Binns*, 2 Bing. N. C. 625.

(*h*) See Ord. LXV. r. 11, post, p. 184.

(*i*) *Rex* v. *Bennett*, Say. 169.

(*k*) *Rex* v. *Tew*, Say. 50.

(*l*) *De Roufigny* v. *Peale*, 3 Taunt. 484. And see *White* v. *Sandell*, 3 Dowl. 798.

(*m*) *In re Martin*, 24 W. R. 111; W. N. 1875, 198.

(*n*) Jud. Act, 1873, s. 87: *Ex p. Higgs*, 1 Dowl. 495.

(*o*) *Cave* v. *Cave*, 49 L. J., Ch. 656; 43 L. T. 158—*Fry*, J.

(*p*) R. of S. C., Ord. LII. r. 2.

(*q*) Id. r. 4.

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(*r*) Id. r. 5.

(*s*) I. e., the regist
See sect. 1, pp. 40, 78

(*t*) *Burton* v. *Earl*

must be personally served on the solicitor not less than ten clear days before the time fixed by the notice for making the motion (*r*).

Notice, &c. to be given to the registrar.

By 37 & 38 *V. c.* 68, *s.* 7, "Where application is intended to be made to any Court for an order or rule to strike the name of any attorney or solicitor (not being an attorney or solicitor making the application) off the roll of attorneys or solicitors of such Court, or for an order or rule to compel him to answer the matters of an affidavit, notice in writing shall be given to the registrar (*s*) of such intended application fourteen clear days at the least before such application shall be made."

By sect. 8, "Copies of all affidavits intended to be used in support of such application shall be delivered to the registrar with the notice."

Proof of notice.

By sect. 9, "The Court shall not entertain any such application, except upon production of an affidavit proving that the notice required by this Act has been duly given, and that copies of all such affidavits have been duly delivered to the registrar."

Registrar may appear.

By sect. 10, "The registrar may appear by counsel upon the hearing of any such application, and upon any other proceedings arising out of or in reference to the application, and may apply to the Court to make absolute any rule nisi which may have been granted by the Court in the matter of such application, or to make an order that the name of the attorney or solicitor be struck off the roll of attorneys or solicitors of the said Court, or, as the case may be, to order the attorney or solicitor to answer the matters of the affidavit, or such other order as to the Court may seem fit; and it shall be lawful for the Court to order the costs, charges and expenses of the registrar of or relating to any of the matters aforesaid, to be paid by the attorney or solicitor against whom any such application is made or was intended to be made, or by the person by or on whose behalf the application is made or was intended to be made, or partly by the one and partly by the other of them."

Registrar may draw up order.

By sect. 11, "Where any Court or any judge of any Court shall, upon motion, have ordered or directed a rule (whether nisi or absolute) or order to be drawn up for striking the name of any attorney or solicitor off the roll of attorneys or solicitors of such Court, or for compelling an attorney or solicitor to answer the matters of an affidavit, and such rule shall not have been drawn up by or on behalf of the person applying for the same within one week after the order or direction for drawing up the same shall have been made or given, it shall be lawful for the registrar to cause the rule or order to be drawn up, and all future proceedings thereupon shall be had and taken as if the application for the rule or order had in the first instance been made to the Court by the registrar."

Form of motion.

The application should be for an order that the solicitor do answer the matters of the affidavit, or be struck off the roll; though formerly the Court would not grant a rule in the alternative (*t*). Where the misconduct consists in disobedience to a rule or order,

(*r*) Id. r. 5.

(*s*) I. e., the registrar of solicitors. See sect. 1, pp. 40, 78.

(*t*) *Burton* v. *Earl of Chesterfield*, 9 Jur. 373. See *Ex p. A. B.*, 4 Jur. 630: *Belcher* v. *Goodered*, 4 C. B. 474, per *Wilde*, C. J.: *Re Blake*, ante, p. 178, note (*l*).

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the motion should be for an attachment (*t*). It must not be in the alternative, that he do a certain act, or that an attachment do issue against him; but the course is first to obtain an order (in the usual way) that he do the act; and if he afterwards disobey, then to move for an attachment (*u*). The motion must be made by counsel (*x*). On the hearing the practice is not to mention the solicitor's name (*y*), and only the applicant's name appears on the list of motions.

By counsel.

At what time.

Formerly, when a rule nisi was applied for in the first instance the application had to be made sufficiently early in the sittings to enable the solicitor to show cause in the same sittings (*z*), and the Court would not entertain the application on the last day, or the last day but one of the sittings (*a*). Now this is no longer so, but the application must be made within a reasonable time after the act complained of (*b*). If the application be to strike a solicitor off the roll for any defect in his articles of clerkship, or in the registry of it, or in his service under them, or in his admission or inrolment, it must be made within twelve months from the time of admission or inrolment (*c*). But there is no limit of time to such application where there has been fraud (*c*).

Affidavit in support of application.

If the matter complained of took place in the conduct of an action, the affidavit upon which the motion is founded should be intituled in such action, and this although judgment has been obtained in it (*d*). If it did not take place in a cause, then the affidavit should be intituled, "In the matter of A. B. [*the solicitor*], a solicitor of the Supreme Court, Ex parte ——— [*the client*]." It is usual to state in the affidavit that the party is a solicitor of the Court, or that he was such when he did the act complained of (*e*). The subject-matter of the affidavit, and the necessity for its showing such facts as will induce the Court to interfere, may be collected from what has been already said as to when the Court will interfere. If it does not state the wrongful act directly and positively, it must state not merely facts from which it may be inferred, but also the information and belief of the party that the solicitor is guilty of the misconduct the deponent imputes to him (*f*). A copy of the affidavit must be served with the notice of motion (*g*). An

(*t*) *Ex p. Townley*, 3 Dowl. 39: *Ex p. Grant*, 3 Dowl. 320. See ante, p. 175, and the cases cited in the notes on that page.

(*u*) *Roscoe* v. *Hardman*, 5 Dowl. 157; 2 H. & W. 118: *Twiss* v. *Fry*, 5 Dowl. 157.

(*x*) *Ex p. Pitt*, 2 Dowl. 439; 5 B. & Ad. 1077; 3 N. & M. 566.

(*y*) *Anon.*, 8 W. R. 530; 2 L. T., N. S. 432.

(*z*) *Ex p. Anon.*, 2 Dowl. 227: *Re Turner*, 3 Dowl. 557: *Bailey* v. *Jones*, 1 Chit. 744: *Anon.*, 1 Ex. 453.

(*a*) *In re a. Solicitor*, "Times," August 8th, 1876, Q. B. D.

(*b*) *Re* ——, 2 B. & Ad. 766.

(*c*) See 6 & 7 V. c. 73, s. 29, ante, p. 49: and see *Ex p. Page*, 1 Bing. 160; 7 Moore, 572: *Re* ——, 2 B. & Ad. 766: *Paget* v. *Chambers*, 7 Sc. 610; 5 Bing. N. C. 630: *Re Thompson*, 13 C. B., N. S. 218, where the solicitor had been convicted of embezzlement.

(*d*) *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl., N. S. 669: *Simes* v. *Gibbs*, 6 Dowl. 310.

(*e*) See ante, p. 175, n. (*e*): *Ex p. Becke*, 1 H. & W. 417: *Ex p. Lord*, 1 Hodges, 195. As to the Court taking judicial notice of a solicitor being on the roll, see *Wilson* v. *Northorp*, 4 Dowl. 441; ante, p. 77. As to the Law List being evidence, see ante, p. 81.

(*f*) *Re King*, 3 N. & M. 716.

(*g*) R. of S. C., Ord. LII. r. 4.

affidavit of service of the notice of the application, &c., on the registrar is also necessary, *see ante*, p. 181.

If the solicitor positively and unequivocally deny the matters alleged against him, the Court will, if satisfied with his denial, sometimes dismiss the application (*i*), but they will not do so if his account of the transaction is incredible (*k*); and in most cases where there is any doubt, the matter will be referred to the Master. Course pursued on hearing (*h*).

Sometimes the Court will refer the matter to the Master for inquiry and report, and the Court will afterwards, in general, act upon his report (*l*). The order in this case usually contains provisions as to the evidence to be received (*m*). If there appears to have been reasonable and probable cause for imputing misconduct to the solicitor, although it turns out that there was no actual foundation for the charge, the Court may not give costs to the solicitor (*n*).

If the solicitor does not appear, the Court will cause him to be called three times in Court, and will order an attachment to issue against him (*o*).

If the Divisional Court order the solicitor to be struck off the roll, it is not necessary to apply to the other Divisions of the High Court of Justice to strike him off the roll; and the 23 & 24 *V.* c. 127, s. 25, is now inoperative. Sometimes the Court orders that the solicitor be suspended from practice for a certain time.

This punishment of a solicitor, by striking him off the roll, is not in all cases to be considered a perpetual disability; the judges may intend it as a temporary suspension only; and if his offence has been attended with circumstances of extenuation, and his subsequent conduct proves him deserving of their lenity, they may order him to be re-admitted (*p*). If, indeed, he has been struck off the roll for having acted for an unqualified person, or for having suffered his name to be used by one, then he will for ever after be disabled from practising, and cannot be re-admitted (*q*). Where a solicitor was struck off the roll for misappropriating his client's money, it was held by the Court of Common Pleas to be a condition precedent to the Court entertaining an application for his re-admission that it be shown that he had made reparation if he could; or, if he could not, had made sincere and earnest efforts to make reparation as far as possible (*r*). As to notices for re-admission, *see ante*, p. 85. Striking off roll not always perpetual.

See ante, p. 181, the enactments enabling the registrar under certain circumstances to draw up the order, &c.

An appeal lies to the Court of Appeal from an order of the Divisional Court striking a solicitor off the rolls (*s*). Appeal to Court of Appeal.

(*h*) See *Re Worman*, 32 L. J., Ex. 83; 1 H. & C. 636, where the solicitor did not appear; and see *Re Bluck*, 31 L. J., Q. B. 362. As to the registrar appearing on the hearing, see ante, p. 181.

(*i*) Tidd, 9th ed. 88: *Wadworth* v. *Allen*, 1 Chit. Rep. 186.

(*k*) *Re Crossley*, 6 T. R. 701.

(*l*) *Re Wright*, 12 C. B., N. S. 705. See *Easton* v. *Neville*, 18 C. B. 548; and see *Re Bluck*, supra.

(*m*) *Dicas* v. *Warne*, 2 Dowl. 812.

(*n*) *Doe* d. *Thwaites* v. *Roe*, 3 D. & R. 226.

(*o*) *Easton* v. *Neville*, 18 C. B. 548: *In re a Solicitor*, 36 L. T., N. S. 113.

(*p*) See *Rex* v. *Greenwood*, 1 W. Bl. 222: *Ex p. Frost*, 1 Chit. Rep. 558, n.: *Re Garbett*, 18 C. B. 403: *Ex p. Pyke*, 6 B. & S. 703.

(*q*) 6 & 7 V. c. 73, s. 32, ante, p. 91.

(*r*) *Ex p. Poole*, L. R., 4 C. P. 350; 38 L. J., C. P. 216. See *Re Robins*, 34 L. J., Q. B. 121: *Re Pyke*, ib. 121, 220: *Anon.*, 31 L. T. 730.

(*s*) *In re Hardwick* (C. A.), 12 Q. B. D. 148; 52 L. J., Q. B. 64; 49 L. T. 584; 32 W. R. 191.

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(b) *Order to pay Costs of Proceedings.*

Order against solicitor to pay costs of proceedings.

By *R. of S. C., Ord. LXV. r.* 11, "If in any case it shall appear to the Court or a judge that costs have been *improperly* or *without any reasonable cause* incurred, or that by reason of any *undue delay* in proceeding under any judgment or order, or of any *misconduct or default* of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require. The Court or judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solicitor, in the first place, to show cause before such taxing officer, and may also, if they or he think fit, direct or authorize the official solicitor of the Supreme Court to attend and take part in such inquiry. Such notice (if any) of the proceedings or order shall be given to the client in such manner as the Court or judge may direct. Any costs of the official solicitor shall be paid by such parties, or out of such funds as the Court or a judge may direct; or, if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament."

No order can be made under this rule without giving the solicitor an opportunity of showing cause against it (*t*). Prior to this rule it was held that an appeal would lie against an order directing that costs be paid by a solicitor personally (*t*); but it would appear that this rule places the costs in the discretion of the judge, and that no such appeal would lie now.

Order at trial.

By *Ord. LXV. r.* 5, "Where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court or judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court or judge shall think fit to award."

8. *Striking off the Roll at their own Request.*

Striking off the roll at their own request, &c.

A solicitor may be struck off the roll at his own request, as for the purpose of being called to the bar, or the like (*u*). The affidavit for this must state that there is no complaint pending against him as a solicitor, and that he does not apprehend any (*v*). It need not state that he has taken out his certificate (*x*), nor need it state for what purpose he wishes to be struck off the roll (*y*). He may afterwards be re-admitted, upon petition to the Master of the Rolls, and undertaking not to take advantage of his privilege in any action

(*t*) *Re Bradford* (C. A.), 50 L. T. 171; *S. C.* nom. *In re Milton*, 53 L. J., Q. B. 65; 32 W. R. 238.

(*u*) See form of the affidavit and order for that purpose, Chit. Forms.

(*v*) *Anon.*, 1 Chit. Rep. 557, n. And see Id. 692: *Ex p. Gray*, 9 Dowl. 336: *Re Sturdy*, 2 Jur., N. S. 452.

(*x*) *Ex p. Partridge*, 4 Jur. 681.

(*y*) *Ex p. Charnock*, B. C., H. T. 1839, cor. *Patteson*, J., 1 W. W. & H. 548: *Ex p. Burrell*, 11 Jur. 1062, B. C.

then pending (*z*). If he has been called to the bar, the Court will not re-admit him until he has been disbarred, upon application for that purpose to the Inn of Court where he was called (*a*). In general he must satisfy the Court by affidavit that he ought to be re-admitted (*b*).

III. AGENTS TO SOLICITORS (*c*).

Agents in town.

Solicitors in the country usually employ other solicitors in town as their agents. Both must be solicitors duly admitted, and have duly taken out their certificates. If a solicitor knowingly and wilfully act as agent for an unqualified person, he may be struck off the roll (*d*). The agent's name is usually inserted in the pleadings as well as the name of the solicitor in the action. This, however, does not constitute any privity between the agent and the client, where, in fact, he is acting but as agent. And a retainer to a country solicitor is not sufficient to justify the issue of a writ by an agent to which he appears as the solicitor on the record (*e*).

Agents in country.

Solicitors in the country are frequently employed by solicitors in town to serve writs (*f*), and manage other proceedings and business. The authority of these agents is limited to the particular business in which they are employed, and the solicitor or client is not bound by their acts not falling within the scope of this limited authority, and an agent who is employed merely to serve process or do some other specific act cannot receive the debt due from the defendant (*g*).

Agents in town in general treated as solicitors in the cause.

In general, the agent in town may be considered and treated by the opposite party as the solicitor in the action. As to service of notices, &c., upon such agent, *see post*, *Ch. CXXVI.* The country solicitor sometimes attends the trial of or other proceedings in a town cause, and sometimes the London agent attends the trial of or other proceedings in a country cause; whether the costs of such attendance will be allowed as costs in the cause is wholly in the discretion of the master, and, generally speaking, they would not be allowed, unless the magnitude of the cause, or other special circumstances, require it (*h*), or the attendances were expressly authorized by the client (*h*).

Amenable to opposite party for misconduct.

The agent is, in most cases, amenable to the opposite party as if he were the solicitor in the cause; and if he has been guilty of any

(*z*) Ante, p. 85: 1 Doug. 114, n.: *Moody's case*, Barnes, 42: *Hill's case*, 2 W. Bl. 991.

(*a*) *Ex p. Cole*, 1 Doug. 114: *Ex p. Warner*, 6 Jur. 1016.

(*b*) *Ex p. Sambridge*, Tidd, 9th ed. 90: *Ex p. Smith*, 1 Chit. Rep. 692: *Re Pyke*, 34 L. J., Q. B. 121, 220. See *In re Walshe*, 10 Ir. R., C. D. 165. As to re-admission, see ante, p. 85.

(*c*) As to when an action for discovery and account lies by the country solicitor against his London agent, see *Ward* v. *Lawson*, L. R., 8 Ch. 65; 42 L. J., Ch. 273.

(*d*) Ante, p. 91.

(*e*) *Wray* v. *Kemp*, 26 Ch. D. 169; 50 L. T. 552; 32 W. R. 334.

(*f*) See *Cole* v. *Grove*, 1 Sc. N. R. 30, ante, p. 172, note (*o*).

(*g*) *Robbins* v. *Heath*, 11 Q. B. 257, n.

(*h*) *In re Storer*, 26 Ch. D. 189; 53 L. J., Ch. 872; 50 L. T. 583; 32 W. R. 767. See *Parsloe* v. *Foy*, 1 Dowl. 181: *Archer* v. *Marsh*, 7 Dowl. 541. *In re Foster*, *Ex p. Dickens*, 8 Ch. D. 598, where a country solicitor attending an appeal instead of employing an agent was allowed the entire costs occasioned by his so doing.

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misconduct, he will be held liable to that party for its consequences. Thus, if an affidavit filed by him be scandalous, he is charged with the costs, though the affidavit were prepared by the solicitor in the country (*i*); and agents in town are frequently made personally to pay costs to the opposite party for any misconduct they may have been guilty of towards him. But where, in an action for a solicitor's bill of costs, the town agent obtained an order for taxing the bill, it was held that the plaintiff could not call upon such agent to take up the Master's allocatur, and pay the fees (*k*).

Solicitor and client bound by his acts.

The solicitor is bound by the acts of his agent (*l*). It seems, however, that the agent's authority to bind the solicitor and client is confined to the conduct of the proceedings in the cause (*m*).

Solicitor answerable for misconduct of.

The solicitor is answerable to his client for the mistakes or negligence of the agent (*n*). And if an agent be guilty of negligence, and the client thereby sustain an injury, he cannot sue the agent, nor will the Court, as a general rule, entertain any application of the client against him, for there is no privity between them: the client's remedy in such a case is against his own solicitor (*o*), who has his remedy against the agent. Thus, there is not, in general, such privity between the client and the agent as entitles the client to recover against the agent, for money had and received in respect of proceeds of the cause which the agent has received in the ordinary course of his business (*p*). But if it appears that such proceeds have been received by the agent without authority, either from the client or the country solicitor, the Court will, if the agent be a solicitor of the Court, compel him, upon application, to pay over the proceeds to the client, though the country solicitor be indebted to the agent on other accounts. And where S., the London agent of W., the solicitor of A., in a suit between A. and B., received the sum sued for from B., and, at W.'s request, set it off against advances in an account between them, the Court compelled S. to pay the money over again to A., as there was nothing to show that the latter was indebted to W. at the time that credit was thus given him by S. (*q*).

Client proceeding against agent.

Change of and continuance of authority.

The agent may be changed at any time, and the same course of proceeding should be adopted for changing him as we have already

(*i*) *Ex p. Wake*, 3 D. & C. 246.

(*k*) *Becke* v. *Cattell*, 3 M. & G. 480; 4 Sc. N. R. 246.

(*l*) *Wallace* v. *Willington*, Barnes, 256: *Griffiths* v. *Williams*, 1 T. R. 710. See *Withers* v. *Parker*, 5 H. & N. 725; 29 L. J., Ex. 620.

(*m*) *Yates* v. *Frecklington*, 2 Dougl. 623. See *Hanley* v. *Cassan*, 11 Jur. 1088, Ex.; 10 L. T., O. S. 189.

(*n*) *Collins* v. *Griffin*, Barnes, 37: *Anon.*, Barnes, 38.

(*o*) *Ex p. Jones*, 2 Dowl. 161, per Taunton, J.: *Gray* v. *Kirby*, 2 Dowl. [illegible] *Wildbore* v. *Bryan*, 8 Price, 67[illegible] *Robbins* v. *Fennell*, 11 Q. B. 2[illegible] 17 L. J., Q. B. 77, per Cur. [illegible] *Robbins* v. *Fennell*, 11 Q. B. 248. 17 L. J., Q. B. 77: *Cobb* v. *Becke*, 6 Q. B. 930, where B., the country solicitor of A., sent a sum of money to defendants, who were his London agents, to be paid to C. on account of A., and defendants promised B. to pay the money according to his directions, but afterwards being applied to by C., refused to pay it, claiming a balance due to themselves from B. on a general account between them: it was held that an action for money had and received would not lie against defendants at the suit of A. See *Collins* v. *Brook*, 29 L. J., Ex. 255.

(*p*) *Hanley* v. *Cassan*, 11 Jur. 1088, Exch., cited per Cur. in *Robbins* v. *Fennell*, 11 Q. B. 255.

noticed in respect of the change of the solicitor (*r*). Service of a rule after a lapse of seven years without any proceedings having been taken, on an agent who knew nothing of the plaintiff or his solicitor, was held to be bad; but the rule was enlarged, in order to give an opportunity of serving it on some one else (*s*). Where a solicitor, being himself plaintiff in a feigned issue, died after a verdict in his favour, and his agent got possession of the postea, the Court held that the death of the plaintiff was no revocation, so as to prevent his agent from doing that which it was for the interest of the person whom he represented that he should do, and, therefore, that he had a lien on it against the administrator of the plaintiff for his costs (*t*).

Recovery of costs by.

A solicitor employing an agent to do business for his client is *prima facie* liable to the agent for his bill, although the latter knew that the business was done for the client; but to whom the credit was given is a question for the jury (*u*). As a general rule, the agent cannot sue the client for his bill of costs (*x*). If the client pay his bill of costs to the London agent, this is not binding on the country solicitor (*x*). An agency bill must be delivered, and is taxable the same as any other bill for business done by a solicitor (*y*).

The *Solicitors Act*, 1870 (*ante*, p. 130), does not apply between country solicitor and town agent (*z*).

His lien against the solicitor.

An agent has a general lien against the solicitor who employs him and his representatives, upon all papers and monies which come to the hands of the agent in the course of his agency, just as a solicitor would have as against his immediate client (*a*).

Against the client.

But, as against the client, the agent has no lien upon money recovered by him in an action for the client (*b*), beyond the amount of his charges for agency in that particular action (*c*), and this lien is limited to the amount due from the client to the country solicitor (*d*). When the client pays the country solicitor without notice of the claim of the town agent, the lien of the latter is gone (*e*).

(*r*) Ante, p. 109.

(*s*) *Curtis* v. *Tabram*, 1 H. & W. 523.

(*t*) *Taunton* v. *Goforth*, 6 D. & R. 384.

(*u*) *Scrace* v. *Whittington*, 2 B. & C. 11; 3 D. & R. 195: *Robbins* v. *Fennell*, supra, per Cur.

(*x*) *Robbins* v. *Fennell*, supra, per Cur.

(*y*) Ante, p. 132.

(*z*) *Ward* v. *Eyre*, 15 Ch. D. 130; 49 L. J., Ch. 657.

(*a*) *Lawrence* v. *Fletcher*, 12 Ch. D. 858; 27 W. R. 937. See 2 Hullock, 529, 2nd ed.: *Bray* v. *Hine*, 6 Price, 203.

(*b*) *Moody* v. *Spencer*, 2 D. & R. 6.

(*c*) *Lawrence* v. *Fletcher*, supra: *White* v. *Royal Exch. Ass.*, 1 Bing. 29; 7 Moore, 219. And see *Taunton* v. *Goforth*, 6 D. & R. 384: *Dicas* v. *Stockley*, 7 Car. & P. 587: *Robbins* v. *Heath*, 11 Q. B. 257 (*n*), 259, per *Denman*, C. J., and *Patteson*, J. The costs of taxation of his bill would not be such costs as he could claim a lien for against the client. See Barnard, 264.

(*d*) *Ex p. Edwards*, 8 Q. B. D. 262; 51 L. J., Q. B. 108, C. A., where the Court, in the exercise of its summary jurisdiction, ordered the payment to the client of money received by the town agent: *Waller* v. *Holmes*, 30 L. J., Ch. 24: *Re Andrews*, 7 H. & N. 87; 30 L. J., Ex. 403. But see *Bray* v. *Hine*, 6 Price, 203: *White* v. *Royal Exch. Ass.*, supra: *Ward* v. *Heppel*, 15 Ves. 597: *Ex p. Steel*, 6 Ves. 164; 2 Hullock, 530, 2nd ed.: and per *Bayley*, J., in *Moody* v. *Spencer*, 2 D. & R. 8.

(*e*) *Lyse* v. *Foster*, 32 L. T., N. S. 219, affirmed on appeal, 23 W. R. 413. See *Peatfield* v. *Barlow*, L. R., 8 Eq. 61; 38 L. J., Ch. 310: *Cockayne* v. *Harrison*, L. R., 15 Eq. 298; 42 L. J., Ch. 660.

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An agent has not, it seems, the same constructive lien, which we have seen (*f*) the solicitor has, upon the costs and judgment or award in the cause; and he cannot, therefore, prevent a set-off of cross judgments (*g*). The lien may be waived or lost as any other lien may (*h*). If the agent voluntarily parts with the papers, even by mistake, he loses his lien; but not so if they are taken from him wrongfully (*i*).

Lien may be lost.

(*f*) Ante, p. 164.
(*g*) *Vansandau* v. *Burt*, 1 D. & R. 168.
(*h*) Ante, p. 162.
(*i*) *Taunton* v. *Goforth*, 6 D. & R. 381.

CHAPTER IX.

SITTINGS, VACATIONS, HOURS OF ATTENDANCE, &c.

Sittings.]—There are four sittings in each year which are substituted for the old terms (*see Judicature Act*, 1873, *s.* 26, *infra.*)

Sittings.

By *R. of S. C., Ord. LXIII. r.* 1, "The sittings of the Court of Appeal and the sittings in London and Middlesex of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings and the Trinity sittings. The Michaelmas sittings shall commence on the 2nd of November and terminate on the 21st of December; the Hilary sittings shall commence on the 11th of January and terminate on the Wednesday before Easter; the Easter sittings shall commence on the Tuesday after Easter week and terminate on the Friday before Whit Sunday; and the Trinity sittings shall commence on the Tuesday after Whitsun week and terminate on the 8th of August."

By an Order in Council dated the 12th December, 1883 (*a*), it is ordered "That the Trinity sittings of the Court of Appeal and in London and Middlesex of the High Court of Justice shall for the future be extended till the 12th of August inclusive, and that the long vacation in the several Courts and offices of the Supreme Court shall for all purposes commence on the 13th August. That the Michaelmas sittings of the same Courts respectively shall, for the future, commence on the 24th of October, and that the long vacation in the several Courts and offices of the Supreme Court shall for all purposes terminate on the 23rd of October."

By *R. of S. C., Ord. LXIII. r.* 5, "The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively."

Terms abolished.

By the *Judicature Act*, 1873, *s.* 26, "The division of the legal year into terms shall be abolished, so far as relates to the administration of justice (*b*); and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose (*b*), unless and until

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(*a*) Printed in the Weekly Notes, pt. ii., 29th December, 1883.

(*b*) This proviso preserved the old terms as a limit of time within which (prior to the Rules of 1883) an application to set aside an award must have been made, *College of Christ* v. *Martin*, 3 Q. B. D. 16; 40 L. J., Q. B. 591.

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provision is otherwise made by any lawful authority. Subject to rules of court, the High Court of Justice and the Court of Appeal, and the judges thereof respectively, or any such commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such judges or commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term."

Sittings may be held at any time and place.

The old terms.

Anciently the Courts of law sat in what was called term time only, and all legal proceedings took place, or were supposed to take place, during such time. There were four terms in each year: Hilary, Easter, Trinity, and Michaelmas. At the time of the coming into operation of the Judicature Acts, the commencement and duration of these terms were fixed by 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 6, and 1 *W.* 4, *c.* 3, *s.* 3. By the first of these enactments, Hilary Term began on the 11th, and ended on the 31st January; Easter Term began on the 15th April, and ended on the 8th May; Trinity Term began on the 22nd May, and ended on the 12th June; and Michaelmas Term began on the 2nd and ended on 25th November: but if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter-day fell within Easter Term, there were to be no sittings in banc on any of such intervening days; but the term was, in such case, to be prolonged, and continue for such number of days of business (*c*) as should be equal to the number of the intervening days before mentioned exclusive of Easter-day, and the commencement of the ensuing Trinity Term was in such case to be postponed, and its continuance prolonged for an equal number of days of business (*d*). The latter statute enacted, "that, in case the day of the month on which any term according to the Act aforesaid was to end should fall to be on a Sunday, then the Monday next after such day should be deemed and taken to be the last day of the term; and that, in case any of the days between the Thursday before and the Wednesday next after Easter should fall within Eastern Term, then such days should be deemed and taken to be a part of such term, although there should be no sittings in banc on any of such intervening days" (*e*). Neither of the above statutes said on what day the term should *begin*, in case the day fixed for its commencement was a *Sunday;* in such case, however, the day so fixed was, for the purpose of computation, considered as the first day of the term (*f*); but, as the Courts do not sit on a Sunday, no judicial act could be done or supposed to have been done till the following Monday (*g*). At the time the Judicature Acts took effect, by different statutes the Courts of law could sit in banco for the determination of questions of law, and could also try issues of fact at certain times after term, and most proceedings at law could be taken after term, except during the Long Vacation, during which time only certain steps could be taken.

(*c*) See *Wright* v. *Lewis*, 9 Dowl. 183.

(*d*) Id.: *Downes* v. *Bostock*, Id. 241.

(*e*) See *Doe* v. *Grace*, 7 Jur. 628; and see the rule 175, H. T. 1853.

(*f*) See *Doe* v. *Roe*, 1 C. & J. 483; 1 Dowl. 63.

(*g*) See Tidd's Pract. 220, n.: *Cornall* v. *Foulkes*, 2 B. C. Rep. 262.

Sittings at Nisi Prius in London and Middlesex.

Sittings at Nisi Prius in London and Middlesex.]—By *Judicature Act*, 1873, *s.* 30, "Subject to rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Middlesex and London, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many judges as the business to be disposed of may render necessary. Any judge of the High Court of Justice sitting for the trial of causes and issues in Middlesex or London, at any place heretofore accustomed, or to be hereafter determined by rules of Court, shall be deemed to constitute a Court of the said High Court of Justice."

Where such sittings held.

The sittings for Middlesex are now held at the Royal Courts of Justice. Formerly, they must have been in Westminster Hall; but at the time of the passing of the Judicature Acts, these sittings in the Court of Queen's Bench might, with the consent of her Majesty, under her sign manual, be holden at any place in the city of Westminster the Chief Justice of that Court might deem convenient for the purpose (*h*); and the trials in such places might, in all records, process, indictments for perjury, &c., be alleged and laid to have been had in Westminster Hall.

The sittings for London are also now held at the Royal Courts.

Attendance at chambers.

Attendance of Judges at Chambers.]—Besides their attendance in Court, one at least of the judges attends, according to a rotary arrangement made among themselves, with certain exceptions, every day during the sittings at the Judges' Chambers, in the Royal Courts of Justice. On some occasions, matters which ought to be disposed of before a judge at chambers are held before the judge in Court (*i*), or at his own private residence.

Some of the masters also attend every day with certain exceptions at the Royal Courts for the purpose of disposing of business which they have power to dispose of.

The power of the judges and masters and course of proceedings at chambers will be noticed, *Vol.* 2, *Ch. CXXIII.* (*k*).

Sittings, &c. of offices.

Attendance at the Offices, &c.]—By *R. of S. C., Ord. LXIII. r.* 3, "The sittings of the several offices of the Supreme Court shall extend over the whole of the four periods between the vacations."

By *r.* 6, "The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Easter Eve, Monday and Tuesday in Easter week, Whit Monday, Christmas Day, and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation or thanksgiving."

By *r.* 7, "The offices of each District Registrar of the High Court of Justice shall be open on every day and hour in the year on which the offices of the registrar of the County Court of the place in which the district registry is situate are required to be kept open."

(*h*) 1 G. 4, c. 21, s. 1. And see 3 G. 4, c. 87, as to the Exchequer.

(*i*) The appeal from a judge sitting in Court is to the Court of Appeal: *Hoch* v. *Boor*, 49 L. J., C. P. 665; 43 L. T. 425.

(*k*) The whole history of the power of a judge at chambers is reviewed in *R.* v. *Almon*, Wilmot's Notes, 264.

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Saturdays.

By *r.* 8, "The offices of the Supreme Court (including the judges' chambers) shall, save as hereinafter mentioned, close on Saturdays at 2 o'clock."

Office hours.

By *r.* 9, "The office hours in the several offices of the Supreme Court, other than the Summons and Order, Crown Office and Associates Departments of the Central Office, shall be from ten in the forenoon to four in the afternoon, except on Saturday and in vacation, when the offices shall close at two in the afternoon. In the excepted departments the hours shall be from eleven in the forenoon to five in the afternoon, except on Saturday and in vacation, when the hours shall be from eleven in the forenoon to three in the afternoon."

By *r.* 10, "The office of the district registry at Manchester shall not be open in any year on the five days next following Whit Monday."

Vacations.

Vacations (*l*).]—By *R. of S. C., Ord. LXIII. r.* 4, "The vacations to be observed in the several Courts and offices of the Supreme Court shall be four in every year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation. The Long vacation shall commence on the 10th of August and terminate on the 24th of October: the Christmas vacation shall commence on the 24th of December and terminate on the 6th of January: the Easter vacation shall commence on Good Friday and terminate on Easter Tuesday: and the Whitsun vacation shall commence on the Saturday before Whit Sunday and shall terminate on the Tuesday after Whit Sunday."

Long Vacation.

By Order in Council dated the 23rd December, 1883 (*see ante*, p. 189), the Long vacation now commences on the 13th August and terminates on the 23rd October.

Days of commencement, &c.

By *R. of S. C., Ord. LXIII. r.* 5 (*ante*, p. 189), the days of the commencement and termination of each vacation are included in the vacation (*m*).

Queen's birthday.

By *Ord. LXIII. r.* 2, "It shall not be necessary for the Court of

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Power by Order in Council.

(*l*) By the Jud. Act, 1873, s. 27, "Her Majesty in Council may from time to time, upon any report or recommendation of the judges by whose advice her Majesty is hereinafter authorized to make rules before the commencement of this Act, and after the commencement of this Act upon any report or recommendation of the council of judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, make, revoke, or modify orders regulating the vacations to be observed by the High Court of Justice and the High Court of Appeal, and in the offices of the said courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. This section shall come into operation immediately upon the passing of this Act."

(*m*) No pleading can be amended or delivered during the Long vacation unless directed by the Court or a judge; and the Long vacation is not reckoned in the computations of the times allowed by the rules for filing, amending, or delivering any pleading, unless otherwise directed by the Court or a judge (R. of S. C., Ord. LXIV. rr. 4, 5, post, p. 193).

Appeal or the High Court of Justice to sit on the day appointed to be kept as the Queen's birthday."

By *r.* 15, "Any interval between the sittings of the High Court or any Division thereof, not included in a vacation, shall, so far as the disposal or business by the vacation judges is concerned, be deemed to be a portion of the vacation." Intervals between sittings.

Sittings in Vacations (*n*)*—Vacation Judges.*]—By *R. of S. C., Ord. LXIII. r.* 11, "Two of the judges of the High Court shall be selected at the commencement of each Long vacation for the hearing in London or Middlesex, during vacation, of all such applications as may require to be immediately or promptly heard (*o*). Such two judges shall act as vacation judges for one year from their appointment. In the absence of arrangement between the judges, the two vacation judges shall be the two judges last appointed (whether as judges of the said High Court or of any Court whose jurisdiction is by the principal Act transferred to the said High Court) who have not already served as vacation judges of any such Court, and if there shall not be two judges for the time being of the said High Court who shall not have so served, then the two vacation judges shall be the judge (if any) who has not so served, and the senior judge or judges who has or have so served once only according to seniority of appointment, whether in the said High Court or such other Court as aforesaid. The Lord Chancellor shall not be liable to serve as a vacation judge." Sittings in Vacation.

By *r.* 12, "The vacation judges may sit either separately or together as a Divisional Court as occasion shall require, and may hear and dispose of all causes, matters, and other business, to whichever Division the same may be assigned. No order made by a vacation judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or the judge who made the order. Any other judge of the High Court may sit in vacation for any vacation judge" (*p*).

Proceedings in Vacations.]—By *Ord. LXIV. r.* 4, "No pleadings shall be amended or delivered in the Long vacation, unless directed by a Court or a judge." Proceedings in vacations.

By *r.* 5, "The time of the Long vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending, or delivering any pleading, unless otherwise directed by the Court or a judge."

(*n*) By Jud. Act, 1873, s. 28, "Provision shall be made by rules of Court for the hearing, in London or Middlesex, during vacation, by judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard."

(*o*) See Jud. Act, 1873, s. 28: *Crom v. Samuel*, 2 C. P. D. 21; 46 L. J., C. P. 1.

(*p*) Cp. Jud. Act, 1881, s. 12, ante, p. 18, which gives power to one judge to sit for another.

CHAPTER X.

CIRCUITS.

PART I.

THE country is divided into several circuits, and certain of the judges, acting under commissions from the Crown, go these circuits at stated times every year. Serjeants-at-law, Queen's counsel, and County Court judges may also be included in these commissions. (*Judicature Act*, 1873, *s.* 37; *Id.* 1884, *s.* 7.)

The 23rd section of the *Judicature Act*, 1875, gives power to her Majesty, by order in council, to make regulations as to these circuits, and the places where, and time when they are to be held.

Winter Assizes.

The Winter Assizes Act, 1876 (39 & 40 *V. c.* 57), gives power to her Majesty, by order in council, to make provision for the holding of winter assizes (*a*). Two orders in council, dated the 6th September, 1876, were made under this Act, but they relate exclusively to criminal matters. (*London Gazette*, 16*th September*, 1876.)

Spring Assizes.

By the Spring Assizes Act, 1879 (42 *V. c.* 1), the provisions of the Winter Assizes Act, 1876, are applied *mutatis mutandis* to spring assizes (*b*).

By an order in council, dated the 26th June, 1884, made in pursuance of resolutions of the judges, regulations are made as to the places and the times at which the assizes shall be held, and other matter relating to the circuits. It is not thought necessary to do more than refer to the order here.

Constitution of circuits and places where assizes held.

By Order in Council, dated 5th February, 1876, made under the 23rd section of the *Judicature Act*, 1875, it was ordered, amongst other things,

1. "That the existing circuits shall be discontinued, and instead thereof the circuits shall be those named in the first column of the schedule hereto."

2. "The circuits shall be respectively constituted as specified in the 2nd column of the said schedule, and the places where assizes may be held shall be the places at which assizes have hitherto been held."

3. "Nothing in this order shall affect the provisions of an order in council made on the 4th day of May, 1864, relating to the division of the county of Lancaster into three divisions, or the provisions of an order in council made on the 10th day of June, 1864, as amended by an order in council made on the 9th day of July, 1864, relating to the division of the county of York into two divisions."

4. "The North and South Wales Circuit shall be divided into two divisions, the North-Wales division and the South-Wales division; and such divisions shall be respectively constituted as specified in the 2nd column of the said schedule."

5. "The county of Surrey shall not be included in any circuit, but commissions shall be issued not less often than twice in every year for the discharge of civil and criminal business therein."

(*a*) *I. e.*, any assize held in September, October, November, December or January; 39 & 40 V. c. 57, s. 6, as amended by the Winter Assizes Act, 1877 (40 & 41 V. c. 46), s. 1.

(*b*) *I. e.*, any assize held in March, April or May; 42 V. c. 1, s. 2.

Name of Circuit.
Northern Circuit.
North Eastern Circuit.
Midland Circuit.
South Eastern Circuit.
Oxford Circuit.

(*c*) The parts within
not in the schedule.
(*d*) By the Order in
26th June, 1884, the co
wick is divided into t

SCHEDULE.

Name of Circuit.	Constitution of Circuit.
Northern Circuit.	County of Westmoreland [assize town, Appleby (*c*)]. County of Cumberland [assize town, Carlisle (*c*)]. County of Lancaster [assize towns, Lancaster, Manchester, and Liverpool. See Ord., *supra* (*c*)].
North Eastern Circuit.	County of Northumberland [assize town, Newcastle (*c*)]. County of the Town of Newcastle-upon-Tyne [assize town, Newcastle]. County of Durham [assize town, Durham (*c*)]. County of York [assize towns, York, for the North and East Ridings; Leeds, for the West Riding. See Ord., *supra* (*c*)]. County of the City of York [assize town, York].
Midland Circuit.	County of Lincoln [assize town, Lincoln (*c*)]. County of the City of Lincoln [assize town, Lincoln (*c*)]. County of Nottingham [assize town, Nottingham (*c*)]. County of the Town of Nottingham [assize town, Nottingham (*c*)]. County of Derby [assize town, Derby (*c*)]. County of Warwick [assize town, Warwick (*d*)]. County of Leicester [assize town, Leicester (*c*)]. Borough of Leicester [assize town, Leicester (*c*)]. County of Northampton [assize town, Northampton (*c*)]. County of Rutland [Oakham, assize town (*c*)]. County of Buckingham [Aylesbury, assize town (*c*)]. County of Bedford [assize town, Bedford (*c*)].
South Eastern Circuit.	County of Norfolk [assize town, Norwich (*c*)]. County of the City of Norfolk (*sic*) [assize town, Norwich (*c*)]. County of Suffolk [assize towns, Bury St. Edmunds or Ipswich (*c*)]. County of Huntingdon [assize town, Huntingdon (*c*)]. County of Cambridge [assize town, Cambridge (*c*)]. County of Hertford [assize town, Hertford (*c*)]. County of Essex [assize town, Chelmsford (*c*)]. County of Kent [assize town, Maidstone (*c*)]. County of Sussex [assize town, Lewes (*c*)].
Oxford Circuit.	County of Berks [assize town, Reading (*c*)]. County of Oxford [assize town, Oxford (*c*)]. County of Worcester [assize town, Worcester (*c*)]. County of the City of Worcester [assize town, Worcester (*c*)].

(*c*) The parts within brackets are not in the schedule.

(*d*) By the Order in Council, dated 26th June, 1884, the county of Warwick is divided into two divisions, the "Warwick Division" and the "Birmingham Division," and assizes for the county are held at both those places.

PART I.

Name of Circuit.	Constitution of Circuit.
Oxford Circuit.	County of Stafford [assize town, Stafford (c)]. County of Salop [assize town, Shrewsbury (c)]. County of Hereford [assize town, Hereford (c)]. County of Monmouth [assize town, Monmouth (c)]. County of Gloucester [assize town, Gloucester (c)]. County of the City of Gloucester [assize town, Gloucester (c)].
Western Circuit.	County of Southampton [assize town, Winchester (c)]. County of Wilts [assize towns, Devizes or Salisbury (c)]. County of Dorset [assize town, Dorchester (c)]. County of the City of Exeter [assize town, Exeter (c)]. County of Devon [assize town, Exeter (c)]. County of Cornwall [assize town, Bodmin (c)]. County of Somerset [assize towns, Taunton or Wells (c)]. County of the City of Bristol [assizes held at Bristol (c)].
North and South Wales Circuit.	(a) *North Wales Division.* County of Montgomery [assize towns, Welchpool or Newtown (c)]. County of Merioneth [assize town, Dolgelly (c)]. County of Carnarvon [assize town, Carnarvon (c)]. County of Anglesea [assize town, Beaumaris (c)] County of Denbigh [assize town, Ruthin (c)]. County of Flint [assize town, Mold (c)]. County of Chester [assize town, Chester (c)]. (b) *South Wales Division.* County of Glamorgan [assize towns, Cardiff or Swansea (c)]. County of Carmarthen [assize town, Carmarthen (c)]. County of the Borough of Carmarthen [assize town, Carmarthen]. County of Pembroke [assize town, Haverfordwest (c)]. County of the Town of Haverfordwest [assize town, Haverfordwest (c)]. County of Cardigan [assize town, Cardigan (c)]. County of Brecknock [assize town, Brecon (c)]. County of Radnor [assize town, Presteign (c)].

When circuits held.

Commissions are issued not less than twice in every year for the discharge of civil business. There are generally two circuits in each year at which civil business is transacted, the winter circuit and the summer circuit (*d*). The former begins in January, and the

(*c*) The parts within brackets are not in the schedule.

(*d*) Under the Winter and Spring Assizes Act (supra), civil business is generally taken at Liverpool and Manchester, and at either York or Leeds in the winter and spring. See Order in Council, 13th August, 1877, and Order in Council, 26th June, 1884.

latter at the end of June or beginning of July. Each circuit lasts about six weeks. The judges who have to go circuit select their circuits by an arrangement among themselves. The commission day for each place is fixed before the commencement of the circuit, and can be easily ascertained.

Jurisdiction of judges on circuit.

By *Judicature Act*, 1873, *s.* 29, "Her Majesty, by commission of assize or by any other commission, either general or special, may assign to any judge or judges of the High Court of Justice or other persons usually named in commissions of assize (*e*), the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by her Majesty shall be of the same validity as if it were enacted in the body of this Act; and any commissioner or commissioners appointed in pursuance of this section shall when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the said High Court of Justice (*f*); and subject to any restrictions or conditions imposed by rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact or partly of law, may, with the leave of the judge or judges to whom or to whose Division the cause or matter is assigned, require the question or issue to be tried and determined by a commissioner or commissioners as aforesaid, or at sittings to be held in Middlesex or London as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly.

"A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto" (*g*).

The Court of Assize is a superior Court, and the judge has power to commit without being bound to set out in the warrant the cause of commitment (*h*).

Circuit officers.

By the Judicature Act, 1884 (47 & 48 *V. c.* 61), *s.* 21, "The power of appointment to such offices connected with the circuits of the judges under commissions of assize, oyer and terminer, and gaol delivery or otherwise, as before the *Supreme Court of Judicature Act*, 1873, came into operation, were in the appointment of the senior judge going on any circuit, and also the power of appointment to all subordinate offices, the salaries of which are paid out of moneys provided by parliament, and which may be held under any

(*e*) See 13 & 14 V. c. 25, extended by Jud. Act, 1884, s. 7, to county court judges.

(*f*) See 1 G. 4, c. 55, ss. 5, 6, as to judges before Jud. Acts granting summonses and making orders on circuit in causes not depending in their Courts.

(*g*) See 2 & 3 V. c. 72, intituled "An Act for enabling justices of assize and nisi prius, oyer and terminer, and gaol delivery to hold Courts for counties at large in adjoining counties of cities and towns and conversely." Commissions into counties palatine now issue in the same manner as into other counties. Jud. Act, 1873, s. 99.

(*h*) *Ex p. Fernandez*, 10 C. B., N. S. 1; 30 L. J., C. P. 321, where the position and jurisdiction of Courts of assize is fully discussed.

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such circuit officers as aforesaid who may be appointed after the commencement of this Act, shall henceforth be vested in the senior judge going on such circuit for the winter and summer assizes, respectively: provided that the power of appointment to any such subordinate offices, which before the *Supreme Court of Judicature Act*, 1873, came into operation were in the appointment of any such circuit officer as aforesaid, shall be deemed to be and be in the appointment of the person holding such circuit office at the time of the commencement of this Act, so long as he shall continue to hold the same office: provided also, that all such offices, whether principal or subordinate, as are in this section mentioned, shall be and remain subject to the provisions in the *Supreme Court of Judicature Act*, 1873, or any other Act contained, as to the abolition, reduction of salary, or alteration of the designation or duties of any such office, and to the provisions of section twenty-one of the *Supreme Court of Judicature Act*, 1881, in case of any vacancy in any such office; and that nothing in this Act shall take away or affect any power of appointment now vested by law in any judge appointed before the *Supreme Court of Judicature Act*, 1873, came into operation."

CHAPTER XI.

RULES OF COURT—ORDERS IN COUNCIL—MAINTENANCE OF EXISTING PRACTICE—APPLICATION OF RULES—INTERPRETATION CLAUSES AND RULES.

Rules of S. C. 1883.

Rules of Court.]—The practice of the Queen's Bench Division is now regulated by the "Rules of the Supreme Court, 1883" (*a*). These rules came into force on the 24th October, 1883, and they apply so far as practicable (unless it is otherwise expressly provided) to all proceedings taken on or after that day in all causes and matters then pending. These rules are cited throughout the present work as "R. of S. C."

Repeal of former Rules, &c.

These rules repeal most, but not all, of the previously existing rules of practice (*b*). The Statute Law and Civil Procedure Act, 1883 (46 & 47 *V. c.* 49), repeals many of the provisions of the *Com. Law Proc. Acts* (*c*).

(*a*) The rules provide that "The following orders and rules may be cited as 'The Rules of the Supreme Court, 1883,' they shall come into operation on the twenty-fourth day of October, 1883, and shall also apply, so far as may be practicable (unless otherwise expressly provided), to all proceedings taken on or after that day in all causes and matters then pending.

"The orders and rules mentioned in Appendix O. hereto are hereby annulled, and the following orders and rules shall stand in lieu thereof."

(*b*) The Appendix O. of repealed rules is as follows:—

1. The several rules, orders, and forms contained in the Schedule and Appendix to the S. C. of Judicature Act (1873) Amendment Act.
2. The additional rules to the Jud. Act, 1875.
3. The R. of the S. C., Dec. 1875.
4. The R. of the S. C., Feb. 1876.
5. The R. of the S. C., June, 1876.
6. The R. of the S. C., Dec. 1876.
7. The R. of the S. C., May, 1877.
8. The R. of the S. C. (Costs).
9. The R. of the S. C., June, 1877.
10. The R. of the S. C., Nov. 1878.
11. The R. of the S. C., March, 1879.
12. The R. of the S. C., Dec. 1879.
13. The R. of the S. C., April, 1880.
14. The R. of the S. C., May, 1880.
15. The R. of the S. C., May, 1883.
16. The Reg. Gen. of Hilary Term 1853, dated 11th January, 1853 (except the rules as to juries).
17. Reg. Gen., as to pleading made by the judges in pursuance of the C. L. P. Act, 1852, dated the 10th of May, 1853.
18. The rules under the 6th section of the Debtors Act, 1869.
19. The Chancery Consolidated General Orders of 1860.
20. The Chancery Orders dated—March 6th, 1860; March 20th, 1860; February 1st, 1861; February 5th, 1861; July 13th, 1861; January 1st, 1862; May 16th, 1862; May 27th, 1865; May 7th, 1866; November 22nd, 1866; April 17th, 1867.
21. The Chancery Regulations, dated August 8th, 1857, and March 15th, 1860.
22. The Rules, Orders, and Regulations for the High Court of Admiralty of England, 1859 and 1871.

(*c*) By the Act the C. L. P. Acts are repealed, except the following sections, viz.: Of the C. L. P. Act, 1852, ss. 23, 104 to 108, 110, 112 to 115, 126, 127, 132, 208 to 220, 226, 235 and 236. Of the C. L. P. Act, 1854, ss. 3 to 17, 20 to 30, 59, 87, 89, 103, 106 and 107. Of the C. L. P. Act, 1860, ss. 1, 17, 22, 45 and 46.

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Annulled rules not revived.

By *R. of S. C., Ord. LXXII. r.* 1, "No order or rule annulled by any former order shall be revived by any of these rules, unless expressly so declared."

Power to make new or additional rules.

Power to make new rules, annulling or altering former rules to annul or alter rules, and to make new or additional rules, is given by the *Judicature Act*, 1875, *ss.* 16 *and* 17, the *Supreme Court of Judicature (Officers) Act*, 1879, *s.* 22, the *Appellate Jurisdiction Act*, 1876, *s.* 17, the *Judicature Act*, 1881, *s.* 19, and the *Judicature Act*, 1884, *ss.* 23 *and* 24 (*d*). Power to adopt existing rules, and to make new Rules of Court, modifying or altering existing statutory provisions, so as to adapt them to the new practice, is conferred by the 24th section of the *Judicature Act*, 1875 (*e*).

Section 75 of the *Judicature Act*, 1873, provides for the holding of an annual council of the judges to consider the working of the rules and other matters.

As to laying new rules before Parliament, *see Judicature Act*, 1875, *s.* 25.

The office rules settled by the practice masters will be found in the Appendix at the end of Vol. II.

Some revised rules and regulations have been issued, and will be found noticed in their proper place hereafter.

Orders in Council.

Orders in Council, &c.]—In addition to the above Rules of Court several Orders in Council affecting the practice in the High Court have been published since the Judicature Acts came into operation. An order, dated the 12th August, 1875, contains provisions as to District Registries (*see post, Ch. CXXIV.*). An order, dated the 26th June, 1884, contains regulations as to the circuits. An order, dated the 16th December, 1880, provides for the abolition of the Common Pleas and Exchequer Divisions of the High Court (*see ante*, p. 9). An order, dated the 12th December, 1883, lengthens the sittings preceding and following the Long Vacation (*see ante*, p. 189).

Two orders of the Lord Chancellor, &c., with the consent of the Treasury, which will be found in the Appendix to this work, contain regulations as to Court fees. A similar order, dated the 24th April, 1877, regulates the fees to be taken by official referees. A similar order, dated the 6th August, 1880, regulates the fees to be taken for searches and inspections.

An order of the Treasury, with the concurrence of the Lord Chancellor, dated July, 1884, contains regulations as to the taking of fees and percentages in the Supreme Court by stamps.

Maintenance of old procedure.

Maintenance of old Procedure.]—The forms and methods of procedure, which were in use at the time of the passing of the Judicature Acts, are expressly preserved, and remain in force and use except so far as they are altered by, or are inconsistent with, the new rules.

(*d*) The power to make rules conferred by the 68th sect. of the Jud. Act, 1873, and the schedule of rules appended to that Act, were repealed by the Jud. Act, 1875, s. 23 and sched.

(*e*) Independently of these enactments, the judges have a power, necessarily inherent in all Courts, to make rules for the regulation of their practice; *Bartholomew* v. *Carter*, 3 Sc. N. R. 529. And see *Morris* v. *Hancock*, 1 Dowl., N. S. 320, per *Patteson*, J.: *Sharp* v. *D'Almaine*, 8 Dowl. 664.

This is provided for by sect. 21 of the *Judicature Act*, 1875, by which it is enacted that "Save as by the principal Act or this Act, or by any Rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act or any Rules of Court, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed" (*f*).

The *R. of S. C.* 1883, *Ord. LXXII. r.* 2, expressly provides that "When no other provision is made by the Acts or these rules, the present procedure and practice remain in force" (*f*).

The *R. of S. C., Ord. I. r.* 1, contains provisions as to actions, and by *r.* 2, it is provided that "All other proceedings in and applications to the High Court may, subject to these rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Acts had not passed" (*g*).

As to what amounts to an inconsistency between the new rules and former statutes and rules, see *Garnett* v. *Bradley* (*h*), where the former Ord. LV. (now Ord. LXV.) was held inconsistent with the old statutes as to costs.

In all cases where no new procedure is provided the old practice must be followed, and in cases where the new rules (*i*) leave it doubtful what steps are to be taken, the proceedings should be as nearly like as they can be to analogous proceedings before the Act (*k*).

Variances in old practice.

Where no rule is laid down as to the practice on any particular point, and there is a variance between the old practice at common law and that in equity, it is now well settled that the practice which is the more convenient will be adopted (*l*). Thus the old common law practice, as to the course to be adopted when a solicitor commences an action without authority (*m*), has been preferred to the equity practice. The notice required by the Chancery Consolidated

(*f*) See also Jud. Act, 1873, *s.* 23, ante, p. 5, which contains similar provisions with reference to the exercise of the jurisdiction conferred by the Act. See per *Jessel*, M. R., *China Steamship Co.* v. *Commercial Ass. Co.*, 8 Q. B. D. 142, at p. 145: per *Jessel*, M. R., *In re New Callao Co.*, 30 W. R. 647.

(*g*) See per *Jessel*, M. R., *China Steamship Co.* v. *Commercial Ass. Co.*, 8 Q. B. D. at p. 145.

(*h*) 3 App. Cas. 949; 48 L. J., Q. B. 186.

(*i*) See per *Brett*, L. J., *Jackson* v. *Litchfield*, 8 Q. B. D. 474, at p. 477. See also *Re Phillips*, 1 Q. B. D. 78: *In re New Callao Co.*, 30 W. R. 647, per *Jessel*, M. R.

(*k*) See per *Brett*, L. J., in *Jackson* v. *Litchfield*, 8 Q. B. D. 474, at p. 477.

(*l*) *Newbiggen-by-the-Sea Gas Co.* v. *Armstrong*, 13 Ch. D. 310; 49 L. J., Ch. 231, C. A.: *Thomas* v. *Palin*, 21 Ch. D. 367; 47 L. T. 208, C. A., per *Jessel*, M. R.: cp. *Jackson* v. *Litchfield*, 8 Q. B. D. 477; 51 L. J., Q. B. 327: *Fowler* v. *Barstow*, 20 Ch. D. 240, per *Jessel*, M. R., at p. 243.

(*m*) *Newbiggen-by-the-Sea Gas Co.* v. *Armstrong*, supra.

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Orders to be indorsed on orders before moving for attachment, but which was unnecessary at common law, was held to be unnecessary (*n*). On the other hand, the Chancery practice as to dismissing an action for want of prosecution pending an order for security for costs, was adopted (*o*).

Repeal of statutes as to practice.

Many of the former statutes as to practice have now been repealed. The principal statutes by which this repeal is effected are the Civil Procedure Acts Repeal Act, 1879 (42 & 43 *V. c.* 59), the Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 *V. c.* 78, *s.* 78), the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 *V. c.* 59), the Statute Law Revision Act, 1883 (46 & 47 *V. c.* 39), and the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 *V. c.* 49).

In these statutes, it is provided that the repeal effected by them shall not affect, *inter alia*, any principle or rule of law or equity established by or under the repealed enactments (*p*). A practice established by or under one of the repealed statutes, not inconsistent with the new rules, is not affected by the repeal (*q*).

Acts of parliament relating to former Courts, &c.

By *Judicature Act*, 1873, *s.* 76, "All Acts of Parliament relating to the several Courts and judges, whose jurisdiction is hereby transferred to the said High Court of Justice and the said Court of Appeal respectively, or wherein any of such Courts or judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice or the said Court of Appeal, and the judges thereof respectively, as the case may be, had been named therein instead of such Courts or judges whose jurisdiction is so transferred respectively; and in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the judge or any judges, or of any number of the judges, of any one or more of the Courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of judges of the said High Court of Justice; and all general and other commissions, issued under the Acts relating to the Central Criminal Court or otherwise, by virtue whereof any judges of any of the Courts whose jurisdiction is so transferred may, at the commencement of this Act, be empowered to try, hear, or determine any causes or matters, criminal or civil, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered" (*r*).

To what proceedings the R. of S. C. apply.

To what Proceedings the Rules apply.]—The Rules of the Supreme Court, 1883, apply to all civil actions in the Queen's Bench Division.

(*n*) *Thomas* v. *Palin*, supra. See now Ord. XLI. r. 5, post, Ch. LXX.

(*o*) *La Grange* v. *M'Andrew*, 4 Q. B. D. 210; 48 L. J., Q. B. 315.

(*p*) See per *Williams*, J., *The London Scottish Permanent Benefit Society* v. *Chorley*, 12 Q. B. D. at p. 459; 50 L. T. at p. 267.

(*q*) Per *Mathew* and *Day*, JJ., *Reg.* v. *Justices of Pirehill*, 51 L. T. at p. 205.

(*r*) See *Padley* v. *Camphausen*, 10 Ch. D. 550, 552: *Morris* v. *Ingham*, 13 Ch. D. 338: *Justice* v. *Mersey Steel and Iron Co.*, 1 C. P. D. 575; 25 W. R. 955: *Commissioners of Sewers* v. *Gellatly*, 24 W. R. 1059.

By *Ord. LXVIII. r.* 1, "Subject to the provisions of this Order, nothing in these Rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters:—

Exclusion of criminal proceedings, Crown and revenue side.

(a.) Criminal proceedings;
(b.) Proceedings on the Crown side of the Queen's Bench Division;
(c.) Proceedings on the Revenue side of the Queen's Bench Division;
(d.) Proceedings for Divorce or other Matrimonial Causes."

By *Ord. LXVIII. r.* 2, "The following orders shall, as far as they are applicable, apply to all civil proceedings on the Crown side of the Queen's Bench Division, including mandamus and prohibition, and also to quo warranto, and to all proceedings on the Revenue side of the said Division; namely,—

Application of certain rules to proceedings on Crown and revenue side.

Mandamus, prohibition, and quo warranto.

(a.) Ord. XXVIII. (Amendment);
(b.) Ord. XXXIV. (Special case);
(c.) Ord. XXXVIII. (Affidavits);
(d.) Ord. LII. (Motions);
(e.) Ord. LVIII. (Appeals);
(f.) Ord. LXIV. (Time);
(g.) Ord. LXV. (Costs);
(h.) Ord. LXVI. (Notices, &c.);
(i.) Ord. LXX. (Non-compliance);

Provided, that Ord. LVIII. shall not apply to quo warranto."

By the Judicature Act, 1884 (47 & 48 *V. c.* 61), *s.* 15, "Proceedings in quo warranto shall be deemed to be civil proceedings, whether for the purposes of appeal or otherwise."

Quo warranto a civil proceeding.

Interpretation Clause in the Judicature Acts.]—By *Judicature Act*, 1873, *s.* 100, "In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following (that is to say):

Interpretation of terms (*s*).

'Lord Chancellor' shall include Lord Keeper of the Great Seal.
'The High Court of Chancery' shall include the Lord Chancellor.
'The Court of Appeal in Chancery' shall include the Lord Chancellor as a judge on rehearing or appeal.
'London Court of Bankruptcy' shall include the chief judge in bankruptcy.
'The Treasury' shall mean the commissioners of her Majesty's treasury for the time being, or any two of them.
'Rules of Court' shall include forms.
'Cause' shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown.
'Suit' shall include action.
'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown.

(*s*) The provisions of this section apply to the R. of S. C. See Ord. LXXI., post.

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'Plaintiff' shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

'Petitioner' shall include every person making any application to the Court, either by petition, motion, or summons, otherwise than as against any defendant.

'Defendant' shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

'Party' shall include every person served with notice of, or attending any proceeding, although not named on the Record.

'Matter' shall include every proceeding in the Court not in a cause.

'Pleading' shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counterclaim of a defendant.

'Judgment' shall include decree.

'Order' shall include rule.

'Oath' shall include solemn affirmation and statutory declaration.

'Crown cases reserved' shall mean such questions of law reserved in criminal trials as are mentioned in the Act of the eleventh and twelfth years of her Majesty's reign, chapter seventy-eight.

'Pension' shall include retirement and superannuation allowance.

'Existing' shall mean existing at the time appointed for the commencement of this Act."

Interpretation order in the R. of S. C.

Interpretation Order in the R. of S. C.]—By *R. of S. C., Ord. LXXI. r.* 1, "The provisions of the 100th section of the principal Act shall apply to these rules.

In the construction of these rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following:—

'Originating summons' means a summons by which proceedings are commenced without writ.

'Person' includes a body corporate or politic.

'Probate actions' include actions and other matters relating to the grant or recall of probate or of letters of administration other than common form business.

'Proper officer' means an officer to be ascertained as follows:—

(a.) Where any duty to be discharged under the Acts or these rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same.

(b.) Where any new duty is under the Acts or these rules to be discharged, the proper officer to discharge the same shall be such officer as may from time to time

be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any Division, by the Lord Chancellor, and in the case of an officer attached to any Division, by the President of the Division, and in the case of an officer attached to any judge, by such judge.

'Master' means a Master of the Supreme Court of Judicature.

'Receiver' includes consignee or manager appointed by or under an order of the Court.

'Taxing officer' means Taxing Master in the Chancery Division, and the Master or person whose duty it is to tax the costs to be taxed in the other Divisions respectively.

'The principal Act' means the Supreme Court of Judicature Act, 1873.

'The Acts' means the Supreme Court of Judicature Acts, 1873 to 1879, the Appellate Jurisdiction Act, 1876, and the Supreme Court of Judicature Act, 1881.

'Central Office' means the Central Office of the Supreme Court of Judicature.

By *r.* 2, "In these rules, unless repugnant to the context, the singular number shall include the plural, and the plural number shall include the singular."

Vacancy in office of Lord Chancellor or Chief Justice.

By *Ord. LXXII. r.* 3, "During the period of any vacancy in the office of Lord Chancellor, and when the great seal is not in commission, these rules shall operate as if wherever the words 'Lord Chancellor' are used, the words 'Lord Chief Justice of England' were used; and during the period of any vacancy in the office of Lord Chief Justice of England, as if wherever the words 'Lord Chief Justice of England' are used the words 'Lord Chancellor' were used."

PART II.

MATTERS PRELIMINARY TO THE COMMENCEMENT OF AN ACTION.

[*As to Demand of Copy Warrant in Actions against Constables, &c., see post, Vol. 2, Ch. XCI.*]

CHAPTER XII.

NOTICE OF ACTION.

PART II.

When requisite.

In ordinary cases no notice of action is necessary; but it is usual and courteous to give some notice to a person, or, at all events, to send him the usual solicitor's letter before commencing an action against him. By several statutes notice of action is required to be given before bringing an action for anything done (*a*) in pursuance of them. Magistrates and many public officers are entitled to notice of action for anything done by them in the execution of their office (*b*).

The provision for notice of action is intended for the protection of persons who *bonâ fide* mean to discharge their duty; and the Court will consequently so interpret it as to save harmless all persons who act illegally, under the honest belief that they are authorized in what they do by act of parliament, whether the error complained of has been committed in respect of time, place or circumstance (*c*). If a person does an act or exercises an authority, honestly believing in a state of facts which, had it existed, would have justified his so doing (*d*), he is within the provision of a statute entitling him to notice, although he may have acted illegally or exceeded his authority (*e*); and this without reference to the reason-

(*a*) As to a nonfeazance being an act done, see post, p. 208.

(*b*) See the various titles in the *Index*.

(*c*) Per *Parke*, B., in *Jones* v. *Gooday*, 9 M. & W. 743; and *Hughes* v. *Buckland*, 15 M. & W. 346; and per *Blackburn*, J., in *Selmes* v. *Judge*, L. R., 6 Q. B. 724; 40 L. J., Q. B. 287.

(*d*) Per *Cockburn*, C. J., in *Griffith* v. *Taylor*, 2 C. P. D. at p. 201.

(*e*) *Roberts* v. *Orchard*, 2 H. & C. 769; 33 L. J., Exch. 249; *Arnold* v. *Seneschal*, 13 C. B., N. S. 836; 32 L. J., C. P. 43: *Burton* v. *Gray*, 34 L. J., Q. B. 91: *Heath* v. *Brewer*, 15 C. B., N. S. 802: *Bayley* v. *Aldred*, 10 L. T., N. S. 523: *Cox* v. *Reid*, 13 Q. B. 558: *Kine* v. *Evershed*, 10 Q. B. 143: *Selmes* v. *Judge*, ubi sup.: per *Willes*, J., *Williams* v. *Golding*, L. R., 1 C. P. at p. 74; see Rosc. Ev. 13th ed. 1183.

ableness of such belief (*f*), provided there be some facts upon which it could be grounded, and that it was not mere guess work or suspicion (*g*). The belief, however, must be in a state of facts, which had it existed would have justified the act (*h*).

As a general rule it may be laid down that a public officer or other person is not entitled to notice of action unless he *bonâ fide* believed that the act complained of was done by him in the execution of his duty, or in pursuance of the statute requiring notice of action (*i*). The question of *bona fides* is generally for the jury (*j*). Where the act in question has not been done by a person in the capacity of a justice, and cannot be referred to that character, he is not entitled to notice of action as a justice (*k*). Thus, it is not required in an action against a justice for not being duly qualified (*l*). A person is not entitled to notice of action as a justice or constable because he *bonâ fide* believed he was such, when he was not so (*m*).

(*f*) *Chamberlain* v. *King*, L. R., 6 C. P. 474; 40 L. J., C. P. 273: *Booth* v. *Clive*, 10 C. B. 827: *Read* v. *Coker*, 13 Id. 850; 22 L. J., C. P. 201: *Jones* v. *Howell*, 29 L. J., Exch. 19.

(*g*) *Leete* v. *Hart*, L. R., 3 C. P. 322; 37 L. J., C. P. 157, as explained in *Chamberlain* v. *King*, ubi sup.

(*h*) *Downing* v. *Capel*, L. R., 2 C. P. 461; 36 L. J., M. C. 97: *Cann* v. *Clipperton*, 10 Ad. & El. 582: *Leete* v. *Hart*, ubi sup.: *Griffith* v. *Taylor*, 2 C. P. D. 194; 46 L. J., C. P. 152: *Agnew* v. *Jobson*, 13 Cox, C. C. 625; 47 L. J., M. C. 67.

(*i*) *Booth* v. *Clive*, 20 L. J., C. P. 151: *Read* v. *Coker*, 22 L. J., C. P. 201: *White* v. *Morris*, 21 L. J., C. P. 185: *Smith* v. *Hopper*, 9 Q. B. 1005. See *Kine* v. *Evershed*, 10 Q. B. 143: *Heath* v. *Brewer*, 15 C. B., N. S. 803: *Selmes* v. *Judge*, ante, n. (*c*): *Whitman* v. *Pearson*, 37 L. J., C. P. 156. As to a party being protected when he had no reasonable grounds for the belief, see supra, notes (*f*), (*g*) and (*h*), and *Allen* v. *Preece*, 24 L. J., Ex. 9: *Hermann* v. *Seneschal*, 13 C. B., N. S. 392; 32 L. J., C. P. 43: *Downing* v. *Capel*, ubi supra, n. (*h*). As to a party being entitled to notice of action when he has acted maliciously, see *Acland* v. *Butler*, 1 Ex. 837: *Kirby* v. *Simpson*, 22 L. J., M. C. 165.

(*j*) *Hazeldine* v. *Grove*, 3 Q. B. 997: *Cox* v. *Reid*, 13 Q. B. 558: *Horn* v. *Thornborough*, 3 Ex. 846: *Jones* v. *Howell*, 29 L. J., Ex. 19: *Roberts* v. *Orchard*, 33 L. J., Ex. 65, where, per *Williams*, J.: "The result of the cases bearing upon this point is, that when the question is whether a defendant is entitled to notice of action under an Act of Parliament of this nature (24 & 25 V. c. 96, s. 103, an enactment as to arresting persons found committing certain offences, such as larceny, &c.), the proper way of leaving the question to the jury is to ask them, 'Did the defendant himself believe in the existence of those facts, which, if they had existed, would have afforded a justification for the arrest under the statute:'" *Leete* v. *Hart*, ubi supra, n. (*g*): *Griffith* v. *Taylor*, ubi supra, n. (*h*). See *Kirby* v. *Simpson*, 23 L. J., M. C. 165, where it was held that it was for the judge to decide, in an action against a magistrate, whether notice of action was necessary, and that the jury were not to determine the question of *bona fides*. In the absence of proof to the contrary, it will generally be assumed that the party acted *bonâ fide*. See *Walker* v. *Nottingham Board of Guardians*, 28 L. T. 308.

(*k*) *James* v. *Saunders*, 10 Bing. 429; 4 M. & Sc. 316.

(*l*) *Wright* v. *Horton*, Holt. 458. See *Morgan* v. *Palmer*, 2 B. & C. 729, where a magistrate illegally exacted a fee.

(*m*) See *Copland* v. *Powell*, 8 Moore, 400; 1 Bing. 369: *Jones* v. *Williams*, 3 B. & C. 762; 5 D. & R. 654: *Hughes* v. *Buckland*, 15 M. & W. 356, per *Parke*, B.: *Lidster* v. *Borrow*, 9 A. & E. 654, where the defendant thought he was entitled to act as gamekeeper: *Doust* v. *Slater*, 10 B. & S. 400; 38 L. J., Q. B. 159: *Williams* v. *Golding*, 35 L. J., C. P. 1, a case as to the meaning of "other person" in the Metropolitan Building Act, 1855: *Stringer* v. *Barker*, W. N. 1879, 127, where it was held that the Public Health Act, 1875, s. 264, does not entitle a contractor employed by

PART II.

The right to notice of action given to constables by the stat. 1 & 2 *W.* 4, *c.* 41, *s.* 19, extends to constables appointed under the 2 & 3 *V. c.* 93, but it does not apply to constables acting under the provisions of any subsequent statute (*n*). Where trustees are entitled to notice of action under an Act of Parliament, they are entitled to such notice if they are trustees de facto (*o*). A surveyor of the highways informally appointed, who acted *bonâ fide*, was held entitled to notice of action under the Highways Act (*p*). Where an action was brought against the servant of a person who *bonâ fide* believed himself to be the owner of a fishery, and had reasonable grounds for such belief, but who was not so, for an act which would have been justified under the 7 & 8 *G.* 4, *c.* 29, if such person had been such owner, and the Act gave protection to any person for anything done in pursuance of it; it was held that the defendant was entitled to notice of action (*q*). In order to entitle a party to notice of action it is not necessary that, at the time of the act complained of, he should have known of the statute requiring the notice (*r*). If a party make a wrongful distress for two causes, for one of which he is entitled to notice of action, he may be sued in respect of the other without giving him notice of action (*s*). Where the bailiff of a County Court, under a warrant against the goods of A., by mistake takes those of B., this is an act done in pursuance of the Act which entitles the bailiff to notice of action (*t*). The notice must be necessary notwithstanding the action be for negligence (*u*). It is not necessary in an action of replevin (*x*). A railway company sued for default of duty as common carriers were held not to be entitled to notice of action as not being sued for anything done or omitted to be done in pursuance of their act or in the execution of the powers and authorities given by it (*y*). But in an action to recover back excessive charges for the carriage of goods, a railway company were held to be entitled to such notice (*z*).

Omission may be an act done.

An *omission* to do something which ought to be done in order to

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a local board to notice. As to the meaning of "person" in Acts requiring notice of action, see *Union Steamship Co. of New Zealand, Limited* v. *Melbourne Harbour Trust Commissioners*, 9 App. Cas. 365; 53 L. J., P. C. 59; 50 L. T. 637.

(*n*) *Bryson* v. *Russell*, 51 L. T. 90, so held under the Contagious Diseases (Animals) Act, 1878.

(*o*) *Hughes* v. *Buckland*, 15 M. & W. 356, per *Parke*, B.: *Braham* v. *Watkins*, 16 M. & W. 77, where a bailiff *de facto* was held to be entitled to notice of action.

(*p*) *Huggins* v. *Waydney*, 15 M. & W. 357. See *Lidster* v. *Borrow*, 9 A. & E. 654.

(*q*) *Hughes* v. *Buckland*, 15 M. & W. 346: *Allen* v. *Preece*, 24 L. J., Ex. 9: *Jones* v. *Howell*, 29 L. J., Ex. 19.

(*r*) *Read* v. *Coker*, 13 C. B. 850; 22 L. J., C. P. 201: *Danvers* v. *Morgan*, 1 Jur., N. S. 1051. A person is entitled to notice if he *bonâ fide* believes that he is acting under some law, though he did not know the particular enactment: *Norwood* v. *Pitt*, 5 H. & N. 801; 29 L. J., Ex. 127: *Read* v. *Coker*, ubi sup.: *Selmes* v. *Judge*, ubi sup.

(*s*) *Lamont* v. *Southall*, 5 M. & W. 416.

(*t*) *Burling* v. *Harley*, 27 L. J., Ex. 258.

(*u*) *Mason* v. *Eastwood Improvement Commission*, 1 H. & N. 72; 29 L. J., Ex. 467: *Davis* v. *Curling*, 8 Q. B. 286: *Wilsum* v. *Thirst*, L. R., 2 C. P. 419.

(*x*) *Gay* v. *Matthews*, 4 B. & S. 425, Ex. Ch.

(*y*) *Carr* v. *London and Brighton R. Co.*, 5 Q. B. 747: *Palmer* v. *Grand Junction R. Co.*, 4 M. & W. 749.

(*z*) *Kent* v. *Great Western R. Co.*, 3 C. B. 714.

the complete performance of a duty imposed on a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action (*a*).

Not limited to actions for torts.

The necessity of giving notice of action is not in general limited to actions for torts. Thus notice of action must be given to a turnpike collector before an action to recover back money *bonâ fide* but illegally received can be sustained (*b*). So, under sect. 264 of the Public Health Act, 1875, notice is required before commencing an action to recover back money paid under a mistaken belief that the statute rendered the plaintiff liable to make the payment (*c*). But it is not in general necessary to give a notice of action before bringing an action on a specific contract (*d*). Where a local Act directed that the guardians, &c. of a parish should be sued in the name of their vestry clerk, and required notice to be given of any action for anything done in pursuance of the Act, it was held that notice was not necessary in an action for work and labour (*e*).

When injunction claimed.

When the principal relief sought is an injunction, the notice is not necessary even though damage be also sought as subsidiary relief (*f*).

Action for recovery of land.

The notice required by sect. 264 of the Public Health Act, 1875, is not necessary in an action for recovery of land (*g*).

Waiver of.

A tender of amends by a magistrate or any other act done by him does not waive the necessity of serving or proving the notice (*h*).

(*a*) *Jolliffe* v. *Wallasey Local Board*, L. R., 9 C. P. 62; 43 L. J., C. P. 41: *Wilson* v. *Mayor, &c. of Halifax*, L. R., 3 Ex. 114; 37 L. J., Ex. 44: *Joule* v. *Taylor*, 21 L. J., Ex. 31: *Blanchard* v. *Bramble*, 3 M. & Sel. 131: *Atkins* v. *Banwell*, 3 East, 92: *Holland* v. *Northwich Highway Board*, 34 L. T. 137. See *Davis* v. *Curling*, 10 Jur. 69, 287; 15 L. J., Q. B. 56, an action against a surveyor of the highways for permitting gravel to remain on a highway, whereby plaintiff was injured. *Hardwick* v. *Moss*, 7 H. & N. 136; 31 L. J., Ex. 305, an action against such a surveyor for erecting weighing-machines on the highway. *Newton* v. *Ellis*, 24 L. J., Q. B. 337, an action against a contractor employed by a local board of health. *Poulsum* v. *Thirst*, L. R., 2 C. P. 449; 36 L. J., C. P. 225. See *Mason* v. *Birkenhead Improvement Commissioners*, 29 L. J., Ex. 407, where improvement commissioners sued for an injury caused by negligence of their servants were held to be entitled to notice of action under their Act of Parliament. See *Cobbett* v. *Warner*, 26 L. J., Ex. 11, where, upon the construction of an Act of Parliament, it was held that the omission to give notice of action barred not merely the plaintiff's right to costs, but his right of action altogether.

(*b*) *Waterhouse* v. *Keen*, 4 B. & C. 211: *Selmes* v. *Judge*, L. R., 6 Q. B. 724. See *Wallace* v. *Smith*, 5 East, 122.

(*c*) *Midland R. Co.* v. *Withington Local Board*, C. A., 11 Q. B. D. 788; 52 L. J., Q. B. 689; 49 L. T. 489.

(*d*) *Davies* v. *The Mayor, Aldermen and Burgesses of Swansea*, 22 L. J., Ex. 297: *Midland R. Co.* v. *Withington Local Board*, 11 Q. B. D. 788, per *Brett*, M. R., at p. 794.

(*e*) *Fletcher* v. *Greenwood*, 4 Dowl. 166.

(*f*) *Flower* v. *Local Board of Low Leyton*, 5 Ch. D. 347; 46 L. J., Ch. 621, C. A.: *Att.-Gen.* v. *Hackney Board of Works*, L. R., 20 Eq. 626; 44 L. J., Ch. 545: *Baker* v. *Corporation of Wisbeach*, W. N. 1877, 56.

(*g*) *Foat* v. *Mayor, &c. of Margate*, 11 Q. B. D. 299: *S. C.* nom. *Holder* v. *Mayor, &c. of Margate*, 52 L. J., Q. B. 711.

(*h*) *Martins* v. *Upcher*, 3 Q. B. 662. See *Jones* v. *Nicholls*, 2 D. & L. 425; 13 M. & W. 361.

PART II.

By whom to be given.

The intended plaintiff should give the notice. Sometimes the statute requiring the notice allows it to be given by a solicitor (*i*) or agent on his behalf. Where a notice of action was given on behalf of two, one of whom was dead, and the action was brought in the name of the other, the Court held the notice insufficient (*k*). Where a statute required a notice of action to be given "by the attorney or agent of the party," it was held that a notice of action might be given by the prochein amy of an infant, although he might not be the prochein amy on the record (*l*).

To whom to be given.

The notice should be given to the intended defendant, or, if it is intended to make more than one person defendant in the action, the notice should be given to all the defendants entitled to notice. In a case where the same party acted as a clerk to two public bodies, and a notice of action was given him, addressed to him as clerk of the one body, the cause of action arising under the supposed authority of the other body, it was held that the notice was insufficient (*m*).

Length of notice.

By the 5 & 6 *V. c.* 97, *s.* 4, "In all cases where notice of action is required, such notice shall be given *one calendar month* at least before any action shall be commenced; and such notice of action shall be sufficient, any Act or Acts to the contrary thereof notwithstanding." In reckoning the calendar month in a notice of action, both the day of delivering the notice and that of issuing the writ must be excluded (*n*). It has been held that if a notice be given on the 28th of a month, an action may be commenced on the 29th of the following month, whatever the length of the preceding month (*o*). This section does not affect Acts passed subsequently to its coming into operation (*p*).

Form of notice (*q*).

The notice should be in the form of a notice, and not like a mere letter (*r*). It is usual to state the address and addition of the party to whom the notice is given; but this is not absolutely necessary, unless required by the statute. In general, the intended plaintiff's name and place of abode (*s*) should be given in the body, or in the indorsement on the notice. There is no occasion, unless the statute requires it, to state his addition (*t*). The notice should in general state the Court in which the action is to be brought (*u*). It is not in general necessary to state the names of all the parties intended to be included in the action, or whether the action is to be a joint

(*i*) As to whether a solicitor *de facto* is sufficient, see *Sabin* v. *De Burgh*, 2 Camp. 196; 3rd vol. of "Burn's Justice," by Chitty, p. 1038.

(*k*) *Pilkington* v. *Riley*, 3 Ex. 739; 18 L. J., Ex. 323.

(*l*) *De Gondouin* v. *Lewis*, 10 A. & E. 117.

(*m*) *Hider* v. *Dorrell*, 1 Taunt. 383.

(*n*) *Young* v. *Higgon*, 6 M. & W. 49. As to the computation of time in general, see post, Ch. CXXV.

(*o*) *Freeman* v. *Read*, 4 B. & S. 174; 32 L. J., Q. B. 227.

(*p*) *Boden* v. *Smith*, 18 L. J., C. P. 121.

(*q*) See a form of notice, Chit. Forms, pp. 51, 54.

(*r*) See *Lewis* v. *Smith*, Holt's C. N. P. 27: *Mason* v. *Birkenhead Improvement Commissioners*, 29 L. J., Ex. 407.

(*s*) See *Williams* v. *Burgess*, 3 Taunt. 127.

(*t*) See *Mason* v. *Barker*, 1 C. & K. 100: *Wood* v. *Folliott*, 3 B. & P. 552, n. In this case, "William Wood, of Rotherhithe, in the county of Surrey, merchant," was held a sufficient description. As to indorsing the plaintiff's name, &c., on a writ of summons, see post, p. 219.

(*u*) *Elstob* v. *Wright*, 3 C. & K. 1: *Burton* v. *Le Gros*, 34 L. J., Q. B. 91.

or several one (*x*). The notice need not, unless the statute requires it, state the form of the action to be brought (*y*); it is sufficient to state the cause of it (*z*) with clearness and certainty (*a*). It is not to be construed with the same strictness as a pleading (*b*). The time and place of the act complained of should be stated (*c*). But a slight mistake in the date, not calculated to mislead, will not vitiate the notice (*d*). A notice of action to magistrates, for that the defendants, "at ——, on the 1st day of August," &c., imprisoned the plaintiff, and also for that they, "on the said 1st day," &c., seized plaintiff's (*e*) goods, was held to be sufficiently certain as to the averment of place (*f*). Where the cause of action is for having done an act maliciously, and without any reasonable or probable cause, the notice should state that the act complained of was so done (*g*). A notice of action which stated that the action would be brought for causing a distress to be made, is sufficient, though the action is for a trespass (*h*). The notice is sufficient, though it state the act complained of to have been done by more parties than it really was (*i*). Where the declaration contained one count for the cause of action mentioned in the notice, and another for a different cause, the notice was held sufficient (*k*). In an action against a magistrate, the notice need not specify the ground upon which he acted (*l*). A notice under a local Act, that, unless the name of the party on whose information the defendants had taken certain steps was given up, proceedings would be taken against them, was held bad, because it was conditional (*m*).

Signature to notice.

It is as well that the plaintiff, or his solicitor or agent, when the notice is given by a solicitor or agent, should sign the notice; though this is not always absolutely necessary (*n*).

(*x*) *Bax* v. *Jones*, 5 Price, 168: *Jones* v. *Simpson*, 1 C. & J. 174: *Ayan* v. *Morgan*, 2 Price, 126.

(*y*) *Prickett* v. *Gratrex*, 8 Q. B. 1020; 15 L. J., M. C. 145: *Pilkington* v. *Riley*, 3 Ex. 739: *Strickland* v. *Ward*, 7 T. R. 631, n.: *Robson* v. *Spearman*, 3 B. & A. 493; 3 B. & P. 552, n.

(*z*) See *Towsey* v. *White*, 5 B. & C. 133: *Gimbert* v. *Coyney*, M'Clel. & Y. 469.

(*a*) See *Freeman* v. *Line*, 2 Chit. 673: *Gimbert* v. *Coyney*, M'Clel. & Y. 469. Cp. *Clarkson* v. *Musgrave*, 9 Q. B. D. 386; 51 L. J., Q. B. 526.

(*b*) *Jones* v. *Bird*, 5 B. & A. 837. See *Freeman* v. *Line*, 2 Chit. Rep. 673: *Aked* v. *Stocks*, 1 M. & P. 346: *Smith* v. *West Derby Local Board*, 3 C. P. D. 423; 47 L. J., C. P. 607.

(*c*) *Jacklin* v. *Fytche*, 14 M. & W. 381: *Briese* v. *Jerdein*, 4 Q. B. 586: *Martins* v. *Upcher*, 3 Q. B. 662: *Prickett* v. *Gratrex*, 8 Q. B. 1020: *Leary* v. *Patrick*, 15 Q. B. 266: *Burton* v. *Le Gros*, supra: *Forbes* v. *Lloyd*, 10 Ir. R., C. L. 552, Ex.

(*d*) *Green* v. *Broad*, 51 L. J., Q. B. 640; 46 L. T. 888.

(*e*) See *Burton* v. *Le Gros*, 34 L. J., Q. B. 91; 13 W. R. 46.

(*f*) *Leary* v. *Patrick*, supra.

(*g*) See *Massey* v. *Johnson*, 12 East, 67: *Gray* v. *Cookson*, 16 East, 13: *Burley* v. *Bethune*, 1 Marsh. 220: *Taylor* v. *Nesfield*, 22 L. J., M. C. 169.

(*h*) *Hollingworth* v. *Palmer*, 4 Ex. 267; 18 L. J., Ex. 409. And see *Sabin* v. *De Burah*, 2 Camp. 196: *Pilkington* v. *Riley*, 3 Ex. 739; 18 L. J., Ex. 323.

(*i*) *Breese* v. *Jerdein*, 4 Q. B. 585; 12 L. J., Q. B. 234.

(*k*) *Breese* v. *Bradley*, 7 Jur. 490, Q. B. See *Robson* v. *Spearman*, 3 B. & A. 493: *Stringer* v. *Martyr*, 6 Esp. 134.

(*l*) *R.* v. *Devon* (*Justices*), 1 M. & Sel. 412.

(*m*) *Norris* v. *Smith*, 2 P. & D. 353, et per *Patteson*, J., "the notice should have specified that the action would be commenced at the expiration of the number of days mentioned in the Act."

(*n*) See *Morgan* v. *Leach*, 10 M. & W. 558: *Forman* v. *Dawes*, Car. & M. 127.

PART II.

Indorsement on.

Sometimes the statute requiring the notice requires the name and place of abode of the intended plaintiff or his solicitor or agent to be indorsed on it. It seems that on a notice of action against a magistrate it is sufficient to endorse the initial of the christian name of the solicitor, with his surname and abode, in words at length (*o*). It is sufficient if signed by a firm of two solicitors who are partners, and are employed by the intended plaintiff; and if it be signed T. & W. A. W., this is good, though the christian name of one is T. A., and of the other W. A., if there was no other firm of the surname in the same place at which the notice bore date (*p*). And a solicitor may be described on such a notice as of the place of his office (*q*), or as of his residence (*r*). Describing him generally of a large town would not be sufficient, but this would be otherwise if the town were a small one (*s*). Where the indorsement was "given under my hand at Durham," without any other notification of residence, it was held to be insufficient, being a mere description, not of residence, but of the place of signature (*t*). Where the notice was indorsed by A. and B. as solicitors for the plaintiff, and, the partnership having been dissolved, the action was brought by A. only, this was held to be no ground of objection (*u*).

Service of.

The service should be made as directed by the Act of Parliament. In general it is sufficient to serve the notice personally or leave it for the intended defendant at his usual place of abode (*x*). It is not necessary that the plaintiff or his solicitor should personally serve the notice (*y*).

Discontinuing action, and bringing another.

Where a writ was sued out as described in the notice of action, but afterwards discontinued, and, within the time limited by the statute, another writ was sued out, and served, in which another person was joined as defendant, it was held that the notice given was sufficient (*z*).

Costs of notice.

The reasonable expenses of a notice of action, where it is necessary to give the same, may be allowed as costs in the cause (*a*).

Pleading want of notice.

By the 5 & 6 *V. c.* 97, *s.* 3, "So much of any clause or provision in any Act or Acts, commonly called public local and personal, or local and personal, or in any Act or Acts of a local and personal nature (*b*), whereby any party or parties are entitled or permitted

(*o*) *Mayhew* v. *Locke*, 7 Taun. .
(*p*) *James* v. *Swift*, 6 D. & R. ; 4 B. & C. 681.
(*q*) *Roberts* v. *Williams*, 1 Gale, 315.
(*r*) Id., 4 Dowl. 483; 11 & 12 V. c. 44, s. 9.
(*s*) See *Stears* v. *Smith*, 6 Exch. 138: *Osborne* v. *Gough*, 3 B. & P. 551: *Crooke* v. *Curry*, 1 Tidd's Pract. 28. As to the indorsement of a solicitor's name, &c., on a writ of summons, see post, p. 226.
(*t*) *Taylor* v. *Fenwick*, 7 T. R. 635, n.
(*u*) *Hollingworth* v. *Palmer*, 18 L. J., Ex. 409; 4 Ex. 267.
(*x*) See *Castle* v. *Burditt*, 3 T. R. 623: *Vaux* v. *Vollans*, 1 N. & M. 307: *Goody* v. *Deltrick*, 4 F. & F. 938.
(*y*) See *Morgan* v. *Leach*, 10 M. & W. 558. See *Forman* v. *Dawes*, Car. & M. 127, where the plaintiff had signed the notice and the party who served it did not know his handwriting.
(*z*) *Jones* v. *Simpson*, 1 C. & J. 174.
(*a*) See *Kent* v. *The Great Western R. Co.*, 3 C. B. 714: *Edwards* v. *The Great Western R. Co.*, 12 C. B. 419.
(*b*) *Pilkington* v. *Riley*, 3 Ex. 739: *Shepherd* v. *Sharp*, 25 L. J., Ex. 254.

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specially the wa
statutes (*d*).

(*c*) As to plea
issue by statute, se
(*d*) See *Edward*
Western R. Co., 11

to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed" (*c*). It is, in general, necessary to plead specially the want of notice of action when required by any of these statutes (*d*).

(*c*) As to pleading the general issue by statute, see post, Ch. XVIII.

(*d*) See *Edwards* v. *The Great Western R. Co.*, 11 C. B. 588: *Davey* v. *Warne*, 14 M. & W. 199. See *Law* v. *Dodd*, 17 L. J., M. C. 65, Ex.: *Peck* v. *Boyes*, 7 Sc. N. R. 436.

PART III.

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CHAPTER XIII.

WRIT OF SUMMONS.

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Sect. 1. *Writ of Summons where Defendant is within the Jurisdiction.*

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(a) Proceedings in certain actions, as ejectment, replevin, &c., where the proceedings are in some respects different from those in ordinary actions, are treated of in Vol. 2, Ch. CVI., and subsequent chapters.

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CHAP. XIII.

1. Actions must be commenced by writ of summons.

1. *Actions must be commenced by Writ of Summons.*]—By *R. of S. C., Ord. I. r.* 1, "All actions which, previously to the commencement of the principal Act, were commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the principal Act, were commenced by bill or information in the High Court of Chancery, or by a cause in rem or in personam in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action." *See ante*, p. 203, as to the meaning of "action."

By *R. of S. C., Ord. II. r.* 1, "Every action in the High Court shall be commenced by a writ of summons" (*b*).

The issuing of the writ is the act of the party, and is not a judicial act, and consequently the rules as to the relation back of judicial acts to the earliest hour of the day do not apply (*c*).

At the time the Judicature Acts came into operation all personal actions in the Superior Courts of Common Law were commenced by writ of summons (*C. L. P. Act*, 1852, *s.* 2), and an action of ejectment to recover the possession of land was commenced by writ. (Id. s. 168. *See Vol.* 2, *Ch. CVI.*)

An action of *scire facias* was before the Judicature Acts, and is still, commenced by writ.

As to the mode of commencing an action of *replevin* and the proceedings in such action, *see Vol.* 2, *Ch. CVII.*

The actions most commonly brought in the Queen's Bench Division of the High Court of Justice, are actions for debt, for breaches of contract, for torts where damages are claimed, and for the recovery of the possession of personal property and land. By 3 & 4 *W.* 4, *c.* 27, *s.* 36, all real and mixed actions were abolished, except actions of writ of right of dower, dower, *quare impedit*, and ejectment, and by the *C. L. P. Act*, 1860, *s.* 26, writs of right of dower, or of dower *unde nihil habet*, and plaints for freebench or dower in the nature of any such writ, and *quare impedit*, were

(*b*) By this rule, "Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned."

(*c*) *Clarke* v. *Bradlaugh*, 8 Q. B. D. 63; 51 L. J., Q. B. 1, C. A.

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abolished. In all these cases, an ordinary writ of summons indorsed with the claim to be made may be issued.

As to removing a cause commenced in an inferior Court to the High Court of Justice, *see Vol.* 2, *Ch. CXXXIV.*

2. Form of writ (*d*).

2. *Form of Writ.*]—By *R. of S. C., Ord. II. r.* 3, "The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in one of the forms Nos. 1, 2, 3 and 4 in Appendix A., Part I., with such variations as circumstances may require" (*e*).

By *Ord. II. r.* 2, "Any costs occasioned by the use of any forms of writs, and of indorsements thereon other or more prolix than the forms hereinafter prescribed, shall be borne by the party using the same, unless the Court or a judge shall otherwise direct."

If the forms are not complied with, the proceedings will not be void, but may be dealt with as irregular under *Ord. LXX. r.* 1, and may be amended under *Ord. XXVIII. r.* 12, *post*, *Ch. XLII.*

By *Ord. II. r.* 6, "No writ shall hereafter be issued under the Summary Procedure on Bills of Exchange Act, 1855" (18 & 19 *V. c.* 67).

We shall proceed more fully to notice the particular parts and requisites of the writ of summons, together with the indorsements and memoranda required to be made thereon.

Year, letter and number.

Year, Letter and Number.]—Every action is distinguished by a year, letter and number, which are to be written or printed at the top of each proceeding. (*See Ord. V. r.* 13, *post*, p. 228.) The year is that in which the writ is issued. The letter corresponds with the initial letter of the plaintiff's surname, and the number with the place of the action in the cause book. The number is added at the office when the writ is sealed. The following are the rules with regard to the letter (*f*):—

Actions and matters in the title of which a limited company is first must be indexed under the first letter of the first word or initial.

Courtesy titles of eldest sons of peers are not to govern the distinctive mark, which is to follow the surname, viz., "Campbell" and not "Marquis of Lorne."

In cases such as Mayor and Corporation of, &c., the initial letter of the city or borough should govern the distinctive mark.

Owners of ships by name of ship.

Overseers of parishes by name of parish.

Names in which "de" occurs as part of the surname, or is preceded only by Christian names, should be indexed under "D."

Foreign companies should be indexed under the initial letter of the first word in their name, *e. g.*, Banco de Lima under "B.," Société d'Acclimatisation, "S."

Foreign titles should be indexed under the initial letter of the

(*d*) As to the form of the writ when the defendant is residing out of the jurisdiction, see post, p. 248. If the writ is issued out of the Registry of any District, certain variations in the form of the writ are required as mentioned, Vol. 2, Ch. CXXIV.

(*e*) See forms in Chit. Forms.

(*f*) Masters' Practice Rules. See Appendix.

proper or local name in the title, *e. g.*, Comte de Paris under "P.," Duc de Montebello under "M."

3. *Division of High Court, Assignment of Action to.*]—*R. of S. C., Ord. II. r.* 1 (*ante*, p. 215, n. (*b*)), requires that the writ "shall specify the Division of the High Court to which it is intended that the action should be assigned."

3. Division of High Court.

By the *Judicature Act*, 1873, *s.* 34 (*ante*, p. 9), certain matters are assigned to particular divisions, and the Acts and rules contain provisions for the transfer of actions from one division to another (*g*). By *R. of S. C., Ord. V. r.* 5, "Subject to the power of transfer, every person by whom any cause or matter may be commenced in the High Court of Justice which would have been within the non-exclusive cognizance of the High Court of Admiralty if the principal Act had not passed, shall assign such cause or matter to any one of the divisions of the said High Court, including the Probate, Divorce and Admiralty Division, as he may think fit, by marking the document by which the same is commenced with the name of the division, and giving notice thereof to the proper officer of the Court." (*See also Judicature Act*, 1875, *s.* 11 (*ante*, p. 11).)

Assignment of actions to.

By *R. of S. C., Ord. V. r.* 14, "Notice to the proper officer of the assignment of an action to any division of the Court, shall be sufficiently given by leaving with him the copy of the writ of summons."

4. *Parties, Joinder and Number of, &c.*]—As to the parties who can and who should be made plaintiff and defendant respectively, and their joinder, and the effect of misjoinder, *see post, Vol.* 2, *Ch. LXXXVII.*, "*Parties.*" As to the proceedings peculiar to actions by and against particular persons, *see post, Vol.* 2, *Part XII., Ch. LXXXIX., and the following chapters.*

4. Parties, joinder and number of, &c.

If the writ be at the suit of one plaintiff only, and the statement of claim at the suit of two, the Court or a judge might set aside the statement of claim for irregularity, if the application be made before the usual time for pleading has expired. So, if the writ be against one defendant, a statement of claim against two would be irregular; and so if the writ be against two defendants it would be irregular to deliver a separate statement of claim against each (*h*). But if the writ be against two defendants, and the statement of claim against one, the latter would not be irregular, if plaintiff entirely dropped his proceedings against the other defendant (*i*). If there be several defendants and several writs, all the defendants should be named in each.

5. *Direction of, Parties' Name and Residence, &c.*]—It will be observed that the writ must be directed to the defendant himself, and not to any sheriff or officer. It should in general set forth the true christian name and surname of the defendant, and of all the de-

5. Direction of, parties' names and residence, &c.

(*g*) See sect. 11, ante, p. 11; and see the rules and practice as to the transfer of actions, post, Ch. XXXVII.

(*h*) *Pepper* v. *Whalley*, 1 Bing. N. C. 71; 2 Dowl. 821. And see *Carson* v. *Dowding*, 4 Dowl. 297.

(*i*) *Caldwell* v. *Blake*, 3 Dowl. 456: *Evans* v. *Whitehead*, 2 M. & R. 367: *Bowles* v. *Bilton*, 2 C. & J. 474: *Knowles* v. *Johnson*, 2 Dowl. 653: *Wilson* v. *Edwards*, 3 B. & C. 734.

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fendants, if more than one, in full (*k*). He may be sued by any name or names he may have acquired by usage or reputation; and this applies both to his christian and surname (*l*). In actions on bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it will be sufficient to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full (*m*). And, independently of this, it seems, that, although the defendant be designated in a writ of summons by a wrong christian or surname, or by no christian name, or by initials, that will not be a ground for setting it aside (*n*). It is only upon a misnomer appearing in the statement of claim that the defendant can take any advantage of it; and since the abolition of pleas in abatement for misnomer, the only advantage that can be taken of it is that the defendant may obtain an order to compel the plaintiff to amend the mistake and pay the defendant's costs of the application (*o*). Where a party has been sued by a wrong name, the title of the cause cannot be changed until an appearance has been entered by him, stating his true one, or until the statement of claim has been amended (*p*).

Name of dignity.

If the defendant has a name of dignity, as duke, earl, &c., he should be described by that name accordingly: but it is unnecessary to describe a peer as having privilege of peerage or a member of parliament as having privilege of parliament (*q*). A baronet should be described as Sir A. B., Bart.

As to suing a person or persons carrying on business in the name of a firm in such name, *see post, Vol.* 2, *Ch. XCIII.*

Defendant's residence.

A reasonable degree of certainty in the description of the defendant's residence should be used, and will suffice. Therefore, it is not necessary that the number of the defendant's house, or the parish, should be stated. Describing him as of "Tufton-street, in the county of Middlesex," would suffice (*r*). It is sufficient to describe him as of an ordinary town; and perhaps it might be considered that a description of the defendant as "of the city of London" is

(*k*) See *Traill* v. *Porter*, 1 Ir. L. R., Ch. D. 60.

(*l*) *Williams* v. *Bryant*, 5 M. & W. 447, per *Parke*, B.; Bracton, 188 b; Com. Dig. *Fait*, E. 3; Year-book, 46 Ed. 3, fo. 22. But see Vin. Ab. *Misnomer*, C. 12.

(*m*) 3 & 4 W. 4, c. 42, s. 12. It would seem that this section applies to plaintiff's christian name as well as to defendant's; but see *Lindsey* v. *Wells*, 4 Scott, 471; 3 Bing. N. C. 777, per *Tindal*, C. J.

(*n*) *Wells* v. *Suffield*, 4 C. B. 750: *Serjant* v. *Gordon*, 7 D. & R. 258: *Rolph* v. *Peckham*, 6 B. & C. 164; 9 D. & R. 214: *Summer* v. *Batson*, 11 Moore, 39. It seems that the total *omission* of the christian name would not be a ground for setting the writ aside. See *Rust* v. *Kennedy*, 4 M. & W. 586; 7 Dowl. 199: *Walker* v. *Parkins*, 2 D. & L. 982. See, in what name the appearance should be entered when defendant has been sued in a wrong name, post, p. 254. And see, as to the form of statement of claim in such a case, post, Ch. XIX.

(*o*) 3 & 4 W. 4, c. 42, s. 11.

(*p*) *Borthwick* v. *Ravenscroft*, 5 M. & W. 31; 7 Dowl. 393.

(*q*) *Cantwell* v. *Earl of Stirling*, 1 M. & Scott, 297; 8 Bing. 174: *Wells* v. *Lord Suffield*, 4 C. B. 750, where defendant was described as the Right Hon. Baron Suffield, instead of by his proper title of "The Right Hon. Edward Vernon Harbord, Baron Suffield, of Suffield."

(*r*) *Cooper* v. *Wheal*, 4 Dowl. 231; 1 H. & W. 525.

sufficient (*s*). A description "to be heard of at Peele's Coffee-house, in the city of London," would be insufficient (*t*). A description of defendant as "now or late carrying on business in King William-street, in the city of London," would be insufficient (*u*). Where the defendant's residence was described as at "Clapham, in the county of Surrey," this was held sufficient (*x*). The Court or judge, on an application to set the writ aside, will not try a disputed question of residence or boundary (*y*). Where the defendant's place of abode cannot be discovered at the time of issuing the writ, it seems enough to describe him as of his last known place of abode (*z*). Where a corporation is defendant, a description as of the chief office or place of business, or where its functions are carried on, would be sufficient (*a*). Describing a defendant as resident within the jurisdiction who is really resident out of it, but whom it is not intended to serve until he comes within it, is no ground for setting the writ aside (*b*). In general it would be useless to make an application to set aside the writ on the ground of a mistake as to the residence of the defendant, as an amendment would in almost all cases be allowed.

Plaintiff's name.

The christian and surname of the plaintiff, or of each of the plaintiffs if more than one, should be inserted in the writ (*c*). A misnomer affords no ground for setting the writ aside (*d*). It is no ground of nonsuit at the trial if it be shown that the defendant knew that the action was brought by the person who actually sues (*e*). The only mode of taking advantage of such misnomer is when it is carried into the statement of claim, in which case the defendant may obtain an order to have it amended at the plaintiff's cost. If the plaintiff's name be omitted in the writ, it might be set aside for irregularity (*f*). As to suing in the name of a partnership firm, *see post, Vol.* 2, *Ch. XCIII.*

(*s*) Under the 2 W. 4, c. 39, such a description was insufficient, see *Caton* v. *Sawyer*, 10 M. & W. 328; 2 Dowl., N. S. 310. And see 3 C. B. 730.

(*t*) *Simpson* v. *Ramsay*, 5 Q. B. 371; 13 L. J., Q. B. 91. See *Parrott* v. *Storks*, 11 Jur. 455.

(*u*) *Pilbrow* v. *Pilbrow's Atmospheric R. Co.*, 4 D. & L. 450; 3 C. B. 730.

(*x*) *Toulmin* v. *Bowditch*, 11 Jur. 455; 2 B. C. Rep. 89.

(*y*) *Windham* v. *Fenwick*, 11 M. & W. 102; 2 Dowl., N. S. 783. And see *Balman* v. *Sharp*, 16 M. & W. 81: *Jelks* v. *Fry*, 3 Dowl. 37: *Rippon* v. *Dawson*, 7 Bing. N. C. 206; 7 Dowl. 287: *Levy* v. *Parrott*, 2 C. B. 345: *Lawrence* v. *Garbett*, 2 D. & L. 944: *Bird* v. *Hopkins*, 2 D. & L. 637; 13 M. & W. 685.

(*z*) *Norman* v. *Winter*, 7 Scott, 251; 1 Bing. N. C. 279; 7 Dowl. 304: *Caton* v. *Sawyer*, 10 M. & W. 328; 2 Dowl., N. S. 310. And see *Launceston and Victoria R. Co.* v. *Brennan*, 3 Jur. 196.

(*a*) See *Le Tailleur* v. *South Eastern R. Co.*, 3 C. P. D. 18: *Keynsham Blue Lias Co.* v. *Baker*, 2 H. & C. 729; 33 L. J., Ex. 41.

(*b*) *The Catalonia*, 47 L. T. 446: *S. C.*, sub nom. *The Helenslea*, 51 L. J., P. 16; 30 W. R. 616.

(*c*) See *Walker & Co.* v. *Parkins*, 2 D. & L. 982, where plaintiffs were improperly described as "Henry Walker & Co." And see *Scott* v. *Soans*, 3 East, 111.

(*d*) *Morley* v. *Law*, 2 B. & B. 34; 4 Moore, 369. See ante, p. 218. He may sue by any name or names he has acquired by usage or reputation. This applies both to his christian and proper name. *Williams* v. *Bryant*, 5 M. & W. 454, per *Parke*, B.

(*e*) *Broughton* v. *Frere*, 3 Camp. 29. And see *Moody* v. *Aslatt*, 1 C. M. & R. 771; 5 Tyr. 492; 3 Dowl. 486.

(*f*) *Smith* v. *Crump*, 1 Dowl. 519.

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6. Character in which parties sue or are sued.

6. *Character in which Parties sue or are sued.*]—It is not necessary, in any case, whether or not the plaintiff sues, or the defendant is sued, *in autre droit* (as executor, administrator, assignee, or the like), to describe him as such in the title of the action or in the body of the writ of summons (*g*); nor need a plaintiff who sues *qui tam* state that he so sues (*h*). But when a party sues or is sued in a representative capacity, the indorsement must state the capacity in which he sues or is sued, and it is usual to state this also in the title of the action. As to the indorsement when the parties sue or are sued in a representative character, *see post*, p. 226.

Addition of.

The *addition* either of the plaintiff or defendant (*i*) need not be inserted.

7. Date and teste of writ.

7. *Date and Teste of Writ.*]—By *Ord. II. r.* 8 (*k*), "Every writ of summons and also (unless by any statute or by these rules it is otherwise provided) every other writ (*l*) shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of England."

If not dated at all, or if dated on a day different from the day on which it was issued, it would be irregular (*m*); and the omission or mistake would not be cured by any indorsement on the writ (*n*). Any inaccuracy in this respect may, however, be amended by leave (*o*). The writ cannot be tested on a Sunday (*p*). It seems immaterial whether the day and year be stated in words at length or in figures (*q*).

Not to be issued till cause of action complete.

It must not be issued until there is a complete cause of action, otherwise there would be a good defence to the action (*r*); or in a clear undisputed case the proceedings might perhaps be set aside (*s*). The issue of the writ is not, however, a judicial act, so that it does not relate back to the earliest hour of the day, and it may be issued on the same day as the cause of action arises, provided that the cause of action is complete at a time on that day earlier than that at which the writ is issued (*t*).

(*g*) *Ashworth* v. *Ryal*, 1 B. & Ad. 19: *Isley* v. *Isley*, 2 C. & J. 330; 2 Tyr. 214: *Knowles* v. *Johnson*, 2 Dowl. 653: *Watson* v. *Pilling*, 6 Moore, 66; 3 B. & B. 4. See *Rees* v. *Morgan*, 3 N. & M. 205; 5 B. & Ad. 1035.

(*h*) *Weavers' Co.* v. *Forrest*, 2 Stra. 1232: *Lloyd* v. *Williams*, 2 W. Bl. 722; 3 Wils. 141: *Delves* v. *Strange*, 6 T. R. 158, post.

(*i*) *Morris* v. *Smith*, 1 Gale, 103; 3 Dowl. 698; 2 C. M. & R. 120; 5 Tyr. 523.

(*k*) See former enactment, C. L. P. Act, 1852, s. 5.

(*l*) This is confined to other writs of a similar nature. It does not apply to a mittimus. *Green* v. *Lord Penzance*, 6 App. Cas. 657, 683.

(*m*) See post, p. 241, as to the consequences of a defect in the writ.

(*n*) *Anon.*, 1 Dowl. 654. And see *Millar* v. *Bowden*, 1 Price, N. R. 104: 1 C. & J. 563; 2 Tyr. 112.

(*o*) *Pleasants* v. *East Dereham Local Board*, 47 L. T. 439, error in name of Lord Chancellor: *Weeson* v. *Stalker*, 47 L. T. 444, 188—for 1882. Court refused to set aside judgment in default.

(*p*) See *Hanson* v. *Shackleton*, 4 Dowl. 48: *Corrall* v. *Foulkes*, 5 D. & L. 590.

(*q*) See *Butler* v. *Cohen*, 4 M. & Sel. 335: *Eyre* v. *Walsh*, 6 Taunt. 335. But see *Grojan* v. *Lee*, 5 Taunt. 651.

(*r*) *Alston* v. *Underhill*, 1 C. & M. 492; 2 D. & vl. 26: *Thompson* v. *Dicas*, 2 Dowl. 93; 1 C. & M. 768.

(*s*) *Lamb* v. *Pegg*, 1 Dowl. 447: *Kerr* v. *Dick*, 2 Chit. Rep. 11.

(*t*) *Clarke* v. *Bradlaugh* (C. A.), 8 Q. B. D. 63; 51 L. J., Q. B. 1.

8. Indorsement of claim.

8. *Indorsement of Claim.*]—By *Ord. II. r.* 1 (*ante*, p. 215, n. (*b*)), the writ must be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action.

By *Ord. III. r.* 1, "The indorsement of claim shall be made on every writ of summons before it is issued."

By *Ord. III. r.* 2, "In the indorsement required by *Ord. II. r.* 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled."

By *Ord. III. r.* 3, "The indorsement of claim shall be to the effect of such of the Forms in App. A., Part III., as shall be applicable to the case, or if none be found applicable then such other similarly concise form as the nature of the case may require" (*u*).

9. Joinder of claims.

9. *Joinder of Claims.*]—As to what claims may be joined together, and the proceedings to be taken in order to have claims wrongly or inconveniently joined together separated or tried at different times, *see post, Ch. XXXV.*, "*Joinder and Separation of Causes of Action.*"

10. Special indorsement under Ord. III. r. 6.

10. *Special Indorsement under Ord. III. r.* 6.]—By *R. of S. C., Ord. III. r.* 6, "In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without *interest*, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (B) on a bond or contract under seal for payment of a liquidated amount of money; or (C) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (D) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E) on a trust; or (F) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant; the writ of summons *may, at the option of the plaintiff*, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the forms in App. C., Sect. IV., as shall be applicable to the case" (*x*).

The use of this special indorsement is optional, but it should be adopted in all cases in which it is applicable. Considerable advantages are derived from its use. In case of appearance, the plaintiff may apply, on an affidavit verifying his claim, to sign judgment notwithstanding the appearance, or compel the defendant to find security, or bring the amount into Court (under *Ord. XIV. r.* 1, *see post*, p. 269). And, moreover, the plaintiff need not deliver any further statement of claim (*see post, Ch. XIX.*).

The forms of special indorsement referred to above are given in the

(*u*) See these and other forms, Chit. F.

(*x*) See the forms in Chit. F.

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Appendix to the R. of S. C., App. C., Sect. IV. Similar forms may be used, but the forms in the schedule should be followed as closely as possible, though a mere formal difference will not be any objection to their sufficiency. It is not necessary that the claim should be set out with great particularity or minuteness; all that is required is such particulars as will serve to identify the claim, and enable the defendant to discover whether he owes the money or not (*y*). Thus, a claim "to goods," giving dates and amounts, and containing an entry "to bank draft returned," which was entered on both the credit and debit sides is good (*z*). An indorsement stating the claim to be for balance due for money paid for purchase of shares between certain dates "an account of which has been rendered," is sufficient (*a*). In an action for goods sold, the dates and amounts of the consignments or supplies should generally be given (*b*). And in an action on a bill of exchange, particulars of the amount and date of the instrument, and the parties thereto, should be inserted (*c*); and, *à fortiori*, must such particulars be given where the action is against a co-surety for contribution (*c*). An indorsement that "The plaintiff's claim is 36*l.* 5*s.* for balance of account for goods sold," is reported to have been held, at chambers, to be sufficient, but this is not acted on at chambers, and unless the dates were inserted, would now be held insufficient (*d*). In this last case, Lush, J., is reported to have said, "It could not be intended that a list of items, extending perhaps over three or four years, should be indorsed on the writ."

It seems that the rule does not extend to anything but a simple money demand (*e*). A claim, including a claim for an injunction, is not within it (*f*).

The above rule is similar to the 25th section of the *Com. Law Proc. Act*, 1852, from which it differs, however, in not being limited to cases where the defendant resides within the jurisdiction, and in including the case of a trust debt (*g*), and certain actions for recovery of land. Any indorsement that would have been sufficient under that section will suffice now (*h*).

The rule does not apply where any claim not falling within its provisions is set up (*i*), and care should be taken not to include in the indorsement any item of unliquidated damages, otherwise a judgment signed for want of an appearance would be irregular, and might be set aside, with costs, on an application made in due time for that purpose; and the solicitor making such improper indorsement might be ordered to pay such costs (*k*).

(*y*) Per *Archibald*, J., W. N. 1876, 53.

(*z*) *Smith* v. *Wilson*, 5 C. P. D. 25; 49 L. J., C. P. 96 (C. A.), affirming 4 C. P. D. 292: *Aston* v. *Hurwitz*, 41 L. T. 521, C. A.

(*a*) *Aston* v. *Hurwitz*, supra.

(*b*) *Parpaite Frères* v. *Dickinson*, 38 L. T. 178; 26 W. R. 479.

(*c*) *Walker* v. *Hicks*, 3 Q. B. D. 8; 47 L. J., Q. B. 27.

(*d*) *Anon.*, W. N. 1875, 200.

(*e*) *Butterworth* v. *Tee*, W. N. 1876, 9, per *Quain*, J.: *Hill* v. *Sidebottom*, 47 L. T. 224.

(*f*) *Yeatman* v. *Snow*, 42 L. T. 502.

(*g*) *Wilson* v. *Dundas*, W. N. 1876, 232.

(*h*) Per *Bramwell*, L. J., *Aston* v. *Hurwitz*, 41 L. T. 521.

(*i*) *Yeatman* v. *Snow*, 42 L. T. 502, claim for injunction: *Hill* v. *Sidebottom*, 47 L. T. 224, foreclosure.

(*k*) *Rodway* v. *Lucas*, 10 Ex. 667: *Rogers* v. *Hunt*, 24 L. J., Ex. 23; 10 Ex. 474.

A claim on a foreign judgment is within the rule (*l*), but a claim for arrears of alimony *pendente lite* is not (*m*).

The rule enables the plaintiff to claim interest by the indorsement (*n*), but he has no right to do so unless there has been a contract express or implied to pay it, except in cases in which it is the universal practice of the Courts to allow interest as a matter of course as in the case of bills and notes, or the like (*o*).

A claim for the expenses of noting a bill may be added (*o*).

Under the former practice, if the plaintiff neglected to make this special indorsement when it could be made, he was not entitled to the costs of the declaration upon judgment being signed for want of a plea, or to more costs than if he had made such special indorsement, and signed judgment for non-appearance (*p*).

Indorsement must state amount due for debt and costs, &c.

11. *Indorsement of Amount of Debt and Costs.*]—By *Ord. III. r.* 7 (*q*), "Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and *shall* further state, that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. Such statement shall be in the form in Appendix A., Part III., sect. 3 (*r*). The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation."

Object of this indorsement.

It will be noticed that the use of this indorsement is obligatory: the only object of it is, that defendant may stay the proceedings by paying the amount mentioned in it within four days (*s*). The indorsement is necessary only where the action is for a debt or liquidated demand only. It is not necessary if the plaintiff claims damages only, or if the action is brought for an unliquidated as well as a liquidated demand (*t*); and if the indorsement be made in such a case, the plaintiff would not be bound by it (*u*). It must be made on a writ of summons against a solicitor, in the same manner as against any other person (*x*).

When not necessary.

(*l*) *Grant* v. *Easton* (C. A.), 13 Q. B. D. 302; 53 L. J., Q. B. 68; 49 L. T. 645; 32 W. R. 239, affirming 50 L. T. 722; 32 W. R. 856.

(*m*) *Bailey* v. *Bailey*, 50 L. T. 722; 32 W. R. 856, affd. in C. A.

(*n*) *Smith* v. *Wilson* (C. A.), 5 C. P. D. 25; 41 L. T. 433.

(*o*) *Smith* v. *Wilson*, supra: Bills of Exchange Act, 1882, s. 57: *Northern Bank* v. *Chapman*, 6 L. R., Ir. 25, Q. B. D.; contra *Skelly* v. *McKenna*, 6 L. R., Ir. 24, Ex. D.

(*p*) Up. C. L. P. Act, 1852, s. 28.

(*q*) See former enactment, C. L. P. Act, 1852, s. 8.

(*r*) The form, which will be found in Chit. Forms, 12th ed. p. 64, is as follows:—"And £—— for costs, and if the amount claimed be paid to the plaintiff or his solicitor within four days [*or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the rules*] from the service hereof, further proceedings will be stayed."

(*s*) *Jacquot* v. *Bourra*, 5 M. & W. 156, per *Alderson*, B.

(*t*) See *Perry* v. *Patchett*, 2 Dowl. 607; 1 C. M. & R. 87.

(*u*) See *Smart* v. *Lovick*, 3 Dowl. 31; *Rowland* v. *Dakeyne*, 3 Dowl. 832; *Hobbs* v. *Young*, 14 L. J., Q. B. 4; 2 D. & L. 474; *Davies* v. *Lloyd*, 6 Dowl. 173; 3 M. & W. 69.

(*x*) *Tomkins* v. *Chilcote*, 2 Dowl. 187. And see *Lewellin* v. *Norton*, 4 B. & Ad. 368, note; 1 Dowl. 416; *Long* v. *Wordsworth*, 4 B. & Ad. 367.

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Amount of debt claimed.

The amount of the debt indorsed should not be more than is really due; at least, it should not be such a sum as would mislead the defendant, and prevent him from settling the action; if it were, the proceedings might formerly have been stayed on payment of the real debt, with the costs of the writ only, provided the application be made promptly (*y*); but now, by a judge's order, dated at chambers, November 12th, 1875, "As money may now be paid into Court without leave at any time after service of the writ and before defence (*Ord. XXX. s. 2*), [now *Ord. XXII. r. 1*], summonses to stay on payment of a smaller sum than the sum demanded will no longer be issued. Instead thereof, the amount should be paid into Court, and the receipt sent to the plaintiff's solicitor, with the notice (App. (B.), form 3)." *See post, Ch. XXIX.* Neither should the amount be less than is due, unless the plaintiff intends abandoning the residue; otherwise the proceedings would be stayed if the defendant paid the amount indorsed within four days, unless, indeed, an amendment were allowed, which, as we shall presently see, might be done in such a case, upon the terms of the plaintiff paying the costs of the application, and giving the defendant four more days to pay the amount of the full debt and costs (*z*).

Claim for interest.

In addition to the debt, plaintiff may insert in the indorsement a claim for interest, and this without stating a precise amount, provided he names in it a day from which it is to be calculated (*a*). It seems it is not necessary, though advisable, to state the rate of interest claimed. It will be intended to be 5*l.* per cent. (*b*).

Amount of costs.

If the plaintiff wish to waive his costs, he may omit to mention them in the indorsement; but he must not leave the matter in doubt; and, therefore, an indorsement that the plaintiff claims £——— for costs is irregular (*c*).

Consequence of omission or defect in indorsement.

If this indorsement, when necessary, be not made, or be improperly made, the writ will be irregular, and may be set aside or ordered to be amended (*d*). If the omission or defect be in the copy, then the service may be set aside. Any application for this purpose must be made within a reasonable time, and, in general, within the eight days limited for appearing, though, under special circumstances, it might be made afterwards (*e*). The affidavit in support of the application must state that the action is brought for a debt or liquidated demand (*f*).

Amendment of.

An amendment of a mistake in the indorsement on the writ may be allowed (*g*). This is usually done on the terms of the plaintiff

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(*y*) *Elliston* v. *Robinson*, 2 Dowl. 241; 2 C. & M. 343.

(*z*) *Bowdidge* v. *Slaney*, 2 Bing. N. C. 142; 4 Dowl. 140; 2 Sc. 197. And see per *Alderson*, B., in *Jacquot* v. *Bowra*, 5 M. & W. 156.

(*a*) *Chapman* v. *Becke*, 3 D. & L. 350: *Coppelo* v. *Brown*, 3 Dowl. 166; 1 C. M. & R. 575: *Rogers* v. *Godbold*, 3 Dowl. 106: *Sealey* v. *Hearne*, Id. 96: *Fryer* v. *Smith*, 1 D. & L. 75; 6 Scott, N. R. 658; 5 M. & Gr. 605: *Fitzgerald* v. *Evans*, 2 Dowl., N. S. 916.

(*b*) *Allen* v. *Bussey*, 1 B. C. R. 204 4 D. & L. 430.

(*c*) *Truslove* v. *Whitechurch*, 1 Sc. N. R. 415; 8 Dowl. 837.

(*d*) See R. of S. C., Ord. LXX. r. 1: *Truslove* v. *Whitechurch*, supra. And see *Ryley* v. *Boissomas*, 1 Dowl. 383: *Jones* v. *Price*, 2 Dowl. 410.

(*e*) See post, p. 242: *Fryer* v. *Smith*, 1 D. & L. 75; 6 Sc. N. R. 658; 5 M. & Gr. 605: *Tiling* v. *Hodgson*, 13 M. & W. 638.

(*f*) *Curwin* v. *Moseley*, 1 Dowl. 432.

(*g*) R. of S. C., Ord. XXVIII. r. 12, post, Ch. XLII.

paying the costs of the application, and giving the defendant four more days' time to pay the debt and costs (*h*). In some cases it might be allowed without any terms being imposed.

Where the defendant fails to pay the amount within the four days, he is not afterwards entitled to a stay of proceedings on payment of that sum; the plaintiff may proceed for a further amount of costs (*i*); and if the defendant be desirous of paying the debt and costs, and the plaintiff will not otherwise accept them, his course will be to obtain a master's order for the payment of the amount, and the costs in that case must be taxed, unless the parties can agree upon the amount. Where the debt and costs indorsed were paid to the plaintiff's solicitor's clerk after the expiration of the four days, without the assent of the solicitor, but the latter did not return the amount on ascertaining the fact, it was held, that he was not entitled to proceed for further costs (*k*). Where the defendant, after the issuing, but before the service of a writ, paid the debt to plaintiff's clerk, without costs, and the plaintiff's solicitor, with a view to recover his costs, proceeded hastily to deliver declaration, the Court ordered the proceedings to be stayed on payment of the cost of the writ only (*l*).

Stay of proceedings after the four days.

If the defendant pays the debt and costs indorsed on the writ within the four days, he is at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor will have to pay the costs of taxation (*m*). And this is so although the defendant pays, and the solicitor accepts, less than the amount of costs claimed by the indorsement (*n*). He is also entitled to tax the costs where he makes, and the plaintiff accepts, the payment after the four days (*o*). If the plaintiff's solicitor has wilfully inserted an item of charge which he must have known ought not to have been charged, as for a letter which was not written, or the like, he will not get the costs of taxation, although less than a sixth be taken off (*p*). A sum demanded by the solicitor, and paid by the defendant, in addition to that indorsed on the writ, will not be reckoned in taxation, so as to entitle the defendant to the costs of it (*q*).

Taxation of the costs.

Payment by the defendant to a solicitor employed merely to serve the writ will not be a payment to the plaintiff or his solicitor (*r*).

Payment to solicitor employed to serve writ.

12. *Indorsement in Cases of Account.*]—By *Ord. III. r.* 8, "In all cases in which the plaintiff, in the first instance, desires to have

12. Indorsement in cases of account.

(*h*) See *Urquhart* v. *Dick*, 3 Dowl. 17: *Turner* v. *Gill*, Id. 30: *Shirley* v. *Jacobs*, Id. 101; 1 Scott, 67: *Colls* v. *Morpeth*, 3 Dowl. 23: *Cooper* v. *Waller*, 3 Dowl. 167: *Tabram* v. *Thomas*, Id.

(*i*) *Bowdidge* v. *Slaney*, 4 Dowl. 140; 2 Scott, 197; 2 Bing. N. C. 142.

(*k*) *Hodding* v. *Sturchfeld*, 8 Sc. N. R. 662; 7 M. & G. 957.

(*l*) *Wyllie* v. *Phillips*, 3 Bing. N. C. 776; 5 Dowl. 644. See further as to staying proceedings, post, Ch. XXX.

(*m*) See Ord. III., r. 7; ante, p. 223.

(*n*) *Hunter* v. *Russell*, 5 M. & Gr. 601; 6 Sc. N. R. 627: *Young* v. *Crompton*, 2 D. & L. 557.

(*o*) *Hoole* v. *Earnshaw* (C. A.), 39 L. T. 409.

(*p*) *Holderness* v. *Barkworth*, 3 M. & W. 341; 6 Dowl. 392. See *Tapping* v. *Greenway*, 9 M. & W. 224; 1 Dowl., N. S. 408.

(*q*) *Ward* v. *Gregg*, 5 Dow[illegible]29.

(*r*) *Yates* v. *Freckleton*, [illegible] Dougl. 623.

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an account taken, the writ of summons shall be indorsed with a claim that such account be taken." *See post*, p. 263.

13. Indorsement of claim for mandamus or injunction.

13. *Indorsement of Claim for Mandamus or Injunction or Receiver.*]—If the plaintiff seeks a mandamus or injunction or receiver he should include a claim for it on his writ (*r*), and should state shortly the nature of the injunction or mandamus sought. *See post, Ch. XXXIX.*

14. Indorsement where parties sue or are sued in representative character.

14. *Indorsement where Parties sue or are sued in representative Character.*]—By *Ord. III. r.* 4, "If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show, in manner appearing by such of the forms in Appendix (A.), Part III., sect. 7, as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued" (*s*).

15. Indorsement of address when writ issued by solicitor.

15. *Indorsement of Address.*]—By *R. of S. C., Ord. IV. r.* 1, "In all cases where a writ of summons is issued out of the central office, the solicitor of a plaintiff *suing by a solicitor* shall indorse upon the writ and notice in lieu of service of a writ the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than three miles from the principal entrance of the central hall at the Royal Courts of Justice, another proper place, to be called his *address for service*, which shall not be more than three miles from the principal entrance of the central hall at the Royal Courts of Justice, where writs, notices, pleadings, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And where any such solicitor is only *agent* of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor."

The object of this indorsement is to give the defendant information as to where he may go for the purpose of settling the action (*t*), and where writs and other documents may be left for the plaintiff's solicitor.

When the writ is sued out by a solicitor, it will be enough to give such a description of his place of business as can mislead nobody (*u*). Therefore, a description of his place of business as of "Ely Place," is sufficient (*x*); so is a description "Gray's Inn, London" (*y*); or "Gray's Inn Square, London" (*z*); or "No. 10, Gray's Inn Square, Holborn" (*a*). But it seems "Southampton Buildings" is not (*b*). An indorsement that the writ was issued by "T. W. G., of Hereford, whose address for service is T. W. G., care of T. W. and Son, 11, Bedford Row, W.C.," has been held sufficient under the above rule (*c*). Where the solicitor belongs to

(*r*) *Colebourne* v. *Colebourne*, 1 Ch. D. 690; 45 L. J., Ch. 749, V.-C. H.: cp. *Salt* v. *Cooper*, 16 Ch. D. 544.

(*s*) See Chit. Forms.

(*t*) See per *Parke*, B., *Youlton* v. *Hall*, 4 M. & W. 583; 7 Dowl. 176.

(*u*) See per *Parke*, B., 7 Dowl. 176.

(*x*) *Engleheart* v. *Edwards*, 6 Leg. Obs. 138.

(*y*) *Engleheart* v. *Eyre*, 2 Dowl. 145: *Jelks* v. *Fry*, 3 Dowl. 37.

(*z*) *King* v. *Monkhouse*, 2 Dowl. 221; 3 Cr. & M. 314. And see *Arden* v. *Jones*, 4 Dowl. 120.

(*a*) *Youlton* v. *Hall*, 7 Dowl. 176; 4 M. & W. 583.

(*b*) *Rust* v. *Chine*, 3 Dowl. 464. And see *Tadman* v. *Wood*, 4 A. & E. 1011: *Smith* v. *Pennell*, 2 Dowl. 654.

(*c*) *Smith* v. *Dobbin*, C. A., 3 Ex. D. 338; 47 L. J., Ex. 65.

a firm, it is sufficient to indorse the name of the firm (*d*), and it is better to do so (*e*).

When plaintiff sues in person.

By *r.* 2, "In all cases where a writ of summons is issued out of the central office, a plaintiff suing in person shall indorse upon the writ and notice in lieu of service of a writ his place of residence and occupation, and also, if his *place of residence* shall be more than three miles from the principal entrance of the central hall [illegible] Royal Courts of Justice, another proper place, to be called his *address for service*, which shall not be more than three miles from the principal entrance of the central hall at the Royal Courts of Justice, where writs, notices, pleadings, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him."

Where the writ is issued out by the *plaintiff himself in person*, greater particularity was formerly, and, it would seem, is still, required in the indorsement than when the writ is sued out by a solicitor for him. In the former case it must mention the city, town or parish, and also the name of the street and number of the house of the plaintiff's residence. Where the indorsement was thus, "This writ was issued by C. L., *of* No. 6, B. Street, Brunswick Square, &c., the plaintiff within named in person," the Court of Exchequer seemed to consider it insufficient, as it ought to have stated that he *resided* at the place (*f*); but now it seems it would be held that such a description is sufficient (*g*).

The indorsement must state either that the writ was issued by a *solicitor* or by the plaintiff *in person*. An indorsement, therefore, in the following form would be insufficient:—"This writ was issued by W. L., 32, Great James Street, Bedford Row, *agent for the plaintiff in person*, who resides at Barmouth" (*h*).

Consequences of defect.

An omission of this indorsement, or any irregular or deceptive description in it, may afford a ground for setting aside the writ and proceedings for irregularity (*i*). But an amendment may be allowed, and in general would be so (*k*).

See *post*, p. 250, as to the solicitor whose name is indorsed on the writ declaring whether it was issued by his authority, &c.

District registry.

Where the writ is issued out of a district registry, see *Ord. IV. r.* 3, *post*, *Vol.* 2, *Ch. CXXIV.*

16. *Preparation and Issuing of Writs.*]—By *R. of S. C., Ord. V. r.* 10, "Writs of summons shall be prepared by the plaintiff or his solicitor, and shall be written or printed, or partly written and

16. Preparation and issuing of writs.

(*d*) Ord. IV. r. 1, supra: *Englehart* v. *Eyre*, 3 Dowl. 145. And see *Pickman* v. *Collis*, 3 Dowl. 429.

(*e*) *Dawes* v. *Solomonson*, 6 Scott, 596: *Hartley* v. *Rodenhurst*, 4 Dowl. 748, where some of the solicitors whose names were given had quitted the business.

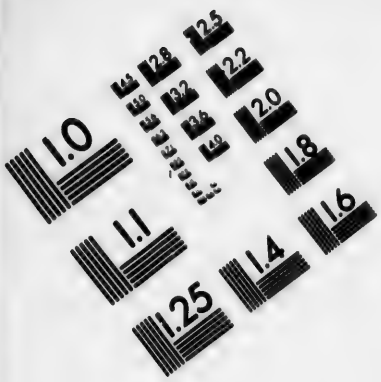
(*f*) *Lewis* v. *Davison*, 3 Dowl. 272; 1 C., M. & R. 655.

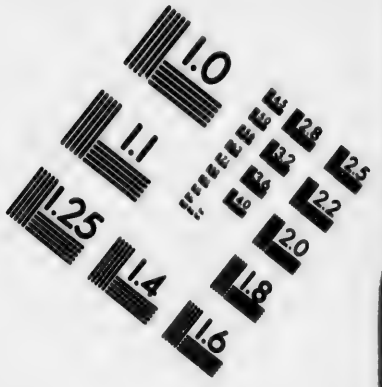
(*g*) *Yardley* v. *Jones*, 4 Dowl. 45; 1 H. & W. 332: *Coppice* v. *Hunter*, 8 Dowl. 504: *Arden* v. *Jones*, 4 Dowl. 120.

(*h*) *Lloyd* v. *Jones*, 1 M. & W. 549; 5 Dowl. 161. See also *Toby* v. *Hancock*, 4 D. & L. 385; 16 L. J., Q. B. 33.

(*i*) See *Humphreys* v. *Budd*, 9 Dowl. 1000: *Shephard* v. *Shum*, 2 C. & J. 632: *Chapman* v. *Ryall*, Barnes, 415: *Oppenheim* v. *Harrison*, 1 Burr. 20: *Williams* v. *Lewis*, 1 Chit. Rep. 611.

(*k*) Ord. XXVIII. r. 12, and Ord. LXX. r. 1, post, Ch. XLII.





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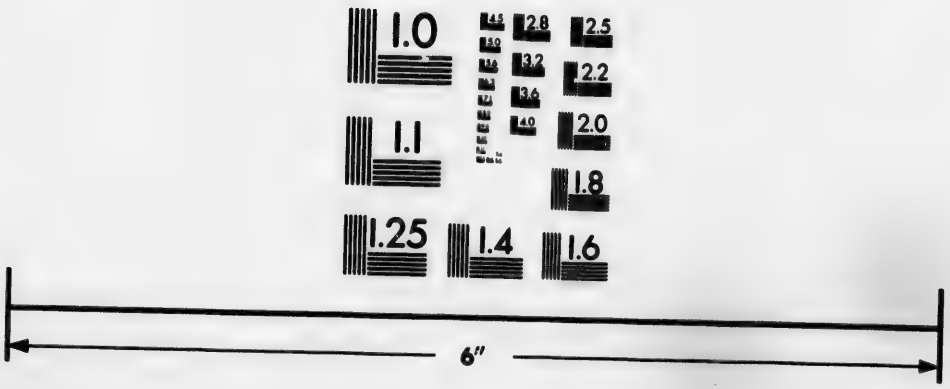

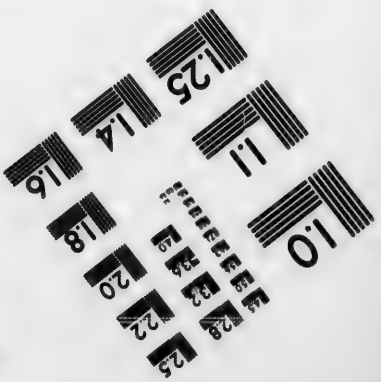

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partly printed, on paper of the same description as by these rules (*l*) directed in the case of proceedings directed to be printed."

Sealing. By *Ord. V. r.* 11, "Every writ of summons shall be sealed by the proper officer, and shall thereupon be deemed to be issued."

Copy to be left and filed. By *Ord. V. r.* 12, "The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, on paper of the description aforesaid (*l*), of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person" (*m*).

By *Ord. V. r.* 13, "The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the cause book, which is to be kept in the manner in which cause books are now kept, and the action shall be distinguished by the date of the year, a letter, and a number, in the manner in which causes are now distinguished in such cause books; and when such action shall be commenced in a district registry it shall be further distinguished by the name of such registry."

Place of issue. By *R. of S. C., Ord. V. r.* 1, "In any action other than a probate action, the plaintiff, wherever resident, may issue a writ of summons out of any district registry." *See post, Vol.* 2, *Ch. CXXIV.*

By *Ord. V. r.* 2, "Every writ of summons not issued out of a district registry shall be issued out of the central office."

How sued out. In order to sue out the writ, *get at a law stationer's a blank writ on paper, and fill it up according to the directions pointed out in the preceding pages, and indorse it with the indorsements directed ante,* pp. 221 to 226. *Take the writ and a copy thereof, which copy must have been previously stamped with a five shilling impressed stamp, and signed as directed by Ord. V. r.* 13, *supra, to the proper officer, and get the writ sealed* (*n*). *Leave the stamped copy with the officer. Make as many copies of the writ as there are defendants. As to suing out concurrent writs, see infra.*

17. Concurrent writs. 17. *Concurrent Writs.*]—By *R. of S. C., Ord. VI. r.* 1 (*o*), "The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear *teste* of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force" (*p*).

(*l*) See post, Vol. 2, Ch. CXXVI.

(*m*) If a writ of summons has been lost, the copy filed may for the purpose of amendment or for any other purpose be treated as a duplicate, but only by leave of a practice master, and on the party giving an undertaking to produce the original at the central office when found (Master Pr. Rules).

(*n*) See *Burt* v. *Jackson*, 2 Dowl. 747; 3 M. & Sc. 552: *Frost* v. *Eyles*, 1 H. Bla. 120: *Wilso[illegible]. Joy*, 2 Dowl. 182; 8 & 9 V. c. 34. See *Dunkley* v. *Farris*, 11 C. B. 457, where the solicitor's clerk fraudulently simulated the Court seal upon a writ of summons.

(*o*) Cp. C. L. P. Act, 1852, s. 9.

(*p*) The original writ is in force for twelve months from its date. R. of S. C., Ord. VIII., post, p. 229. See *Davies* v. *Garland*, 1 Q. B. D. 250: *Cole* v. *Sherard*, 11 Ex. 482; 25 L. J., Ex. 59.

Inasmuch as a service of a writ is effected by delivering to the defendant personally a copy of the writ, and showing to him the original if required, in cases where there are several defendants living in different places, or where it is not known where a single defendant can be met with, or where it is doubtful whether the defendant is abroad or not, or where one or more of several defendants is abroad, two or more concurrent writs would be convenient, and in many cases necessary, for the purpose of effecting service (*q*). Where the writs are for service within the jurisdiction, each writ should be a duplicate of the other (*r*). The defendant is liable only to the costs of the writ with which he is served, unless the circumstances be such as in the judgment of the Taxing Master to warrant the issuing of several writs (*s*). A concurrent writ can only be issued within twelve months from the commencement of the action by the original writ, although the original writ has been renewed (*t*).

—for service out of jurisdiction.

By *Ord. VI. r.* 2 (*u*), "A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction."

If there be two defendants, one residing within the jurisdiction and the other without, two writs may be issued, one for service within the jurisdiction, and the other marked "concurrent" for service, either itself or by notice, without (*x*). Each writ should contain the names of both defendants (*y*). Such writ for service out of the jurisdiction, however, cannot be issued except in the cases pointed out *post*, p. 244.

18. Duration and renewal of writ.

18. *Duration and Renewal of Writ.*]—By *Ord. VIII. r.* 1, "No original writ of summons shall be in force for more than twelve months (*z*) from the day of the date thereof, including the day of such date (*a*); but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a judge for leave to renew the writ; and the Court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons

(*q*) See *Angus* v. *Coppard*, 3 M. & W. 57; *Crow* v. *Crow*, 1 D. & L. 709; 13 L. J., Q. B. 57; *Burt* v. *Jackson*, 3 M. & Sc. 552; 2 Dowl. 747.

(*r*) See *Angus* v. *Coppard*, 3 M. & W. 57; *Crow* v. *Crow*, 1 D. & L. 709; 13 L. J., Q. B. 57.

(*s*) *Dunn* v. *Harding*, 10 Bing. 553; 4 M. & Sc. 450; 2 Dowl. 803; *Angus* v. *Coppard*, 3 M. & W. 57.

(*t*) See *Cole* v. *Sherard*, 11 Ex. 482; 25 L. J., Ex. 59. See Ord. VI. r. 1.

(*u*) See former enactment, C. L. P. Act, 1852, s. 22.

(*x*) *Beddington* v. *Beddington*, 1 P. D. 426; 45 L. J., P. 44.

(*y*) *Traill* v. *Porter*, 1 Ir. L. R., Ch. D. 60.

(*z*) Calendar months. Ord. LXIV. r. 1, post, Ch. CXXV.

(*a*) The writ after such time does not become absolutely defunct. *Pearce* v. *Swain*, 7 M. & W. 543; 9 Dowl. 724; *Bromage* v. *Ray*, 9 Dowl. 559; *Richardson* v. *Daley*, 7 Dowl. 25; 4 N. & M. 384. And, therefore, the defendant may appear to the writ, or be served with a copy of it, if he consent thereto (*Coates* v. *Sandy*, 2 Scott, N. R. 535; 2 M. & Gr. 313; 9 Dowl. 381, post, p. 232, n. (*z*), after the expiration of that period.

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be renewed for six months (*b*) from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 18 in Appendix (A), Part I. (*c*), with such variations as circumstances may require; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons" (*d*).

The affidavit, &c.

The affidavit in support of the application should be indorsed "Affidavit in support of application to renew writ in this action." *Affix a half-crown stamp to the affidavit and leave it with the original writ with the clerk of the Master to whom the action is assigned. Call in two days' time and if the application is granted the Master will endorse the affidavit to that effect. Take the affidavit and writ to the order office with a blank printed form of the order (e) and a three shilling stamp. File the order with the officer who will draw up the order. Then attend with the writ, order and præcipe for renewal (f) at the writ office, where the officer will mark the writ with the renewal seal.*

The affidavit must show that reasonable efforts have been made to serve the writ, or that there is some other good cause why it should be renewed. It must be made within twelve calendar (*Ord. LXIV. r.* 1) months from the date of the first writ, [illegible]ing the day of such date. In the case of a subsequent re[illegible] the application should be made within six calendar months from the date of the previous renewal. In a case before the late M. R., there being no question as to the operation of the Statute of Limitations, the writ was ordered to be renewed after the expiration of the twelve months (*g*). But the Court has no power, under *Ord. LXIV. r.* 7, to extend the time for renewing a writ where the claim would, in the absence of such renewal, be barred by the Statute of Limitations (*h*).

The above rule alters the practice that existed under the *Com. Law Proc. Act*, 1852, *s.* 11, by allowing the writ to be in force for twelve months instead of six only, and by requiring the leave of a judge or registrar for the renewal. Under the latter Act, in a case where the writ had been issued on the 1st of November and

(*b*) Before the Jud. Acts, it was held that the six months for which a writ renewed was to be available were to be calculated inclusive of the day of renewal. *Fisher* v. *Cox*, 16 L. T. 397: *Bluck* v. *Green*, 15 C. B. 262: *S. C., Anon.*, 24 L. J., C. P. 1: *Anon.*, 24 L. J., Q. B. 23: *Anon.*, 1 H. & C. 604; 32 L. J., Ex. 88.

(*c*) See the form, Chit. F., p. 95.

(*d*) See C. L. P. Act, 1852, ss. 10, 11, 12; Chit. Arch. 12th ed. 1307.

(*e*) Chitty's Forms, p. 94.

(*f*) Id. p. 96.

(*g*) *In re Jones, Eyre* v. *Cox*, W. N. 1877, 38; 46 L. J., Ch. 316; 25 W. R. 303. See *Doyle* v. *Kaufman*, infra.

(*h*) *Doyle* v. *Kaufman*, 3 Q. B. D. 7; 47 L. J., Q. B. 26, approved of in C. A., *S. C.*, 3 Q. B. D. 340: *Whistler* v. *Hancock*, 3 Q. B. D. 83. See *Bailey* v. *Owen*, 9 W. R. 128: *Nazer* v. *Wade*, infra: *Evans* v. *Jones*, infra.

duly renewed on the 1st May, and then tendered for further renewal on the next 1st of November, but the officer of the Court refused to seal it, the Court directed him to affix the proper seal *nunc pro tunc* as of the day on which it was tendered, saying that it might be done *quantum valeat*, and that the error, if any, would appear upon the record (*i*). On the day of the expiration of a writ of summons, the plaintiff's attorney attended at the office for the purpose of having it renewed, and paid the fee: but being suddenly called away, omitted to get the seal impressed, and did not discover the mistake until it was too late to keep the writ alive by re-sealing, so as to save the Statute of Limitations. It was held, that the Court had no power to direct the officer to impress the seal on the writ as of the day when the attorney applied to have it renewed; but that it would have been otherwise if the omission to re-seal the writ had been occasioned by a fault of the officer of the Court (*k*). Where a plaintiff has by inadvertence allowed the time for re-sealing a writ to elapse without having the writ re-sealed, the Court will not order it to be done *nunc pro tunc*, unless it can see that there has been some default in the conduct of some one of its officers (*l*). Where an application to re-seal a writ to save the Statute of Limitations was made at the office of the Court on Saturday, the 28th December (during the Christmas holidays, when no one was in attendance), the six months allowed for renewal terminating on the following day: it was held, that an application for the purpose on Monday, the 30th, was too late (*l*). Formerly, it was held that a judge had no power to order the re-sealing of a writ which had once run out of date, and that if one of several re-sealings was too late, all the subsequent ones were useless (*m*).

Formerly, a defendant who had been served after the time during which the writ was in force had expired, could not treat it as a nullity; but, if he wanted to take advantage of the objection, had to apply within a reasonable time to set the writ and service aside (*n*). This would seem to be still so.

Evidence of renewal.

By *Ord. VIII. r.* 2 (*o*), "The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes."

As to the meaning of the expression "*sufficient evidence*," *see Day's Com. Law Proc. Acts, 4th ed.* p. 39, citing *Barraclough* v. *Greenhough* (*L. R.*, 2 *Q. B.* 612), decided under 20 & 21 *V. c.* 77, *s.* 64. It seems that the defendant may produce evidence to rebut it.

When writ lost.

By *Ord. VIII. r.* 3, "Where a writ, of which the production is necessary, has been lost, the Court or a judge, upon being satisfied

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(*i*) *Black* v. *Green*, 15 C. B. 262; 18 Jur. 1014; 24 L. J., C. P. 1; *Anon.*, 18 Jur. 1107; 24 L. J., Q. B. 23.

(*k*) *Nazer* v. *Wade*, 1 B. & S. 728; 8 Jur., N. S. 134; 31 L. J., Q. B. 5; 5 L. T. 604.

(*l*) *Evans* v. *Jones*, 2 B. & S. 45; 31 L. J., Q. B. 61.

(*m*) *Fisher* v. *Cox*, 16 L. T. 397. See, however, *Re Jones, Eyre* v. *Cox*, supra.

(*n*) *Hamp* v. *Warren*, 11 M. & W. 103; 2 Dowl., N. S. 758.

(*o*) See C. L. P. Act, 1852, s. 13, the former enactment.

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of the loss, and of the correctness of a copy thereof, may order that such copy shall be sealed and served in lieu of the original writ" (*q*).

19. Service of writ.

19. *Service of Writ.*]—While the writ is in force a true copy of it should be served, if practicable, on the defendant personally, and the writ itself should be shown to him at the time of service if he requires to see it; but no service of the writ is required where the defendant by his solicitor undertakes in writing (*r*) to accept service and enters an appearance. (*R. of S. C., Ord. IX. rr.* 1 *and* 2 (*s*)).

Where.

The service may be in any county (*t*). As to the writ and service of the same, when defendant is out of the jurisdiction, *see post*, p. 244. Before the *Com. Law Proc. Act*, 1852, it was held that service of a writ of summons abroad was an irregularity only and not a nullity (*u*). The service of a writ of summons in a Court of justice on a party attending his own cause is not irregular (*x*).

At what time.

The writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months, from the date of such renewal including the day of such date and not afterwards (*y*). But the service may be effected after such time with the consent of the defendant (*z*). If improperly effected after the twelve months, the defendant may get it set aside, but he cannot treat it as a nullity (*a*). The writ may be served late at night (*b*), though, of course, this is not recommended, except in urgent cases. It cannot be served on a Sunday (*c*): such a service would be wholly void (*d*).

By whom.

It may be served by any person who can read and write, so as to be able to swear that he served a true copy of the writ (*e*), and to make the indorsement of service presently mentioned (*e*).

Should, where practicable, be personally served.

Where practicable, the defendant (*f*), or each of the defendants if there be more than one (*g*), should be served personally with

(*q*) This avoids the difficulty that arose in *Davies* v. *Garland*, 1 Q. B. D. 250.

(*r*) If a defendant's solicitor does not enter an appearance in pursuance of his *written* undertaking, he is liable to an attachment. Ord. XII. r. 18, ante, p. 119.

(*s*) The following are these rules:

By Ord. IX. r. 1, "No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance."

By Ord. IX. r. 2, "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just." See as to substituted or other service, post, p. 236.

(*t*) See C. L. P. Act, 1852, s. 14.

(*u*) *Minet* v. *Round*, 1 Pr. Rep. 164, C. P.

(*x*) *Poole* v. *Gould*, 1 H. & N. 99; 25 L. J., Ex. 250.

(*y*) See Ord. VIII. r. 1, ante, p. 229, and the memorandum subscribed on the writ, Chit. F., p. 58. As to the renewal of writs, see ante, p. 229.

(*z*) *Coates* v. *Sandy*, 2 Sc. N. R. 535; 2 M. & Gr. 313; 9 Dowl. 381.

(*a*) *Hamp* v. *Warren*, 11 M. & W. 103; 2 Dowl., N. S. 758.

(*b*) *Robertson* v. *Douglas*, 1 T. R. 191: *Maud* v. *Barnard*, 2 Burr. 812: *Anon.*, 2 Chit. Rep. 357: *Upton* v. *M'Kenzie*, 1 D. & R. 172: *Priddle* v. *Cooper*, 1 Bing. 66.

(*c*) 29 C. 2, c. 7, s. 6.

(*d*) *Taylor* v. *Phillips*, 3 East, 155.

(*e*) See *Delafred* v. *Jones*, Ca. Prac. C. B. 34; Pr. Reg. 945. And see 2 Barnard. 399. But service by a marksman would suffice. *Baker* v. *Coglan*, 7 C. B. 131.

(*f*) Lofft, 253. See *Walker* v. *Medland*, 1 D. & L. 159.

(*g*) See *Worley* v. *Bull*, Pr. Reg.

a true copy (*h*) of the writ of summons (*i*). It is not necessary to leave the copy in his actual corporal (*k*) possession; for whether the party serving the writ touches the defendant, or puts it into his hands, it is immaterial. Personal service may be effected by the defendant being seen and the process being brought to his notice (*l*). And if, after defendant is informed of the nature of the process and tendered the copy, he refuses to receive it, then placing it on his person (*m*), or throwing it down in his presence (*n*), would be sufficient service. But the question, whether personal service has been effected in any particular instance must depend upon its peculiar facts (*o*). Where a writ was put through the crevice of a door to the defendant, who had locked himself in, the service was deemed insufficient (*p*). Upon serving the copy it is not necessary to show the writ itself (*q*), unless the defendant asks to see it at the time of, or, as it seems, immediately after, the service (*r*).

As to the mode of proceeding where personal service cannot be effected, *see post*, p. 236.

On particular defendants.

As to the mode of effecting service on particular defendants when the rules provide a special mode, *see post*, p. 234.

In action for recovery of land.

As to service of the writ in actions for recovery of land in cases of vacant possession, *see R. of S. C., Ord. IX. r. 8, post, Vol. 2, Ch. CVI.*

Of amended writ.

An amended writ must be served in the same manner as an original one (*s*).

Obstructing service, &c.

If the defendant or any other person wilfully obstruct the service of the writ, or if he speak contemptuous words of the Court or the writ, he may be punished by attachment. The case, however, must be very clear to induce the Court to issue an attachment (*t*). Merely assaulting the party who attempts the service, or tearing up the writ (*u*), or snatching it out of his hands with great violence (*x*) will not suffice. We shall, however, more fully consider in another place what will amount to a contempt of Court, and in what cases an attachment will be granted. (*See Vol. 2, Ch. LXXXIII.*)

Where wrong party served.

If a wrong party is served, it is advisable to give him a notice stating that he has been served by mistake, and requesting him not to appear, in order that the plaintiff may not be liable to costs (*y*).

351: *Smith* v. *Muller*, 3 T. R. 627: *Christie* v. *Walker*, 8 Moore, 33; 1 Bing. 48.

(*h*) See *Peter* v. *Reignier*, Barnes, 410: *Byers* v. *Whittaker*, Barnes, 406; Pr. Reg. 344; 2 Barnard. 318: *Ashbrook* v. *Townley*, 2 B. & Ad. 416.

(*i*) See C. L. P. Act, 1852, s. 17.

(*k*) *Digby* v. *Thompson*, 1 Dowl. 363: *Thompson* v. *Pheney*, Id. 441.

(*l*) *Thompson* v. *Pheney*, supra. And see *Phillips* v. *Ensell*, 2 Dowl. 684; 1 C. M. & R. 374.

(*m*) *Bell* v. *Vincent*, 7 D. & R. 233.

(*n*) See per *Patteson*, J., 1 Dowl. 443.

(*o*) *Heath* v. *White*, 2 D. & L. 40; 13 L. J., Q. B. 218.

(*p*) *Christmas* v. *Eicke*, 6 D. & L. 156. But see *Smith* v. *Wintle*, Barnes, 405.

(*q*) *Worley* v. *Glover*, 2 Stra. 877: *Panchard* v. *Woolley*, Barnes, 302: *Boswell* v. *Roberts*, Id. 422.

(*r*) *Thomas* v. *Pearce*, 4 D. & R. 317; 2 B. & C. 761: *Edgar* v. *Farmer*, Hardw. 138: *Westley* v. *Jones*, 5 Moore, 162: *Petit* v. *Ambrose*, 6 M. & Sel. 274.

(*s*) *The Cassiopeia*, 4 P. D. 188; 48 L. J., P. 39, C. A.

(*t*) *Adams* v. *Hughes*, 1 B. & B. 24.

(*u*) *Myers* v. *Wills*, 4 Moore, 147.

(*x*) *Weekes* v. *Whitely*, 3 Dowl. 536.

(*y*) See *Richards* v. *Hanley*, 10 Jur. 1057, Q. B.: *Walker* v. *Melland*, 1 D. & L. 159: *Kelly* v. *Lawrence*, 33 L. J., Ex. 197; 12 W. R. 413. As to a party not being the party intended to be served, moving to set aside the writ for irregularity, see post, p. 241.

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Setting aside service.

An application to set aside the service should be made, in ordinary cases within the time limited for entering an appearance (*z*). An irregularity in the service may be waived by an appearance or otherwise (*a*).

20. Service on particular defendants.

20. *Service on particular Defendants.*]—The rules and cases with reference to the service of the writ on particular defendants will be found fully considered hereafter in the respective chapters of Part XII., which treats of "*Actions by and against particular Persons.*" It has been thought advisable, however, to set out the following rules relating to the matter in this place:—

Husband and wife.

By *Ord. IX. r.* 3, "When husband and wife (*b*) are both defendants to the action, they shall both be served unless the Court or a judge shall otherwise order." (*See post, Vol.* 2, *Ch. CI.*)

Infant.

By *Ord. IX. r.* 4, "When an infant is a defendant to the action, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made or to be made on the infant shall be deemed good service."

As to an infant defending by guardian, and as to actions against infants, *see Vol.* 2, *Ch. XCIX.*

Lunatic.

By *Ord. IX. r.* 5, "When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he is, shall, unless the Court or judge otherwise orders, be deemed good service on such defendant."

As to lunatics defending actions by committees or guardians, *see Ord. XVIII., Vol.* 2, *Ch. C.*

Partners.

By *Ord IX. r.* 6 (*c*), "Where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm."

By *Ord. IX. r.* 7, "Where one person carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and such service, if sufficient in other respects, shall be deemed good service on the person so sued."

(*z*) See post, p. 241. *Child* v. *Marsh*, 3 M. & W. 433; 6 Dowl. 576: *Davis* v. *Sherlock*, 7 Dowl. 530: *Patterson* v. *Busby*, 5 M. & W. 521; 7 Dowl. 868: *Hinton* v. *Stevens*, 4 Dowl. 283; 1 H. & W. 521.

(*a*) See *Forbes* v. *Smith*, 10 Ex. 717; 24 L. J., Ex. 167: *Holt* v. *Ede*, 1 D. & L. 68.

(*b*) As to actions against husband and wife, see Vol. 2, Ch. CI.

(*c*) See post, Ch. XCIII. This rule was held not to apply to the now obsolete proceedings under the Bills of Exchange Act. *Pollock* v. *Campbell*, 1 Ex. D. 50; 45 L. J., Ex. 199.

To enable service of a writ to be made under this rule upon the defendant's manager, it is not necessary that the defendant himself should be within the jurisdiction. It is enough if he carries on the business in the name of a firm, and has a place of business within the jurisdiction under the control or management of some person (*d*).

Corporation, &c.

By *Ord. IX. r.* 8 (*e*), "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate (*f*) may be served on the mayor or other head officer, or on the town clerk, clerk (*g*), treasurer or secretary of such corporation; and every writ of summons issued against the inhabitants of a hundred or other like district may be served on the high constables thereof, or any one of them, or, where there is no high constable, on any other acting chief officer of police of the county in which such hundred or district is situate; and every writ of summons issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being a part of a hundred or other like district, on some peace officer thereof: and where by any statute, provision is made for service of any writ of summons, bill, petition, summons, or other process upon any corporation, or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, every writ of summons may be served in the manner so provided." Service on a company established under the Companies Act, 1862, may be effected by post (*h*). See further as to service on such companies, *post*, *Ch. XCII.* See as to service of writs upon railway companies and other corporations, *Ch. XCII.* As to service of writs upon banking and other public companies entitled to sue and be sued in the name of their public officer, *see Ch. XCII.* There are other statutory enactments pointing out the mode of service in actions against commissioners, public companies, &c. (*i*). When a foreign corporation carries on business in England, they may be said to be domiciled in England and resident where they carry on business, and in that case service on the head clerk or officer at the English branch would be sufficient, and it is not necessary to serve process on the officer at the head office abroad (*k*).

21. Indorsement of service.

21. *Indorsement of Service.*]—By *Ord. IX. r.* 15 (*l*), "The person serving a writ of summons shall, within three days at most after

(*d*) *O'Neil* v. *Clason*, 46 L. J., Q. B. 191.

(*e*) Cp. C. L. P. Act, 1852, s. 16.

(*f*) A colonial government is not a corporation within this rule; *Sloman* v. *Governor of New Zealand*, 1 C. P. D. 563.

(*g*) See *Walton* v. *Universal Salvage Co.*, 16 M. & W. 438, where it was held that service on a clerk in the office of the secretary was insufficient. *Mackreth* v. *The Glasgow, &c. Railway Co.*, L. R., 8 Ex. 149; 42 L. J., Ex. 82.

(*h*) *White* v. *Land and Water Company*, W. N. 1883, 174; Bitt. Ch. Cas. 193.

(*i*) See *Williams* v. *The Commissioners for Executing the Office of Lord High Admiral*, 11 C. B. 420; 2 L. M. & P. 456; 20 L. J., C. P. 245, as to the mode of serving such commissioners.

(*k*) *Newby* v. *Von Oppen & Colt's Patent Firearms Co.*, L. R., 7 Q. B. 293; 41 L. J., Q. B. 148; *Palmer* v. *Gould's Manufacturing Co.*, W. N. 1884, 63; Bitt. Ch. Cas. 194.

(*l*) See former enactment, C. L. P. Act, 1852, s. 15. As to when the server of a writ can be sued for not making the above indorsement, see *Curlewis* v. *Broad*, 1 H. & C. 322; 31 L. J., Ex. 473.

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such service, indorse (*m*) on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made. This rule shall apply to substituted as well as other service" (*n*).

It has been held that the rule does not apply where notice in lieu of service has been given out of the jurisdiction (*o*).

The indorsement must be made on an amended writ after it is served (*p*).

When dispensed with.

The time for making the indorsement may be extended (*q*); but it is doubtful whether it could in any case be altogether dispensed with. In a case before the *Com. Law Proc. Act*, 1852, where the defendant had improperly got possession of the writ of summons, the Court allowed an appearance to be entered by the plaintiff without the indorsement, and ordered the defendant to pay the costs (*r*). And in another case before that Act where, on the service of the writ, the defendant denied that he was the party named in it, and the server in consequence omitted to make the indorsement within the three days, the Court allowed him to make it afterwards (*s*). But before that Act the Court refused to allow the same where the writ was sent by the plaintiff to the defendant, at his request, who kept it, and did not appear; the Court observing, that the plaintiff had brought himself into the difficulty by not following the usual course (*t*).

By whom to be made.

The person serving the writ must make the indorsement. It may be made by a marksman (*u*).

22. Substituted or other service.

22. *Substituted or other Service when prompt Personal Service cannot be effected.*]—By *R. of S. C., Ord. IX. r.* 2, "When service is required the writ shall, *wherever it is practicable*, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a judge that the plaintiff is from any cause *unable to effect prompt personal service*, the Court or judge may make such order for *substituted* or *other service*, or for the *substitution for service of notice*, by advertisement or otherwise, as may be just." By this rule the former practice of making an order to proceed as if service had been effected is abolished (*x*); and three modes in which service may be ordered, where prompt personal service cannot be effected, are pointed out.

Substituted service.

The first of these is *substituted service*, a mode of procedure formerly in use in the Court of Chancery, and authorized by the statute 15 & 16 *V. c.* 86, *s.* 5, and the *Consol. Ord., Ord. X. r.* 2.

(*m*) See form, Chit. F., p. 65.

(*n*) This last sentence overrules the decisions in *Dymond* v. *Croft*, 3 Ch. D. 512; 45 L. J., Ch. 604 (C. A.); *Cruse* v. *Kittingell*, W. N. 1875, 250.

(*o*) *Re Livesey, Fish* v. *Chatterton*, 47 L. T. 328, V.-C. B. But see the form of writ, R. of S. C., App. A., No. 10, Chit. F., p. 85; and cp. *Hastings* v. *Hurley*, 16 Ch. D. 734.

(*p*) *The Cassiopeia*, 4 P. D. 188; 48 L. J., P. 39.

(*q*) *Hastings* v. *Hurley*, 16 Ch. D. 734; *Sproat* v. *Peckett*, 48 L. T. 755.

(*r*) *Brooke* v. *Edridge*, 2 Dowl. 647.

(*s*) *Burrows* v. *Gabriel*, 4 D. & L. 107; 1 B. C. Rep. 159.

(*t*) *Atkinson* v. *Howell*, 7 M. & W. 213; 8 Dowl. 872. And see *Russell* v. *Lowe*, 2 Dowl., N. S. 233.

(*u*) *Baker* v. *Coghlan*, 7 C. B. 131.

(*x*) *Anon.*, W. N. 1875, 202.

Substituted service consists of serving some person, such as his agent or solicitor, instead of the defendant himself. The principle being that the person to be served must be either a person authorized to accept service or a person who will certainly communicate the fact of the service to the defendant (*y*). It was allowed in a case where the defendant, who was abroad, had a solicitor in this country (*z*), or an agent in this country, managing the matters in relation to which the suit was commenced (*a*). So it was ordered to be effected on the solicitor of the plaintiff in an action at law brought against the plaintiff in the Chancery suit in which the order was made (*b*). So substituted service was ordered on a solicitor who had acted for the defendant in transactions connected with the subject-matter of the suit, the bill being also ordered to be served at the defendant's residence abroad, when personal service had been attempted but found impracticable (*c*). Where the suit was against a firm, some of the members of which resided abroad, substituted service on those within the jurisdiction has been allowed (*d*). In a creditor's administration suit, service on the administratrix of the intestate for the heir has been allowed (*e*). Service on the medical officer of a lunatic asylum, who refused to allow the defendant, who was one of the inmates, to be seen, has been allowed (*f*). In a suit for specific performance of an agreement for the sale of a ship, substituted service on the master, who was the authorized agent of the owner in the matter, was allowed (*g*). Substituted service should, however, only be ordered where there is a probability that the writ or notice of it will reach the defendant (*h*). As to service on a defendant who is in prison, see *Bland* v. *Bland*, L. R., 3 P. & M. 233. As to who is an agent, for purposes of service, see *Swanzy* v. *Southwell*, Ir. C. A., 64 L. T. Journ. 388. As to substituted service on a corporation, see *Royal Mail S. P. Co.* v. *Braham*, 2 App. Cas. 381.

Under the present rule, where the solicitors of a defendant, who was in India, refused to accept service for him, substituted service was ordered on them and on the defendant's clerk, six weeks being allowed for appearance (*i*). Service on defendant's wife has also been ordered (*k*).

(*y*) *In re Slade*, *Slade* v. *Hulme*, 45 L. T. 276; 30 W. R. 28, *Fry*, J.: *Hope* v. *Hope*, 4 De G., M. & G. 328; 23 L. J., Ch. 682, where the principles on which substituted service is allowed are stated by Lord Cranworth. See *Hobhouse* v. *Courtney*, 12 Sim. 140; 10 L. J., Ch. 377.

(*z*) *In re Slade*, supra.

(*a*) *Hope* v. *Hope*, supra.

(*b*) *Sergison* v. *Beavan*, 16 Jur. 1111: *Baillie* v. *Blanchet*, 10 L. T. 365.

(*c*) *Hope* v. *Carnegie*, L. R., 1 Eq. 126: *The Pommerania*, 4 P. D. 195; 48 L. J., P. 55. See also *Cooper* v. *Wood*, 5 Beav. 391.

(*d*) *Kinder* v. *Forbes*, 2 Beav. 503: *Leese* v. *Martin*, L. R., 13 Eq. 77.

(*e*) *Deanes* v. *Kitchin*, L. R., 13 Eq. 461; 25 L. T. 930; 20 W. R. 353.

(*f*) *Raine* v. *Wilson*, L. R., 16 Eq. 576; 43 L. J., Ch. 469: cp. *Thorn* v. *Smith*, 27 W. R. 617.

(*g*) *Hart* v. *Herwig*, L. R., 8 Ch. 860; 29 L. T. 47; 21 W. R. 663.

(*h*) *Wolverhampton, &c. Banking Co.* v. *Bond*, 43 L. T. 721; 29 W. R. 599, M. R.: *Furber* v. *King*, 29 W. R. 535, V.-C. B.

(*i*) *Armitage* v. *Fitzwilliam*, W. N. 1875, 238. See also Id. 1876, 21: and see *Dymond* v. *Croft*, 3 Ch. D. 512.

(*k*) *Bank of Whitehaven* v. *Thompson*, W. N. 1877, 45. In *Coulburn* v. *Carshalt*, 32 W. R. 33, the Court, where the defendant had absconded, and was believed to be out of the

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The rule, however, only applies to cases where there could be, but for difficulties in the way, personal service; it does not enable the plaintiff to serve a defendant, such as a colonial government, who could not be effectually served at all (*l*). It did not apply to actions under the now obsolete Bills of Exchange Act, 1855 (*m*). Substituted service on the ambassador of a foreign sovereign, named as a defendant, will not be allowed (*n*).

Service by advertisement.

Secondly, service under this rule may, in cases within it, as in the case of an absconding defendant within the jurisdiction, be ordered to be effected by leaving a copy of the writ at the defendant's place of business, and at the lodgings which he had lately occupied, and by inserting advertisements in the "London Gazette" and "Times" (*o*), or by sending a copy of the writ to the defendant's last known place of abode by post, and inserting advertisements in newspapers as to the writ (*p*), or by serving a copy of the writ on the defendant's wife, leaving a copy at his house and inserting advertisements in newspapers (*q*), or by leaving a copy of the writ at each of several houses sought to be recovered, and advertising in the same manner (*r*). In this case the eight days run from the service of the copy and issue of the advertisements (*r*). In a case where the defendant appeared to be avoiding personal service, service was ordered to be effected by leaving a copy of the writ at his dwelling-house and place of business, and sending one to him by post (*s*).

Service by notice.

The third mode is by *substituting a notice for service*. This is not applicable in the ordinary case of an absconding debtor within the jurisdiction (*o*); but it was allowed in a case where the defendant's only known place of residence was a club, and the solicitors who had acted for him in other matters refused to accept service, the notice being given by means of letters addressed to the defendant at his club, and at his solicitors, respectively, and by inserting advertisements in the "London Gazette," the "Times," and another morning paper (*t*).

Application for leave.

Leave to serve the writ in any of the modes above pointed out is obtained on an *ex parte* application to a Master at Chambers.

Affidavit.

By *R. of S. C., Ord. X.*, "Every application to the Court or a judge, for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made."

To obtain an order for substituted or other service the affidavit (*u*)

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jurisdiction, allowed service on his brother and by advertisement, on the terms that the plaintiff brought any money recovered into Court, to abide further order.

(*l*) *Sloman* v. *Government of New Zealand*, 1 C. P. D. 563; 46 L. J., C. P. 185.

(*m*) *Pollock* v. *Campbell*, 1 Ex. D. 50.

(*n*) *Stewart* v. *Bank of England*, W. N. 1876, 263.

(*o*) *Cook* v. *Day*, 2 Ch. D. 218; 45 L. J., Ch. 611: *Hamilton* v. *Parker*, 68 L. T. (Jour.) 299. Q. B. D., Feb. 18th, 1880: *Wolverhampton, &c. Banking Co.* v. *Bond*, 43 L. T. 721: cp. *Hunt* v. *Austin*, 9 Q. B. D. 598; 51 L. J., Q. B. 455.

(*p*) *Hamilton* v. *Davies*, W. N. 1880, 92, V.-C. M.

(*q*) *Mullows* v. *Bannister*, W. N. 1882, 183; 28 W. R. 238.

(*r*) *Crane* v. *Jullion*, 2 Ch. D. 220, 24 W. R. 691, V.-C. H.

(*s*) *Capes* v. *Bower*, 24 W. R. 40; W. N. 1876, 193.

(*t*) *Rafall* v. *Ongley*, 34 L. T. 124. See also *Hartley* v. *Dilke*, 35 L. T. 706: *Whitely* v. *Honeywell*, 35 L. T. 517.

(*u*) See Chitty's Forms, pp. 87 and 91.

should be endorsed "Affidavit in support of application for substituted service." The further proceedings are similar to those detailed *ante*, p. 230, to obtain the renewal of a writ of summons.

Under the *Com. Law Proc. Act* (sect. 71), where personal service could not be effected, in order to proceed without it, it was necessary to satisfy the Court or a judge that reasonable efforts had been made to effect personal service, and either that the writ had come to the knowledge of the defendant, or that he wilfully evaded service of the same. Where the defendant was out of the jurisdiction, an order to proceed in the absence of appearance was obtainable *ex parte*, on an affidavit showing:—1st. That there was a cause of action against the defendant, which arose within the jurisdiction, *or* in respect of the breach of a contract made within the jurisdiction; 2nd. That the writ or notice (in case of the defendant not being a British subject) was personally served upon him, or that reasonable efforts were made to effect personal service thereof upon him, and that it came to his knowledge; 3rd. That the defendant either wilfully neglected to appear to the writ, *or* that he was living out of the jurisdiction of the Courts in order to defeat and delay his creditors; 4th. That the defendant was or was not a British subject (as the case might be); 5th. That no appearance had been entered; and, Lastly, of the official character and signature of the consul-general, or other officer, before whom any affidavit used before the judge had been sworn. If the order were granted on false grounds stated in the application for it, or was otherwise wrongly obtained, it might have been set aside on an application made in a reasonable time(*x*). The Courts would not, it seems, have set aside a judge's order, giving the plaintiff liberty to proceed in the action on the ground that the affidavit, on which it was obtained, was false; and it also seems, that if the motion was founded on the insufficiency of the affidavits used at chambers, the Court would only have set aside the order upon affidavits negativing the facts, in which the original affidavit was insufficient (*y*). The affidavit was required to show that the writ and indorsements were regular (*z*), also what calls had been made at the defendant's place of *residence*. It was not enough to state that the calls were made at the "house" of the defendant (*a*), or at his office or place of business, unless the affidavit also stated that the defendant had no residence (*b*); or that his residence was unknown, and that reasonable efforts (showing them) had been made to ascertain it (*c*). It must have stated distinctly what the party who endeavoured to serve the writ actually said on each call (*d*), also what answers were given to his inquiries, in order that the judge might decide from the materials

(*x*) *Hutton* v. *Whitehouse*, 1 H. & N. 32.

(*y*) *Lewis* v. *Padwick*, 9 C. B. 224; 2 L., M. & P. 78, n. (*a*); 19 L. J., C. P. 241: *Whitaker* v. *Crocker*, 2 L., M. & P. 76.

(*z*) *Wakeley* v. *Teesdale*, 2 L., M. & P. 85. See *Fitzgerald* v. *Evans*, 5 M. & Gr. 207; 2 Dowl., N. S. 916; 6 Scott, N. R. 220: *Russell* v. *Joy*, 11 Jur. 824.

(*a*) Per *Maule*, J., *Batho* v. *Dickman*, 6 C. B. 26.

(*b*) *Russell* v. *Knowles*, 7 M. & Gr. 1001; 2 D. & L. 595; 8 Scott, N. R. 715.

(*c*) *Davies* v. *Westmacott*, 7 C. B., N. S. 829; 29 L. J., C. P. 109: *Baker* v. *Cox*, 1 Exch. 153: *Anon.*, 2 D. & L. 1001. See *Elburne* v. *Marshall*, 1 Dowl., N. S. 188: *Rock* v. *Adam*, 3 D. & L. 817: *Williams* v. *Orpe*, 9 Jur. 711, Q. B.

(*d*) *Dubois* v. *Lowther*, 4 C. B. 228.

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thus furnished whether the defendant was, in truth, in the neighbourhood, and kept out of the way to avoid personal service (*e*). It was necessary that the affidavit should show that there had been *three* several calls made on three *different days* at the defendant's residence, and that *each* of the *last two* calls were made pursuant to appointment; and where an appointment was made, the day and hour at which it was intended to be kept should have been specified (*f*). Two calls on the same day would do where the server was told at the house to call again in the course of the day, and did not himself make the appointment (*g*). There was no necessity that the calls should be made by the same person (*h*). Where calls had been made at the defendant's residence, and answers given on two occasions, that he was at home, but could not be seen; and on another occasion, that he was at home, but ill: and the deponent swore to his belief that the defendant was bedridden, and had been confined to his house for many years, *Coleridge*, J., thought the facts deposed to were sufficient, without any averment of belief that the defendant was keeping out of the way to avoid service of the writ (*i*). The practice required that a copy of the writ should be left at the defendant's residence (*k*). If the residence was unknown, the copy had to be served in the best way that the circumstances admitted of. Where it was unknown, and a copy was sent by post to defendant's attorney, and there were circumstances which justified the belief that it had reached the defendant's hands, the Court granted a rule for distringas (*l*). It was the practice to require the copy to be left at the last of the three calls (*m*). But in one case the Court of Common Pleas considered it sufficient if left at the second (*n*). It was further necessary that the affidavit should state that the defendant has not appeared to the writ. It was required to show a recent search for the appearance (*o*).

Under the present practice the affidavit is required to show, very much in the same manner as under the former practice, what efforts have been made to effect personal service and why it cannot be effected, and also to state the manner in which it is proposed to effect service, and facts showing that that manner is likely to be effective and ought to be adopted. No affidavit of search for appearance is now necessary.

(*e*) *Fisher* v. *Goodwin*, 2 C. & J. 94.

(*f*) *Todd* v. *Crosby*, 5 Scott, N. R. 517: *Wills* v. *Bowman*, 2 Dowl. 413: *Smith* v. *Good*, Id. 398: *Johnson* v. *Disney*, Id. 400: *Atkinson* v. *Clean*, 5 Dowl. 252: *Newman* v. *Hickman*, 9 Dowl. 546: *Smith* v. *Scott*, 6 Jur. 1042: *Snow* v. *Keith*, Id. 995. But *Erle*, J., in *Gorringe* v. *Terrewest*, 2 L., M. & P. 12; 20 L. J., Q. B. 209, held, that this was merely a rule of practice, and that affidavits showing that the plaintiff had adopted any course of proceeding which would bring him within the statute would be sufficient. And see *Clayton* v. *Marsham*, 5 Dowl. 542.

(*g*) Per *Patteson*, J., *Jamieson* v. *Wilkins*, 2 Dowl., N. S. 331: *Stokes* v. *Bland*, 7 Jur. 176, Q. B.

(*h*) *Smith* v. *Good*, 2 Dowl. 398.

(*i*) *Wilkins* v. *Jones*, 3 D. & L. 747.

(*k*) *Street* v. *Lord Alvanley*, 1 C. & M. 27; 3 Tyr. 162; 1 Dowl. 638: *Hooker* v. *Tooke*, 1 Hodges, 315.

(*l*) *Moody* v. *Morgan*, 7 Dowl. 144. See *Houghton* v. *Howarth*, 4 Dowl. 749: *Archer* v. *Brindley*, 9 Dowl. 38.

(*m*) *Smith* v. *Good*, 2 Dowl. 398: *Hill* v. *Moule*, Id. 10; 1 C. & M. 617: *Mason* v. *Lee*, 5 N. & M. 240.

(*n*) *Webb* v. *Jenkins*, 7 Dowl. 135.

(*o*) *Hooker* v. *Townsend*, 1 Hodges, 204.

The affidavit in support of an application for substituted service of a bill in chancery, was required to show what attempts had been made to serve the defendant, and that all practicable means of doing so had been tried (*t*).

Substituted or other service, when duly made in accordance with an order, is, so long as the order stands, as effectual for all purposes as if the writ had been personally served (*u*). Effect of.

Unless the order shall otherwise direct, a copy of the order and of the writ is deemed to have been served the day following the day on which a prepaid letter containing such copy has been posted (*x*).

23. *Setting aside Service.*]—If the service of the writ be irregular the defendant may move to set it aside. 23. Setting aside service of writ.

By *Ord. XII. r.* 30, "A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance (*y*), to serve notice of motion to set aside the service upon him of the writ or notice of the writ, or to discharge the order authorizing such service."

This rule applies chiefly in cases where service out of the jurisdiction is ordered (*see post*, p. 249). The application must be made to the Court, as the rule says, "serve notice of motion" (*z*).

24. *Proceedings to ascertain whether Writ issued with Solicitor's Authority.*]—*See post*, p. 250.

25. *Declaration of Names and Addresses of Partners.*]—*See Ord. VII. r.* 2, *ante*, p. 116.

26. *Defects in Writ or Copy, how taken advantage of, &c.*]—We have already seen, in the preceding pages, in what respects the writ may be defective. As regards the mode of taking advantage of such defect, or of a variance between the writ and statement of claim, the defendant cannot in general take such advantage either by way of defence (*a*) or appeal (*b*). But, for some defects in the writ, or in the copy thereof, which we have pointed out, the writ or the service thereof may be set aside; but in general, where the defect is of a technical character, no advantage is obtained by making an application to set aside the writ or service, as in general an amendment will be allowed (*Ord. XXVIII. r.* 12, *post*, *Ch. XLII.*). 26. Defects in writ or copy, how taken advantage of, &c.

An irregularity in the writ or the copy may be waived (*c*). Irregularity may be waived.

If the plaintiff discover the irregularity before the defendant has appeared, he may give him notice not to appear, and this would Plaintiff's proceedings on finding irregularity.

(*t*) *Firth* v. *Bush*, 9 Jur., N. S. 431. See *Brooker* v. *Smith*, 4 L. T. 545.

(*u*) *Watt* v. *Barnett* (C. A.), 3 Q. B. D. 363; 38 L. T. 903; 26 W. R. 745: *S. C.* 47 L. J., Q. B. 329.

(*x*) Masters' Practice Rules. See Vol. 2, Appendix.

(*y*) It was formerly necessary to enter a conditional appearance. Cp. *Nelson* v. *Pastorino*, 49 L. T. 564.

(*z*) So held by Lord *Coleridge*, C. J., and *Watkin Williams*, J., in *Clarke* v. *Laidlow*, Q. B. D., 12th March, 1884.

(*a*) *Boats* v. *Edwards*, 1 Doug. 227: *Deshons* v. *Head*, 7 East, 383.

(*b*) See 1 Saund. 318 a; *King* v. *Bishop of Carlisle*, Barnes, 9, post.

(*c*) *Holmes* v. *Russell*, 9 Dowl. 487: *Chalkeley* v. *Carter*, 4 Dowl. 480. And see *Davis* v. *Sherlock*, 7 Dowl. 530: *Holt* v. *Ede*, 1 D. & L. 68; 5 M. & Gr. 689; 6 Sc. N. R. 699. See, in general, how an irregularity may be waived, Vol. 2, Ch. XLII.

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afford an answer to the defendant's subsequent application to set aside the writ or the service for irregularity. But, if the defendant has really incurred any costs (which would be allowed him on taxation) before the service of such notice the plaintiff should tender them, otherwise he might be compelled to pay them.

Who may take advantage of it.

Any person served with a writ may apply to set it or the service aside for irregularity, although he may not have been the party intended to be served (*d*).

In what time application to be made.

The application must be made within the eight days limited for entering an appearance (*e*) (unless there be some good excuse to be made for the delay), and before an undertaking to appear (*f*), and before the defendant takes any step after knowledge of the irregularity (*g*). But if the writ be absolutely *void* (which can rarely be the case (*h*)), the application might be made after the above time. As to setting aside proceedings for irregularity in general, and how an irregularity may be waived, &c., *see post, Ch. XLII.*

To whom.

The application to set aside the writ or the service thereof should be made by summons to a Master at Chambers (*i*).

Affidavit in support of.

The affidavit in support of the application to set aside the service upon the ground that the copy served is defective, need not show that the defendant has not been served with a regular copy (*k*), nor need it show that the party making the application is a defendant in the cause (*l*). As to the form of the affidavit when the application is made upon the ground that there is no indorsement of the amount of debt and costs on the copy of the writ, *see ante*, p. 224.

Form of application.

Where the irregularity is only in the writ, the defendant should apply to set the writ aside (*m*); but if the irregularity be carried into the copy, the application may be either to set aside the writ or the service (*n*). Where the copy only is defective, the application should be to set aside the service (*o*) and subsequent proceedings, but not the copy of the writ (*o*) or writ itself (*p*).

27. Amendment of writ.

27. *Amendment of Writ.*]—An amendment of a writ of summons may be made (*r*) by leave of a master (on payment of fee) before

(*d*) *Pilbrow* v. *Pilbrow*, 3 C. B. 730: *Stevenson* v. *Thorne*, 13 M. & W. 149.

(*e*) *Tiley* v. *Hodgson*, 2 D. & L. 655: *Fox* v. *Money*, 1 B. & P. 250: *R.* v. *Hare*, 1 Stra. 155: *Steele* v. *Morgan*, 8 D. & R. 450. See *Newnham* v. *Hanny*, 5 Dowl. 263, per *Littledale*, J.

(*f*) See *Holiday* v. *Lawes*, 3 Bing. N. C. 541: *Anon.*, 1 Chit. 129: *Homfray* v. *Kenning*, 2 Chit. 236.

(*g*) Ord. LXX., r. 2, post, Ch. XLII.

(*h*) See *Hanson* v. *Shackleton*, 4 Dowl. 48; 1 H. & W. 342: *Gurney* v. *Hopkinson*, 3 Dowl. 189; 1 C. M. & R. 587: *Child* v. *Marsh*, 6 Dowl. 576.

(*i*) *Lomas* v. *Price*, 2 B. C. R. 193.

(*k*) *Patterson* v. *Busby*, 5 M. & W. 521.

(*l*) *Stevenson* v. *Thorne*, 13 M. & W. 449.

(*m*) *Hasker* v. *Jarmaine*, 1 C. & M. 408: *S. C. Anon.*, 1 Dowl. 654. See *Cohen* v. *Watson*, 3 Tyr. 238.

(*n*) *Truslove* v. *Whitechurch*, 1 Sc. N. R. 415; 1 M. & Gr. 426; 8 Dowl. 837: *Wills* v. *Dawson*, 2 Dowl., N. S. 465: *Chapman* v. *Becke*, 3 D. & L. 350.

(*o*) *Argent* v. *Reynolds*, 6 Dowl. 480: *Gedge* v. *Bishop*, 2 Sc. N. R. 203; 9 Dowl. 57, nom. *Kenny* v. *Bishop*: *Crow* v. *Field*, 8 Dowl. 231: *Truslove* v. *Whitechurch*, 1 Sc. N. R. 415; 1 M. & Gr. 426; 8 Dowl. 837: *Hall* v. *Redington*, 5 M. & W. 605.

(*p*) *Chalkeley* v. *Carter*, 4 Dowl. 480; 1 T. & Gr. 210. See *Huggett* v. *Parkin*, 1 Bing. 65: *Wills* v. *Dawson*, supra, n. (*n*).

(*r*) Ord. XXVIII. r. 12, post, Ch. XLII. *Pleasants* v. *East Dereham*

service (*s*). A plaintiff can be struck out by special leave given on the order to amend; a defendant, by special leave or on written statement (to be filed) of the plaintiff's solicitor that a notice of discontinuance under *Ord. XXVI. r.* 1, has been given (*s*).

If the writ has not been served, leave to amend it may be obtained *ex parte* (*t*). If it has been served a summons is necessary. In ordinary cases it is not necessary to have any affidavit in support of the application (*u*). Leave to amend by adding a clause for recovery of possession of land which could not have been added originally without leave, has been refused (*x*). So has leave to amend by adding an entirely new case of fraud (*y*).

It would seem that an amendment would be allowed in a writ of summons, although more than twelve months have elapsed since it issued (*z*); but the writ cannot be amended by ante-dating it, even to save the Statute of Limitations (*a*). After the amendment of a writ of summons by substituting the real for the nominal plaintiff, it was held that the commencement of the action reckoned from the date of the writ, and not from the amendment (*b*). An amended writ must be served and the indorsement of service made on it in the same manner as an original writ (*c*).

When the statement of claim has once been delivered, amendment of the indorsement of the writ is unnecessary (*d*).

Before the Judicature Acts it was held that a writ might be altered for the purpose of curing a mistake in it and restamped before it was served, but not afterwards (*e*), without an order allowing an amendment. It was also held that if, after being so altered, it were restamped on a different day to the original teste, the teste need not have been altered to make it correspond with the time of rescaling (*f*); and that if altered in any material part without being restamped, it might be set aside, or perhaps it would be a nullity (*g*). But since those Acts it has been held that an

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Local Board, 47 L. T. 439. See the former enactment, C. L. P. Act, 1852, ss. 20, 21. See *La Banca Nazionale Sede di Torino* v. *Hamburger*, 2 H. & C. 330: *Cornish* v. *Hocking*, 1 El. & Bl. 602; 22 L. J., Q. B. 142: *Lord Bolingbroke* v. *Townsend*, 42 L. J., C. P. 255, where plaintiff sued a local board in the name of their clerk instead of their own name, and an amendment was allowed. As to amending a copy of the writ, see *Moore* v. *Magan*, 16 M. & W. 95: *Eccles* v. *Coles*, 8 M. & W. 537.

(*s*) Masters' Practice Rules. See Vol. 2, Appendix.

(*t*) Per *Lush*, J., Bitt. No. ii.

(*u*) *Conybeare* v. *Lewis*, 44 L. T. 242; 29 W. R. 391.

(*x*) *Musgrave* v. *Stevens*, W. N. 1881, 163.

(*y*) *Hendricks* v. *Montague*, 50 L. J., Ch. 257.

(*z*) See *Eccles* v. *Coles*, 8 M. & W. 537.

(*a*) *Clark* v. *Smith*, 2 H. & N. 753; 27 L. J., Ex. 155.

(*b*) *Coombes* v. *Bristol and Exeter R. Co.*, 1 F. & F. 206.

(*c*) *The Cassiopeia*, 4 P. D. 188; 48 L. J., P. 39.

(*d*) Ord. XX. r. 4, post, Ch. XIX. Cp. *Large* v. *Large*, W. N. 1877, 198; *Johnson* v. *Palmer*, 4 C. P. D. 258: *Moore* v. *Atwill*, 8 L. R., Ir. 245.

(*e*) *Glenn* v. *Wilkes*, 4 Dowl. 322: *Siggers* v. *Sansom*, 2 Dowl. 745; 3 M. & Sc. 194.

(*f*) *Gibson* v. *Varley*, 7 El. & Bl. 49; 26 L. J., Q. B. 79: *Knight* v. *Warren*, 7 Dowl. 663: *Ashburton* v. *Sykes*, 1 D. & L. 133: *Braithwaite* v. *Lord Montford*, 2 C. & M. 408.

(*g*) *Siggers* v. *Sansom*, 2 Dowl. 745; 3 M. & Sc. 194. And see *Anon.*, 2 Chit. Rep. 237: *Taylor* v. *Phillips*, 3 East, 155: *Leigh* v. *Leigh*, 2 Bing. N. C. 464; 2 Scott, 666; 1 Hodges, 411: *Foot* v. *Shirreff*, 2 Bing. N. C. 528; 2 Scott, 806; 1 Hodges, 412.

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order giving leave to amend is necessary in order to make any alteration, even when the writ has not been served (*h*).

Sect. 2. *Writ of Summons where the Defendant is out of the Jurisdiction.*

In what cases.

In what Cases Leave may be obtained.]—Where the defendant is resident within the jurisdiction of the High Court (*i*) so that he can be served within it, a writ of summons may be issued against him without reference to the place where the cause of action arose (*k*). But where he is out of the jurisdiction so that he cannot be served with an ordinary writ within it, the ordinary writ will not suffice; but it is necessary to obtain leave to issue a writ or notice for service out of the jurisdiction.

By *R. of S. C., Ord. XI. r.* 1, "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—

(a.) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or

(b.) Any act, deed, will, contract (*l*), obligation or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside or enforced in the action; or

(c.) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(d.) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or

(e.) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland (*m*); or

(f.) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(g.) Any person out of the jurisdiction is a necessary *or* proper party to an action properly brought against some other person duly served within the jurisdiction" (*n*).

(*h*) Per *Lush*, J., in Chambers, Bitt. No. ii.

(*i*) See ante, p. 4.

(*k*) See *Mostyn* v. *Fabrigas*, Cowp. 161; 1 Sm. L. C. 652: *Buenos Ayres, &c. Co.* v. *Northern, &c. Co. of Buenos Ayres*, 2 Q. B. D. 210: *Whitaker* v. *Forbes*, 1 C. P. D. 51. See Ord. XXXVI. r. 1, post, Ch. LIX.; Foote, Private International Jurisp. p. 129.

(*l*) *McStephen* v. *Carnigie*, 49 L. J., Ch. 397; 42 L. T. 309, C. A.

(*m*) This prevents leave to serve a writ in Scotland or Ireland being given on any action for breach of contract. *Lenders* v. *Anderson*, 12 Q. B. D. 50; 53 L. J., Q. B. 104; 49 L. T. 537; 32 W. R. 230: cp. *Speller* v. *Bristol Navigation Co.*, 13 Q. B. D. 96.

(*n*) This apparently means that the plaintiff may issue his writ against

Leave to serve a writ or notice out of the jurisdiction can only be granted in cases within the above rule (*o*), so that practically it is only in those cases that a defendant resident abroad, and who cannot be served in this country, can be sued in the High Court.

This rule is much less comprehensive than the former one, and does not extend to claims for damages for acts done within the jurisdiction unless the defendant is ordinarily resident within it. Nor is the fact that damages have been incurred within the jurisdiction sufficient (*p*).

The expression "jurisdiction" in this rule means territorial jurisdiction (*q*), which does not extend beyond low water mark (*r*), so that an action for negligence committed on the sea beyond low water mark, though within three miles of the coast, is not within the rule (*r*).

Slander, although partaking of the nature of slander of title respecting land in this country (*s*), is not within the rule.

This rule enables a plaintiff, with leave, to issue a writ against (*t*), and serve a notice of it on, a foreign non-resident corporation or company (*u*) in respect of a cause of action within its provisions. In the case of a foreign corporation having a branch office in this country managed by a head officer or clerk, the ordinary writ may be issued and served upon him (*x*).

Leave to serve a third party notice claiming indemnity out of the jurisdiction may be given under this rule (*y*).

Where defendant in Scotland or Ireland.

Where Defendant resident in Scotland or Ireland.]—In actions for breach of contract where the defendant is domiciled or ordinarily resident in Scotland or Ireland, leave to serve the writ out of the jurisdiction cannot be obtained (*z*). In the other cases mentioned in Rule 1 (*supra*, p. 244) it may be granted, but subject to Rule 2 (*infra*).

By *R. of S. C., Ord. XI. r.* 2, "Where leave is asked from the

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several defendants, and, having served some or one within the jurisdiction, may get leave to issue a concurrent writ for service out of the jurisdiction. *Lightowler* v. *Lightowler*, W. N. 1884, 8; Bitt. Ch. Cas. 199. It will be observed that the rule says necessary *or* proper—not *and*. *Sykes* v. *Schofield*, 25 Sol. Journ. 477.

(*o*) *In re Eager, Eager* v. *Johnson*, C. A., 22 Ch. D. 86; 52 L. J., Ch. 56; 47 L. T. 685: *McStephens* v. *Carnigie*, 49 L. J., Ch. 397; 42 L. T. 309, C. A. See *In re Maugham*, 22 W. R. 748.

(*p*) *Shearman* v. *Findlay*, 32 W. R. 122.

(*q*) *In re Smith*, 1 P. D. 300; 45 L. J., P. 92; 35 L. T. 38.

(*r*) *Harris* v. *Owners of the Franconia*, 2 C. P. D. 173; 46 L. J., C. P. 363. See stat. 41 & 42 V. c. 73, giving the jurisdiction in cases of crimes committed on the seas, which was passed in consequence of the decision in *Reg.* v. *Keyn*, 2 Ex. D. 63; 46 L. J., M. C. 17.

(*s*) *Casey* v. *Arnott*, 2 C. P. D. 24; 46 L. J., C. P. 3: cp. *Bree* v. *Marescaux* (C. A.), 7 Q. B. D. 434; 50 L. J., Q. B. 676.

(*t*) *Westmann* v. *Aktiebolaget Ekmans Mekaniska Snickarefabrik*, 1 Ex. D. 237; 45 L. J., Ex. 327.

(*u*) *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404; 45 L. J., Q. B. 586.

(*x*) *Newby* v. *Van Oppen, &c. Co.*, L. R., 7 Q. B. 293; 41 L. J., Q. B. 148: *Mackereth* v. *Glasgow and South Western R. Co.*, L. R., 8 Ex. 149; 42 L. J., Ex. 82. See ante, p. 235.

(*y*) *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644.

(*z*) *Lenders* v. *Anderson*, 12 Q. B. D. 50; 53 L. J., Q. B. 104; 49 L. T. 537; 32 W. R. 230. Cp. *Speller* v. *Bristol Steam Navigation Co.*, 13 Q. B. D. 96; 53 L. J., Q. B. 322; 50 L. T. 419; 32 W. R. 670.

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Court or a judge to serve a writ, under the last preceding rule, in Scotland or in Ireland, if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be) the Court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriffs' Courts, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively."

This rule is not confined as the former rule was (*a*) to cases of contract only, but extends to all cases in which service out of the jurisdiction can be allowed. The former rule expressly required that the affidavit used in support of the application should state the particulars as to the concurrent remedy and balance of convenience necessary to enable the judge to exercise his discretion in the matter (*b*), and although the present rule does not expressly require it these particulars should always be furnished. Leave has been granted to serve the writ in Ireland (*c*) and Scotland (*d*) in several cases; but the Courts look with considerable closeness into the matter, and require that it should be clearly shown that the balance of convenience is in favour of trying the action in this country. In several cases in which this was not done the leave has been refused (*e*).

The application.

Application for Leave to issue Writ.]—No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, can be issued without the leave of a Court or judge.

A master or district registrar has no jurisdiction to grant this leave (*f*), and it is necessary before issuing the writ to obtain leave to do so from a judge at chambers. This application is made *ex parte* on an affidavit fulfilling the requirements of the rule noticed below, and the proceedings are similar to those on an application for the renewal of a writ, *ante*, p. 230. Leave to issue the writ, and to serve it, or notice of it, out of the jurisdiction, may be and usually are combined in one application and order (*g*).

The affidavit.

The Affidavit.]—By *R. of S. C., Ord. XI. r.* 4, "Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit (*h*), or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application

(*a*) *Fowler* v. *Barstow*, 20 Ch. D. 241; 51 L. J., Ch. 103.

(*b*) *Woods* v. *McInnes*, 4 Ch. D. 67; 27 W. R. 49. Cp. *Fowler* v. *Barstow*, supra.

(*c*) *Green* v. *Browning*, 34 L. T. 760.

(*d*) *Harris* v. *Fleming*, 13 Ch. D. 208; 49 L. J., Ch. 32.

(*e*) *Tottenham* v. *Barry*, 12 Ch. D. 797; 48 L. J., Ch. 641: *Ex p. McPhail*, 12 Ch. D. 632; 48 L. J., Ch. 415: *Creswell* v. *Parker*, 11 Ch. D. 601; 40 L. T. 599.

(*f*) R. of S. C., Ord. LIV. r. 12 (b).

(*g*) *Stigand* v. *Stigand*, 19 Ch. D. 460; 51 L. J., Ch. 446.

(*h*) Chitty's Forms, p. 80.

is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or judge that the case is a proper one for service out of the jurisdiction under this order."

If the application is made without an affidavit to support it, it will be refused (*i*).

The affidavit should be intituled in the matter of the Judicature Acts and of the intended action (*k*). It must state where the defendant is, or probably may be found (*l*), and whether he is a British subject or not (*m*). It must also state that the deponent is advised and believes that the plaintiff has a good cause of action arising within the jurisdiction (*n*); and further, must state what such cause of action is (*o*), and the facts out of which it arises. A mere general assertion that there is a cause of action which arose within the jurisdiction will not suffice (*p*). In cases within Rule 2 (*ante*, p. 245), the affidavit should further state the amount or value of the property in dispute so sought to be recovered; and when the defendant is resident in Scotland or Ireland, it should also show whether there is any convenient remedy (*q*), and how and why it is desirable, having regard to the comparative cost and convenience, to bring the action in this country (*q*).

The affidavit should also state such facts as to the time the post takes in reaching the defendant's residence, and how often and when next a post goes and returns, as will enable the judge to limit the time for appearance under Rule 5 (*post*, p. 248).

It is not necessary that the affidavit should be made by the plaintiff himself (*r*).

In practice the affidavit is, in the first instance, merely left with the judge's clerk at chambers, from whom the order, if it is granted, may be obtained in a day or so. The judge only hears the applicant in case of doubt or difficulty. The affidavit should be indorsed thus:—"Affidavit in support of application for leave to issue a writ for service out of the jurisdiction," *or, in the case of a foreigner*, "of application that a writ of summons may issue against the defendant *C. D.*, and that the plaintiff be at liberty to serve a notice of such writ out of the jurisdiction."

By the *Com. Law Proc. Act*, 1852, *s.* 23 (*not repealed*), "Any affidavit for the purpose of enabling the Court or a Judge to direct proceedings to be taken against a defendant residing out of the jurisdiction of the said Courts may be sworn before any consul-general, consul, vice-consul, or consular agent for the time being, appointed by her Majesty *at any foreign port or place;* and every affidavit so sworn by virtue of this Act may be used and shall be admitted in evidence, saving all just exceptions, provided it purport

(*i*) *Randall* v. *Campbell*, W. N. 1878, 204.

(*k*) *Stigand* v. *Stigand*, 19 Ch. D. 460; 51 L. J., Ch. 446; cp. *Young* v. *Brassey*, 1 Ch. D. 277: *Blake* v. *Lever*, 6 L. R., Ir. 476. See form, Chit. F., p. 80.

(*l*) Ord. XI. r. 3, supra.

(*m*) Id. This is not essential when the defendant resides in Ireland or Scotland. *Fowler* v. *Barstow*, 20 Ch. D. 240; 51 L. J., Ch. 103.

(*n*) *Shearman* v. *Findlay*, 32 W. R. 122: *Great Australian Gold Mining Co.* v. *Martin* (C. A.), 5 Ch. D. 1; 46 L. J., Ch. 289.

(*o*) Id.

(*p*) Per *Lush*, J., W. N. 1875, 202; Id. 193.

(*q*) *Woods* v. *McInnes*, 4 C. P. D. 67; 27 W. R. 49.

(*r*) *Great Australian Gold Mining Co.* v. *Martin*, 5 Ch. D. at p. 19.

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to be signed by such consul-general, consul, vice-consul, or consular agent, upon proof of the official character and signature of the person appearing to have signed the same . . . ." (*The rest of the section relates to the punishment of persons forging the signature, &c.*) As to swearing affidavits abroad before a British ambassador, &c., *see* 18 & 19 *V. c.* 42, noticed *post, Ch. XLIV.*

The order.

The Order.]—The order varies according as the defendant is or is not a British subject. If he is a British subject, it gives the plaintiff leave to issue a writ for service out of the jurisdiction (*s*); but if he is not a British subject, it orders that the plaintiff be at liberty to issue the writ and to serve a notice of it on the defendant out of the jurisdiction (*s*). *Ord. XI. r.* 6 provides that "When the defendant is neither a British subject, nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him." It has been held, that in the case of an English woman married to a foreigner resident abroad, the writ itself should be served on her, and that the service of a notice of it will not suffice (*t*).

By *R. of S. C., Ord. XI. r.* 5, "Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given."

The order will both give leave to issue the writ and to serve it, or a notice of it, out of the jurisdiction (*u*). It may also, in a proper case, provide for the service of interrogatories and of notice of motion for an injunction (*x*). It may also provide for the issue of a concurrent writ for service out of the jurisdiction (*y*).

The writ (*z*).

The Writ and Notice.]—By *R. of S. C., Ord. II. r.* 5, "A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in one of the Forms Nos. 5, 6, 7 and 8, in Appendix A., Part 1 (*a*), with such variations as circumstances may require. Such notice shall be in one of the forms Nos. 9 and 10 in the same Part (*b*), with such variations as circumstances may require."

The writ is filled up and indorsed and issued in the same manner as an ordinary writ, as to which *see ante*, pp. 215 *et seq.*

Service.

Service.]—Service of the writ is effected in the same manner as in the case of an ordinary writ, and by *Ord. XI. r.* 7, "Notice in lieu of service shall be given in the manner in which writs of summons are served." As we have seen (*supra*), the notice is only necessary in the case of a defendant who is not a British subject, but it

(*s*) *Padley* v. *Camphausen*, 10 Ch. D. 550; 48 L. J., Ch. 364: *Westmann* v. *Aktiebolaget, &c. Snickarefabrik*, 1 Ex. D. 237; 45 L. J., Ex. 327: *Beddington* v. *Beddington*, 1 P. D. 426: *Fowler* v. *Barstow*, 20 Ch. D. 240. See per *Jessel*, M. R., at pp. 246, 247; Chitty's Forms, p. 83.

(*t*) *Bacon* v. *Turner*, 34 L. T. 647, V.-C. H.

(*u*) *Trail* v. *Porter*, 1 Ir. L. R., Ch. D. 60. See *Stigand* v. *Stigand*, ante, p. 246, n. (*q*).

(*x*) *Young* v. *Brassey*, 1 Ch. D. 277.

(*y*) Ord. VI. r. 2, supra; *Beddington* v. *Beddington*, 1 P. D. 426; 45 L. J., P. 44.

(*z*) Chitty's Forms, p. 82.

(*a*) See the form, Chit. F.

(*b*) Id.

must be used in such a case, as international comity does not allow of the service of a judicial writ on a foreigner in his own country.

The indorsement of service should be made as on an ordinary writ (*c*). The time for making this indorsement may be enlarged (*d*). It has been held that the indorsement is not necessary in this case (*e*), but, in view of the forms provided by the rules, it is, it is submitted, doubtful whether the decision is correct. An affidavit annexing and verifying a copy of the notice will suffice, both in the Queen's Bench and Chancery Divisions (*f*).

Proceedings by defendant to set aside order.

Proceedings by Defendant to set aside Order.]—If the leave is granted or service is effected in a case to which the rules do not apply, and the defendant intends to object to the order or service on this ground, he must apply to the Court by notice of motion (*g*) to set aside the order and proceedings (*h*). He cannot plead any impropriety in the order or service as a defence (*i*). Formerly it was necessary, before taking out the summons, that the defendant should obtain leave to enter, and enter a conditional appearance (*k*), as by entering an unconditional appearance the defendant waived any objection to the jurisdiction (*l*). Under *Ord. XII. r.* 30 (*ante*, p. 241), the defendant, before appearing, is now at liberty, without obtaining an order to enter, or entering a conditional appearance, to serve notice of motion to set aside the service upon him of the writ, or of notice of the writ, or to discharge the order authorizing such service. On the hearing of the application by the defendant to set aside the order, affidavits on his behalf to show that the cause of action did not arise within the jurisdiction are admissible (*m*). But he has no right to raise an objection on the ground that the case is not one in which the order should have been made (*n*).

Further proceedings.

Further Proceedings.]—The appearance and subsequent proceedings are exactly the same as in an ordinary case. In case of default of appearance no leave to proceed is necessary (*o*).

(*c*) See forms, R. of S. C., App. A., Pt. I.

(*d*) *Hastings* v. *Hurley*, 16 Ch. D. 734; 44 L. T. 176.

(*e*) *Re Livesey*, *Fish* v. *Chatterton*, 47 L. T. 328: cp. *Hastings* v. *Hurley*, supra.

(*f*) *Bustros* v. *Bustros*, 14 Ch. D. 849; 49 L. J., Ch. 396.

(*g*) See ante, p. 241, n. (*z*).

(*h*) *Fowler* v. *Barstow*, 20 Ch. D. 240; 51 L. J., Ch. 103: *Binet* v. *Picot*, 4 H. & N. 365; 28 L. J., Ex. 244: *Diamond* v. *Sutton*, L. R., 1 Ex. 130; 35 L. J., Ex. 127: *Jackson* v. *Spittall*, L. R., 5 C. P. 542.

(*i*) *Preston* v. *Lamont*, 1 Ex. D. 361; 45 L. J., Ex. 797.

(*k*) See *Fowler* v. *Barstow*, supra.

(*l*) *Forbes* v. *Smith*, 10 Ex. 717; 24 L. J., Ex. 167: *Oulton* v. *Radcliffe*, L. R., 9 C. P. 189; 43 L. J., C. P. 87: *Preston* v. *Lamont*, supra, at p. 363. See *Green* v. *Braddyll*, 1 H. & N. 69: *Harrison* v. *Williams*, 24 L. T., O. S. 143; *Edwards* v. *Warden*, L. R., 9 Ch. 495: *Bayne* v. *Slack*, 3 C. B., N. S. 363; 27 L. J., C. P. 14.

(*m*) *Fowler* v. *Barstow*, supra, overruling on this point *Great Australian Gold Mining Co.* v. *Martin*, 5 Ch. D. 1; 46 L. J., Ch. 289, cited ante, p. 247, n. (*n*).

(*n*) *White* v. *Macgregor*, 46 J. P. 775, arg. Field and Stephen, JJ.

(*o*) *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404. See *Bacon* v. *Turner*, 3 Ch. D. 275; 34 L. T. 647.

CHAPTER XIV.

PROCEEDINGS TO ASCERTAIN WHETHER WRIT WAS ISSUED WITH SOLICITOR'S AUTHORITY.

By *R. of S. C., Ord. VII. r.* 1, "Every solicitor whose name shall be indorsed on any writ of summons shall, on demand (*a*) in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith in writing (*b*) whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a judge." This rule is practically the same as sect. 7 of the *Com. Law Proc. Act*, 1852, except that the provision requiring the solicitor, if he answered in the affirmative, to declare the profession, occupation or quality and place of abode of the plaintiff, has been omitted. This omission is, however, supplied by the indorsement of address required by *Ord. IV. r.* 1 (*ante*, p. 226).

The proceedings under the rule should be taken at an early stage of the cause, or within a reasonable time after the circumstances which rendered them desirable have come to the defendant's knowledge.

There must be a demand in writing, as required by the rule, before the Court or a judge will grant an order under it (*c*). The declaration must also be in writing (*d*).

(*a*) Chitty's Forms, p. 97.

(*b*) Id. p. 98.

(*c*) *Malpas* v. *Mudd*, 3 H. & N. 246; 27 L. J., Exch. 367; 31 L. T., O. S. 120. See *Brown* v. *Wigens*, 7 L. T. 622, Q. B. See the form, Chit. F.

(*d*) See the rule, supra, and see form, Chit. F.

CHAPTER XV.

APPEARANCE (a).

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1. Necessity for.

1. *Necessity for.*]—The writ of summons requires the defendant (*b*), or all the defendants, if more than one, to enter an appearance. As a general rule, a defendant cannot take any step in the action without doing so. It would seem that the defendant may, before appearance, take out a summons and obtain an order to stay proceedings, on payment of debt and costs; *post, Ch. XXX.* The defendant may also, it seems, before appearance, take steps for ascertaining whether the writ has been issued by authority of the solicitor whose name is indorsed on it (*c*).

What may be done before.

Application to set aside service.

By *R. of S. C., Ord. XII. r.* 30, "A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service." *See ante*, p. 241.

Waiving irregularity in process.

An appearance entered by the defendant waives all irregularity in the process (*d*) and even the total want of it.

Judgment for want of appearance.

As to signing judgment by default for want of an appearance, *see post*, p. 259. If a defendant has no defence to the action he need not appear to the writ, in which case judgment may be signed against him by default.

2. When to be entered.

2. *When to be entered.*]—The appearance should be entered within the time limited by the writ for that purpose. When the defendant is served within the jurisdiction it must be entered within eight days after the service of the writ inclusive of the day of such service (*e*). The time for appearance when the writ is served, or notice of it is given out of the jurisdiction, varies according to the place of

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(*a*) As to entering an appearance in an action for recovery of land, see Vol. 2, Ch. CVI.; as to appearance by an infant and other particular defendants, see Vol. 2, Ch. XCIX. et seq.

(*b*) See *Belcher* v. *Goodered*, 4 C. B. 472.

(*c*) See ante, p. 250.

(*d*) *Forbes* v. *Smith*, 10 Ex. 717; 24 L. J., Ex. 167: *Humble* v. *Bland*, 6 T. R. 255: *Anon.*, 1 Chit. 129, n. See *Davis* v. *Sherlock*, 7 Dowl. 530: *Chalkley* v. *Carter*, 4 Dowl. 480; 1 T. & Gr. 210: *Holt* v. *Eades*, 6 Sc. N. R. 699.

(*e*) See the form of notice on the writ, Chit. F. 56.

service, and is limited in each case by the order giving leave to issue the writ, and by the writ or notice itself (*f*).

The defendant may, however, appear at any time before judgment is actually signed, even although it is after the time limited, but if he does so he must give notice to the plaintiff that he has done so, and he is not entitled to any further time for delivering his defence or any other purpose (*g*).

By *Ord. XII. r.* 22, "A defendant may appear at any time before judgment. If he appear at any time after the time limited for appearance by the writ, he shall not, unless the Court or a judge shall otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ" (*h*).

If the last of the days for entering the appearance expires on a Sunday or other day on which the offices are closed, the defendant has the whole of the first day on which they are open to appear (*i*).

3. Place where appearance should be entered;

— where writ issued in London;

3. *Place where Appearance should be entered.*]—Except in cases when the writ is issued out of a district registry the defendant must enter his appearance at the central office in London (*k*). In all cases of writs issued out of the central office the appearance must be entered there (*k*).

By *Ord. XII. r.* 1, "Except in the cases otherwise provided for by these rules, a defendant shall enter his appearance in London."

By *r.* 2, "Appearances entered in London shall be entered in the central office."

— where writ issued out of district registry.

When the writ is issued out of a district registry, the place for appearance depends on whether the defendant resides or carries on business within the district of the registry out of which the writ is issued. If he does he must appear in the registry (*l*). If he does not he may appear either in the registry or in London at his option (*m*).

By *Ord. XII. r.* 4, "If any defendant to a writ issued in a district registry resides or carries on business within the district, he shall appear in the district registry."

By *r.* 5, "If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or at the central office."

There does not appear to have been any reported decision as to what is "residing or carrying on business" within the meaning of these rules; but it may be useful to refer to the cases decided on

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(*f*) See *Pearce* v. *Swaine*, 7 M. & W. 543; 9 Dowl. 724: *Bromage* v. *Vray*, 9 Dowl. 559: *Richardson* v. *Levy*, 7 Dowl. 25; 4 M. & W. 38. How time is to be computed, see post, Vol. 2, Ch. CXXV. See *Harris* v. *Robinson*, 2 C. B. 908, as to how the time for entering an appearance was computed before the C. L. P. Act, 1852. As to enlarging time for doing an act, see post, Vol. 2, Ch. CXXV.

(*g*) See Ord. XII. r. 22, supra.

(*h*) Cp. C. L. P. Act, 1852, s. 29.

(*i*) Ord. LXIV. r. 3, post, Vol. 2, Ch. CXXV. See *Mumford* v. *Hitchcocks*, 14 C. B., N. S. 361; 32 L. J., C. P. 168: *Hughes* v. *Griffiths*, 13 C. B., N. S. 324; 32 L. J., C. P. 47: *Rowberry* v. *Morgan*, 9 Exch. 730; 23 L. J., Ex. 191: *Lewis* v. *Calor*, 1 F. & F. 306.

(*k*) Ord. XII. rr. 1 and 2, supra.

(*l*) Id. r. 4, supra.

(*m*) Id. r. 5, supra.

similar words, "dwelling or carrying on business," contained in several other statutes (*n*).

Thus it was held that a man who occupied a house at Margate, in which his wife and family lived, but who had a place of business in London, where he slept three or four nights in the week, "dwelt" at Margate and not in London (*o*).

A man whose home was at Inverness, but who resided some months in every year in Golden Square, London, for the purposes of his business, was held to "dwell" at Inverness (*p*). Where there were two permanent residences, as a town house and a country house, the Common Pleas held that the owner could not be said to dwell, within the meaning of the Act, at either of them (*q*). But the contrary was held by the Queen's Bench in *Bailey* v. *Bryant* (*r*). On the other hand, a man who had no fixed dwelling-place, was held to "dwell" wherever he chanced to be found (*s*); and a corporation dwells wherever its chief place of business is situated (*t*).

The words "carrying on business" occur both in the rule, and in these Acts, and it may be taken that the decisions on the latter are in point.

A distinction is established by the cases between the "carrying on business" by a corporation or company and by an individual. A corporation can only "carry on business" in one place, and that place is, the place where its *principal* business is transacted. In the case of a railway company, such place is that where the general business of the line is carried on (*u*), and not necessarily the terminal station (*x*). Other companies "carry on business" not necessarily at their registered office, even though the directors meet there (*y*), but at their chief place of carrying on their business, whatever it may be (*z*). So no company can be said to carry on business at a place where they have only a receiving agent (*a*).

(*n*) 9 & 10 V. c. 95, s. 128; 19 & 20 V. c. 108, s. 18; 30 & 31 V. c. 142, s. 3 (The County Courts Acts). The London (City) Small Debts Act (15 & 16 V. c. lxxvii, s. 39), and the Mayor's Court Act (20 & 21 V. c. clvii, s. 12).

(*o*) *Keir* v. *Haynes*, 29 L. J., Q. B. 70. And see *Marsh* v. *Conquest*, 17 C. B., N. S. 432.

(*p*) *Macdougall* v. *Paterson*, 11 C. B. 755; 21 L. J., C. P. 27.

(*q*) *Butler* v. *Ablewhite*, 6 C. B., N. S. 740; 28 L. J., C. P. 292: *Pilgrim* v. *Knatchbull*, 18 C. B., N. S. 798; 34 L. J., C. P. 257. And this was so, though, at the time of action brought, he was residing at the house within the district. The ground of the decisions was, that it could not be said, whichever house was in question, that he did not "dwell" in the other.

(*r*) 1 E. & E. 340; 28 L. J., Q. B. 86.

(*s*) *Alexander* v. *Jones*, L. R., 1 Exch. 133; 4 H. & C. 204; 35 L. J., Ex. 78.

(*t*) *Taylor* v. *Crowland Gas Co.*, 11 Ex. 1; 24 L. J., Ex. 233; 24 L. T. 118.

(*u*) *Shiels* v. *Great Northern R. Co.*, 30 L. J., Q. B. 331; 9 W. R. 739.

(*x*) Thus, the South Eastern Railway Company "carries on business" at London Bridge, not at Cannon Street or Charing Cross: *Le Tailleur* v. *South Eastern R. Co.*, 3 C. P. D. 18. The North Western at Euston Square: *Brown* v. *London and North Western R. Co.*, 4 B. & S. 326; 32 L. J., Q. B. 318; 11 W. R. 884. The Great Western at Paddington: *Adams* v. *Great Western R. Co.*, 6 H. & N. 404; 30 L. J., Ex. 124; 9 W. R. 254. See also *Aberystwith Pier Co.* v. *Cooper*, 35 L. J., Q. B. 44; 14 W. R. 28; 13 L. T. 273.

(*y*) *Keynsham Blue Lias Co.* v. *Baker*, 2 H. & C. 729; 33 L. J., Ex. 41; 12 W. R. 156.

(*z*) Id.: *Oldham Building Co.* v. *Heald*, 3 H. & C. 132; 33 L. J., Ex. 206; 10 L. T. 534.

(*a*) *Corbett* v. *General Steam Navi-*

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An individual, on the other hand, is held to "carry on business" at any places where he habitually and personally works (*b*). But it has been held, that the business must be his own independent business—he must not be merely in the employment of some other person (*c*).

A builder who was employed to fit up certain houses at one place, and who for the purpose of performing that contract had set up workshops and counting-houses there, but whose permanent residence was elsewhere, was held not to carry on business at the former place (*d*). But a surgeon who resided at C., but who daily attended patients at B., was held to carry on business at B. (*e*).

4. How entered.

4. *How entered.*]—By *R. of S. C., Ord. XII. r.* 8, "A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing dated on the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. He shall at the same time deliver to the officer a duplicate of the memorandum, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return it to the person entering the appearance, and the duplicate memorandum so sealed shall be a certificate that the appearance was entered on the day indicated by the seal."

Where the defendant appears in person, the memorandum may be delivered to the officer by any authorized agent, though not a solicitor (*f*).

By *r.* 14, "Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the cause book."

5. Form of appearance.

5. *Form of Appearance.*]—By *Ord. XII. r.* 13, "The memorandum of appearance shall be in the Form No. 1 in Appendix (A), Part II., with such variations as circumstances may require" (*g*).

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gation Co., 4 H. & N. 482; 28 L. J., Ex. 214; 7 W. R. 458: *Minor* v. *North Western R. Co.*, 1 C. B., N. S. 325; 26 L. J., C. P. 39; 28 L. T. 104.

(*b*) See *Mitchell* v. *Hender*, 23 L. J., Q. B. 273; 23 L. T. 72: *Gorslett* v. *Harris*, 29 L. T. 75.

(*c*) See *Rolfe* v. *Learmouth*, 14 Q. B. 196; 19 L. J., Q. B. 10 (deputy sealer of writs in Chancery): *Buckley* v. *Hann*, 5 Exch. 43; 19 L. J., Ex. 151 (clerk in the Admiralty): *Sangster* v. *Cave*, 5 Exch. 386; 19 L. J., Ex. 314 (clerk in Privy Council Office). And see per *Rolfe*, B., 5 Exch. 386.

(*d*) *Gorslett* v. *Harris*, 29 L. T., O. S. 75, 15th April, 1857, Q. B.

(*e*) *Mitchell* v. *Hender*, 23 L. J., Q. B. 273; 23 L. T., O. S. 83.

(*f*) *Oake* v. *Moorecroft*, L. R., 5 Q. B. 76.

(*g*) See form in Chit. F., p. 99. Care should be taken that the form of appearance prescribed be followed. If there be any substantial variance from it, the appearance may be set aside, and in some cases treated as a nullity. As to the effect of non-compliance with rules, see post, Ch. XLII. In a case before the C. L. P. Act, 1852, where the appearance entered by the defendant was thus worded "In Q. B., Thomas Warren, Plt., agt. George Love, Dft. —— attorney for, appears for ——," it was held, that the plaintiff was right in treating it as null. *Warren* v. *Love*, 7 Dowl. 602. See *Codrington* v. *Carlewis*, 9 Dowl. 968. Care must also be taken that the entry of appearance corresponds with the writ of summons; or it may be treated as no appearance if there be a substantial variance, or it may be set aside, or the party who entered it may be compelled to put it right at his costs. *Bate* v. *Bolton* or *Batten*, 4 Dowl. 160, 677; 2 C., M. & R. 365; 1 T. & G. 148. If defendant has been sued by a wrong name, it is better that he should appear by his right name, stating in the memoran-

Address for service, &c.

Address for Service.]—By *Ord. XII. r.* 10, "The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and, if the appearance is entered in the central office, a place, to be called his address for service, which shall not be more than three miles from the principal entrance of the central hall at the Royal Courts of Justice, and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district, and where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor."

By *R. of the S. C., Ord. XII. r.* 11, "A defendant appearing in person shall state in such memorandum his address, and, if the appearance is entered in the central office, a place, to be called his address for service, which shall not be more than three miles from the principal entrance of the central hall at the Royal Courts of Justice; and if the appearance is entered in a district registry, a place, to be called his address for service, which shall be within the district" (*h*).

The object of this enactment, in requiring the statement of the defendant's address when he appears in person, is to facilitate the service on the defendant of proceedings subsequent to the writ, and to benefit the defendant by insuring his getting notice of them.

As to proceedings to set aside the appearance where the address stated is illusory or fictitious, *see infra.*

Fictitious address.

By *Ord. XII. r.* 12, "If the memorandum does not contain such address it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a judge, on the application of the plaintiff." The application should be supported by an affidavit, showing the facts as to the address being illusory or fictitious. When the defendant cannot be found at the address for service, and there is nobody there who is authorized to take in or forward documents, the address is illusory, and the appearance will be set aside (*i*). The judge might order an amendment under the general power of amendment given by *Ord. XXVIII. r.* 12.

Appearance by two or more defendants.

Appearance by two or more Defendants.]—By *Ord. XII. r.* 17, "If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum."

The object of this rule is to prevent several defendants entering separate appearances by the same solicitor, and thereby occasioning unnecessary costs. Separate appearances by defendants by separate solicitors, who are members of the same firm, would, it is apprehended, be in contravention of the rule (*k*).

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dum of appearance that he was sued by the wrong name. See 3 & 4 W. 4, c. 42, s. 11: *Hobson* v. *Wadsworth*, 8 Dowl. 601: *Kitchen* v. *Brooks*, 5 M. & W. 522; 8 Dowl. 232. If he appear by the wrong name, plaintiff may in his statement of claim so describe him, post, Ch. XIX.

(*h*) Cp. C. L. P. Act, 1852, s. 30.

(*i*) *A.* v. *B.*, W. N. 1883, 174; Bitt. Ch. Cas. 17.

(*k*) *Gambrell* v. *Earl Falmouth*, 5 Ad. & El. 403; 6 N. & M. 859.

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Appearance by partners sued in name of firm.

Appearance by Defendant Firm.]—By *r.* 15, "Where persons are sued as partners in the name of their firm (*l*), they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm."

By *r.* 16, "Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

Appearance in Actions for Recovery of Land.]—*See post, Ch. CVI.*

6. Notice of appearance.

6. *Notice of Entry of Appearance* (*m*).]—By *R. of S. C., Ord. XII. r.* 9, "A defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance [*Form No.* 2 *in Appendix A., Part II.*(*m*)] to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing served in the ordinary way at the address for service (which, in the case of a writ issued out of a district registry, must be the address for service within the district), or by prepaid letter directed to that address and posted on the day of entering appearance in due course of post, and shall, in either case be accompanied by the sealed duplicate memorandum."

Before this rule notice was only necessary when the defendant appeared elsewhere than where the writ was issued, or when the appearance was entered after the time limited for entering it, but it is now necessary in all cases. And where the writ is issued out of a district registry, and is indorsed with the name of the plaintiff's solicitor in the district, as well as an address for service in London, the defendant, if he appears in London, *must give the notice to the solicitor in the district registry*, and it is not sufficient to serve it at the London address for service. If he does not do so, judgment may be signed against him for default of appearance (*n*).

The appearance is not effectual until the notice has been given (*o*). As to notice of entering the appearance when the appearance is not entered in due time, *see also Ord. XII. r.* 22, *ante*, p. 252.

7. Conditional appearance.

7. *Conditional Appearance.*]—Formerly, if a defendant was desirous of applying to set aside a writ or notice of a writ served on him on the ground of any irregularity or impropriety in its issue, he had

(*l*) As to suing partners in the name of their firm, see post, Ch. XCIII. It seems that one of several partners has no implied authority to enter an appearance for the others. See *Hambidge* v. *De la Crouée*, 3 C. B. 742; 4 D. & L. 466; 16 L. J., C. P. 85.

(*m*) See form, R. of S. C., App. A., Pt. II., No. 2, Chit. F., p. 101.

(*n*) See the rule, supra. Cp. *Smith* v. *Dobbin* (C. A.), 3 Ex. D. 338; 47 L. J., Ex. 65. In this case judgment was signed in the country after appearance and notice in London, and the judgment was upheld, notwithstanding that the London agent to whom the notice was given did not know for whom he was to act. See *Johnson* v. *Whitehead*, Bitt. lxxxviii; W. N. 1876, 10.

(*o*) *Smith* v. *Dobbin*, supra, where the plaintiff signed judgment for want of a notice, and it was held that the judgment was regular.

first to obtain leave *ex parte* to enter a conditional appearance (*p*), but this is no longer necessary, since, by *Ord. XIII. r.* 30 (*ante*, p. 251), the defendant may move to set aside the service without entering any appearance.

8. Irregularity in, how taken advantage of.

8. *Irregularity in.*]—We have seen, *supra*, that in some cases the plaintiff may treat an appearance irregularly entered by defendant as a nullity, and proceed with the action as if no appearance had been entered. In other cases it may be treated as irregular, and plaintiff may then get it set aside as such, or else compel defendant to amend it or enter a fresh appearance (*q*).

In what time.

The application to set aside an irregular appearance should be made within a reasonable time (*r*) after plaintiff first had notice of the irregularity (*s*). Within what time an irregularity must, in general, be taken advantage of, and how it may be waived, *see post, Ch. XLII.*

Order to set aside must be served.

An order to set aside an appearance is of no avail until it is served on the opposite party, although the officer has struck out the appearance in pursuance of the order (*t*).

Proceeding as if no appearance entered when there is one.

If the defendant enter an appearance, but the plaintiff, notwithstanding, proceed as if the defendant had not appeared, the plaintiff's proceedings will not be null, but only irregular; and the irregularity may be waived either by the defendant not applying within a reasonable time after it has come to his knowledge to set the proceedings aside, or by any other act of waiver (*u*).

9. Amendment of.

9. *Amendment of.*]—If the defendant enters an appearance in due time, which is irregular on account of a mistake in the name, the course for him to adopt is to apply to a master for an order to amend that appearance, and not to enter a new one (*x*). As to amendments in general, *see post, Ch. XLII.*

10. Where further proceedings to be taken.

10. *Where further Proceedings to be taken.*]—If the defendant, or any defendant, appears in London, then the action proceeds there, unless a master order otherwise under Rule 7 (*infra*). If the defendant or all the defendants, or all the defendants who appear, do so in the registry, the action proceeds there.

By *Ord. XII. r.* 6, "If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear appear in the district registry and the others make default in appearance, then, subject to the power of removal in *Ord. XXXV. rr.* 13 *to* 16 provided, the action shall proceed in the district registry."

By *r.* 7, "If the defendant appears, or any of the defendants

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(*p*) See *Nelson* v. *Pastorino*, 49 L. T. 564.

(*q*) Ante, p. 254. As to the course to be adopted in case of an irregular appearance in an action against an infant, see post, Vol. 2, Ch. XCIX.

(*r*) See *Strange* v. *Freeman*, 5 Dowl. 407, decided before the C. L. P. Act, 1852.

(*s*) *Esdaile* v. *Davis*, 6 Dowl. 465: *Alsager* v. *Crisp*, 9 Dowl. 353.

(*t*) *Belcher* v. *Goodered*, 4 D. & L. 814; 4 C. B. 472.

(*u*) *Alsager* v. *Crisp*, 9 Dowl. 353: *Strange* v. *Freeman*, 5 Dowl. 407: *Maple* v. *Woodgate*, 1 B. C. 79.

(*x*) *Bate* v. *Bolton*, 4 Dowl. 677. See *Wheston* v. *Packman*, 3 Wils. 49. See *Goodright* v. *Wright*, 1 Str. 33: *Stratton* v. *Burgis*, Id. 114: *Power* v. *Jones*, Id. 445.

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appear, in London the action shall proceed in London; provided that if the Court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant, or has no substantial cause to interfere in the conduct of the action, such Court or judge may order that the action may proceed in the district registry, notwithstanding such appearance in London."

As to the removal of actions to and from the district registries and the proceedings in the registries, *see post, Vol.* 2, *Ch. CXXIV.*

11. Proceedings when defendant does not appear.

11. *Proceedings when Defendant does not appear.*]—As to signing judgment and other proceedings in default of appearance, *see the next Chapter, post, p.* 259.

Where solicitor has given an undertaking to appear.

By *Ord. XII. r.* 18, "A solicitor not entering an appearance or putting in bail, or paying money into Court in lieu of bail in an Admiralty action *in rem*, in pursuance of his written undertaking so to do, shall be liable to an attachment" (*x*).

As to the course to be pursued when a solicitor gives an undertaking to appear without any authority from the defendant to do so, and afterwards enters an appearance, *see ante*, p. 106.

Where appearance entered by mistake.

If a solicitor has caused an appearance to be entered by mistake, the mistake may be rectified with the consent in writing of the solicitor for the plaintiffs, and on the fiat given on a præcipe with a 2*s.* 6*d.* (search) stamp (*y*).

(*x*) As to attachment, see post, Ch. LXXXVIII.

(*y*) Masters' Practice Rules, Vol. 2, Appendix.

CHAPTER XVI.

PROCEEDINGS IN DEFAULT OF APPEARANCE (*a*).

IF the defendant does not appear within the time limited by the writ of summons for so doing, the plaintiff may, in ordinary cases, sign judgment in default of appearance. If the plaintiff's claim is liquidated, final judgment may be signed. If it is unliquidated, so that further proceedings are necessary to ascertain the amount of the claim, the judgment is in the first instance interlocutory only, and final judgment is signed after the claim has been rendered liquidated by writ of inquiry or otherwise. In the case of actions against infants and persons of unsound mind, special proceedings must be taken which are more fully treated of hereafter (*a*). The proceedings in actions for recovery of land are fully treated of hereafter (*a*). The proceedings in ordinary actions are treated of in this chapter.

Leave unnecessary.

No leave to sign judgment in default of appearance is necessary either in the case when the writ is served out of the jurisdiction (*b*) or in any other (*c*).

Time for signing judgment.

Time for signing Judgment.]—The judgment may be signed at any time after the time limited by the writ of summons for entering appearance, provided that in the meantime no appearance is entered. The defendant may, however, appear at any time after the time limited, unless judgment has been previously signed against him (*Ord. XII. r.* 22, *ante*, p. 252). If the time expires on a Sunday or other day on which the offices are closed, the defendant has the whole of the next day on which they are open to appear on (*Ord. LXIV. r.* 3, *ante*, p. 252), and judgment cannot be signed until the following day.

When writ issued out of registry.

By *R. of S. C., Ord. XIII. r.* 11, "Where a defendant fails to appear to a writ of summons issued out of a district registry, and the defendant had the option of entering an appearance either in the district registry or in the Central Office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him." This is to give time for the notice of appearance provided for by *Ord. XII. r.* 9, as to which see *ante*, p. 256.

(*a*) As to the proceedings when the defendant is an infant or person of unsound mind not so found by inquisition, see post, Vol. 2, Ch. XCIX., "*Actions by and against Infants*," and Vol. 2, Ch. C., "*Actions by and against Persons of Unsound Mind*." As to the proceedings in an action for recovery of land, see post, Vol. 2, Ch. CVI., "*Action for Recovery of Land*."

(*b*) *Scott* v. *Royal Wax Candle Co.*, 1 Q. B. D. 404; 45 L. J., Q. B. 586.

(*c*) See note (*a*), ante.

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Affidavit of service.

Affidavit of Service (*d*).]—By *R. of S. C., Ord. XIII. r.* 2, "Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance, under any of the following rules of this Order, or under *Ord. XV. r.* 1, he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be" (*e*).

The rules and practice with reference to the service of the writ will be found *ante*, pp. 232 *et seq.*, and forms of affidavit appropriate to the various modes of service will be found in *Chit. Forms*, at pp. 104—107 *et seq.*

By *R. of S. C., Ord. LXVII. r.* 9, "Affidavits of service shall state when, where and how, and by whom such service was effected."

It seems the Court may compel the party who effected the service to make an affidavit thereof (*f*).

Where claim liquidated.

Where Claim liquidated (*g*).]—By *R. of S. C., Ord. XIII. r.* 3, "Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of five per cent. per annum, to the date of the judgment, and costs."

In order to sign this judgment two copies of the form of judgment, which must be of the proper size, and one copy stamped with a ten shilling impressed stamp and the other with a stamp at the rate of 6d. per folio, which may be either printed or written, should be produced to the officer—one is filed by the officer and the other marked as an office copy is returned to the solicitor. It is also necessary at the time of signing judgment to produce and file an affidavit (*h*) *of service of the writ, or of notice in lieu of service, as the case may be.* As to the duty of the officer of the Court upon and as to signing judgments in general, *see post, Ch. LXX.* There is also a fee of 2*s.* 6*d.* for filing the affidavit

When there has been no personal service of the writ, but a substituted or other service, as mentioned *ante*, p. 236, the judgment is signed as above—the original order for the substituted or other service being filed on signing the judgment with an affidavit stamped with a half-crown stamp that the service has been made as directed by the order, and that the other directions, if any, in such order have been complied with—instead of the affidavit of personal service.

If the writ be indorsed with any claim, however minute, not being a debt or liquidated sum or demand, final judgment signed

(*d*) See forms of affidavit, Chit. F. 104—107.

(*e*) In the Admiralty Registries a copy of the writ is required to be filed with the affidavit. *The Eppos*, 49 L. T. 604.

(*f*) *R.* v. *Rudge*, 1 W. Bla. 432. And see *Weston* v. *Faulkner*, 1 Price, 308: *Clark* v. *Elwick*, 1 Stra. 1; Barnes, 58: *Pigeon* v. *Bruce*, 8 Taunt. 410.

(*g*) See C. L. P. Act, 1852, s. 27.

(*h*) See supra, and Chitty's Forms, pp. 104—107. As to the modes of service, see ante, pp. 232 et seq.

in default of appearance would be irregular, and might be set aside (*i*).

The judgment can only be signed for the sum indorsed on the writ and interest. It should be signed for such an amount only as is really due at the time of signing it. Formerly, in a case where the defendant made payments after action brought, and judgment was signed for the full amount indorsed, it was ordered to be reduced by the amount of the payments (*j*).

Where judgment was signed on a writ specially indorsed, claiming, amongst other things, interest on an I O U, the Court refused to set aside the judgment, on the ground that the defendant, by not appearing to the writ, had admitted a contract, express or implied, to pay interest (*k*). But if a party not entitled to interest makes a claim for it by special indorsement to gain an improper advantage, the Court or a judge will set aside a judgment signed for want of appearance, and may compel the solicitor making such indorsement to pay the costs (*l*).

Where several defendants.

Against one or more of several Defendants.]—By *Ord. XIII. r.* 4, "Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and there are several defendants, of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may enter final judgment, as in the preceding rule, against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with the action against such as have appeared."

Where claim only partly liquidated.

Where Liquidated Claim joined with Unliquidated.]—By *R. of S. C., Ord. XIII. r.* 7, "Where the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, *and* is further indorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appear to the writ, the plaintiff may enter final judgment for the debt or liquidated demand interest and costs against the defendant or defendants failing to appear, and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in such of the preceding rules of this order as may be applicable." In this case one judgment only is necessary, final as to part and interlocutory as to the remainder, and only one fee payable (*m*).

Claim for damages or detention of goods.

Where Claim for Damages or Detention of Goods.]—By *R. of S. C., Ord. XIII. r.* 5, "Where the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and the defendant fails, or all the defendants, if more than one, fail to appear, the plaintiff may enter interlocutory judgment, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a judge may order that, instead of a

(*i*) *Rogers* v. *Hunt*, 10 Ex. 474: *Rodway* v. *Lucas*, 10 Ex. 667; 24 L. J., Ex. 155.

(*j*) *Hodgson* v. *Callaghan*, 2 C. B., N. S. 306.

(*k*) *Rodway* v. *Lucas*, 10 Exch. 667; 24 L. J., Ex. 155.

(*l*) *Rodway* v. *Lucas*, supra.

(*m*) Masters' Practice Rules, Vol. 2, Appendix.

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writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or judge may direct."

It will be noticed that in this case an interlocutory judgment only can be signed. This judgment establishes the plaintiff's right to recover something, but leaves the amount he is entitled to recover unascertained (*m*). The Court or judge may direct the amount of damages, &c. to be ascertained by a reference to an official referee or the master (*n*), and in some cases it may be directed that the amount of damages be assessed before a judge and jury as upon an ordinary trial. A writ of inquiry will be necessary if no order be made. As to this writ, and as to assessing damages in general, *see post, Ch. CXV.*

When the claim is for a return of goods, the plaintiff may enter interlocutory judgment, and after the damages have been assessed, he may obtain an order, under *Ord. XLVIII. r.* 1, for a return of the specific goods, and issue a writ of delivery (*o*). But he cannot get leave to do this until the damages have been assessed (*o*).

Where one of several defendants make default.

By *Ord. XIII. r.* 6, "Where the writ is indorsed as in the last preceding rule mentioned, and there are several defendants, of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may sign interlocutory judgment against the defendant or defendants so failing to appear, and the value of the goods and the damages, or either of them, as the case may be, may be assessed, as against the defendant or defendants suffering judgment by default, at the same time as the trial of the action or issue therein against the other defendant or defendants, unless the Court or a judge shall otherwise direct. Provided that the Court or a judge may order that instead of a writ of inquiry or trial, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or judge may direct."

In Actions against Infants.]—See *R. of S. C., Ord. XIII. r.* 1, *post, Vol.* 2, *Ch. XCIX.*, "*Infants.*"

In Actions against Persons of Unsound Mind.]—See *R. of S. C., Ord. XIII. r.* 1, *post, Vol.* 2, *Ch. C.*, "*Persons of Unsound Mind.*"

In Actions for Recovery of Land.]—See *R. of S. C., Ord. XIII. rr.* 7 *and* 8, *post, Vol.* 2, *Ch. CVI.*, "*Recovery of Land.*"

Actions for mesne profits, &c.

In Actions for Mesne Profits, Rent, &c.]—By *R. of S. C., Ord. XIII. r.* 9, "Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, he may enter judgment as in the last preceding rule mentioned for the land; and may proceed as in the other preceding rules of this order mentioned as to such other claim so indorsed."

(*m*) See the form in Chit. Forms.

(*n*) See *Macdonald* v. *Antelme, Patterson & Co.*, W. N. 1884, 72. See post, Ch. LXXVIII.

(*o*) *Corbett* v. *Lewin*, W. N. 1884, 62; Bitt, Ch. Cas. 103. See *Ivory* v. *Cruickshank*, W. N. 1875, 249.

In Actions on Money Bonds.]—See *R. of S. C., Ord. XIII. r.* 14, *post, Vol.* 2, *Ch. CX.*, "*Actions on Money Bonds.*" Actions on money bonds.

Where Account claimed.]—By *R. of S. C., Ord. XV. r.* 1, "Where a writ of summons has been indorsed for an account, under *Ord. III. r.* 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases, shall be forthwith made" (*p*). Where account claimed.

By *r.* 2, "An application for such order as mentioned in the last preceding rule shall be made by summons, and be supported by an affidavit when necessary, filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired."

When there has been a default of appearance the plaintiff must file an affidavit of service, or of notice in lieu thereof, as the case may be. (*See Ord. XIII. r.* 2, *ante*, p. 260.)

As to making of an order in a district registry, *see Irlam* v. *Irlam, L. R.*, 2 *Ch. D.* 608. "The dissolution of partnerships, or the taking of partnership or other accounts," is assigned to the Chancery Division by the *Judicature Act*, 1873, *s.* 34, *sub-s.* 3 (*ante*, p. 10).

In cases not specially provided for by above Rules.]—By *R. of S. C., Ord. XIII. r.* 12, "In all actions not by the rules of this order otherwise specially provided for, in case the party served with the writ, or in Admiralty actions *in rem* the defendant does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and if the writ is not specially indorsed under *Ord. III. r.* 6, of a statement of claim, the action may proceed as if such party had appeared, subject, as to actions where an account is claimed, to the provisions of *Ord. XV.*" In cases not specially provided for by above rules.

In these cases the plaintiff should file (*R. of S. C., Ord. XIX. r.* 10, *post*, p. 280) a statement of claim (*q*), and a notice of motion (*r*), and then set down the action on motion for judgment (*q*). It is not, however, necessary to file a statement of claim or notice when a copy of it has been personally served on the defendant (*s*). As to motion for judgment, *see post*, "*Motion for Judgment*," *Ch. LXIX.*

Costs of Judgment by Default.]—The costs on a judgment by default are now regulated by the following notice as to "fixed Costs.

(*p*) As to form of order, see *Gatti* v. *Webster*, 48 L. J., Ch. 763.

(*q*) *Mentor* v. *Metcalfe*, 46 L. J., Ch. 584; 36 L. T. 683.

(*r*) See *Norton* v. *Miller*, 3 Ch. D. 516; 45 L. J., Ch. 613, C. A.: *Dymond* v. *Croft*, 3 Ch. D. 513; 45 L. J., Ch. 612: *Shephard* v. *Beane*, W. N. 1876, 61: *Gardner* v. *Hardy*, W. N. 1876, 153, 185, where it was held that the notice of motion for judgment could be served on a non-appearing defendant by being filed. *Cook* v. *Dey*, contra, W. N. 1876, 122, is incorrect.

(*s*) *Renshaw* v. *Renshaw*, 49 L. J., Ch. 127; 42 L. T. 353; 28 W. R., 409: *Whitaker* v. *Thurston*, W. N. 1876, 232.

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costs in cases of judgment by default" issued by order of the masters, and dated the 31st January, 1884:—

"The fees payable in these cases having been increased by the *Order as to Supreme Court Fees*, 1884, the masters direct that the allowance for costs of judgment be increased accordingly *in all cases where such additional fees have been paid.* The amount of costs therefore will be as follows—

	£	*s.*	*d.*
"In cases for a sum exceeding 50*l.* on *specially indorsed writs issued on or after 25th January*, 1884, in *country and agency cases*, and in cases where service effected more than five miles from General Post Office, St. Martin's-le-Grand - - -	5	6	0
"*Town cases* - - - - - - -	4	14	0
"And in addition for each extra service - - -	0	6	0

"*The above allowances to include all mileage.*

"And in cases where writs are indorsed for a liquidated claim, *but not specially*, and in cases in which the sum recovered amounts to 20*l.* and upwards *and does not exceed* 50*l.*, as follows—

	£	*s.*	*d.*
"*In country and agency cases*, or where service effected more than five miles from the General Post Office, St. Martin's-le-Grand - - -	4	12	0
"*Town cases* - - - - - - -	4	0	0
"And in addition for each extra service - - -	0	6	0

"*The above allowances to include all mileage.*

"*In cases under* 20*l.*, *no costs, unless order for costs.*"

Execution.

Execution on Judgment by Default.]—The execution on a judgment by default is, in general, the same as in ordinary cases. In actions of debt within the statute 8 & 9 *W.* 3, *c.* 11, *s.* 8, such as on a bond for the performance of covenants for the payment of money by instalments, or of an annuity, or the like (*t*), if the defendant suffer judgment to go by default, although in strictness this is a *final* judgment, and entered up for the entire penalty of the bond, yet the plaintiff cannot sue out execution for the sum recovered by the judgment, but he must *suggest breaches* from time to time as they occur, and execute a *writ of inquiry*, in order to assess damages on them (*t*).

Setting aside judgment by default.

Setting aside Judgment signed in Default of Appearance.]—By *R. of S. C., Ord. XIII. r.* 10, "Where judgment is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may be just."

—Where irregular.

—*Where Irregular.*]—If the judgment itself be *irregularly* signed, or if any of the previous proceedings upon the part of the plaintiff be irregular, and the irregularity be not waived by any act of the defendant, or if judgment be signed, when, in fact, the defendant has not been guilty of any default, or if it be signed against good faith (*u*), a master will set it aside on a summons.

(*t*) See post, Ch. CX.

(*u*) See *Gould* v. *Whitehead*, 8 Scott, 340: *Cash* v. *Wells*, 1 B. & Ad. 375: and *Drury* v. *Johnson*, 13 Price, 489.

Time for making application.

The application, like all other applications to set aside proceedings for irregularity, should be made within a reasonable time, and, at all events, before the defendant has taken any fresh step after the knowledge of the irregularity (*x*). But mere delay will not bar the application if the plaintiff has not been prejudiced or misled by it (*y*). In general, the time for making the application begins to run from the time that defendant became acquainted with the fact of judgment being signed (*z*). Where notice of inquiry was given on the 4th for the 12th, and the application to set aside the judgment for irregularity was not made until the 12th, the day on which the inquiry was to be executed, the Court held it was too late (*a*). And where judgment for want of a plea was signed on the 4th April, and a summons taken out for setting it aside was discharged on Friday the 23rd, execution was issued on the 27th, and on the 28th the defendant moved the Court to set aside the judgment for irregularity: it was held that the application was too late; that it ought to have been made on the 24th, or, at latest, on Monday the 26th (*b*).

As to the time for applying to set aside the judgment where the irregularity was in there being no service of the writ of summons, *see ante*, p. 241. For other points as to the time within which the application should be made, and which affect applications to set aside proceedings in general for irregularity, *see post*, *Ch. XLII.*

Waiver of irregularity.

An irregularity in signing the judgment may be waived, as in other cases (*c*). Attending the execution of a writ of inquiry will be a waiver of an irregularity in the interlocutory judgment (*d*). See further as to waiving an irregularity, *post*, *Ch. XLII.*

Form of summons.

The summons to set aside the judgment should specify the irregularity complained of (*e*).

Affidavit.

The affidavit in support of the application should distinctly state that judgment has been signed (*f*).

Costs.

As to when the application will be granted with costs, and as to imposing terms upon the defendant, *see post*, p. 266.

Imposing terms.

The usual course for the plaintiff to pursue where he has signed the judgment irregularly, and anything has been done upon it, is to get a master's order on summons for setting it aside and for sign-

Plaintiff may waive the judgment.

(*x*) Ord. LXX. r. 2. See post, Ch. XLII.: *Saunders* v. *Jones*, 3 D. & L. 770, where the judgment was signed against good faith: *Alcock* v. *Sutcliffe*, 2 B. C. 313; 4 D. & L. 612, where the application was made by the assignees of a bankrupt.

(*y*) *Davis* v. *Ballenden*, 46 L. T. 797, personal judgment against married woman before Act of 1882 set aside.

(*z*) *Grant* v. *Flower*, 5 Dowl. 419: *Anderson* v. *Harrison*, 8 Jur. 603, B. C.; 2 D. & L. 91: *Fraas* v. *Paravicini*, 4 Taunt. 545: *Gillingham* v. *Waskett*, M'Clel. 568: *Doe* d. *Antrobus* v. *Jepson*, 3 B. & Ad. 402.

(*a*) *Scott* v. *Cogger*, 3 Dowl. 212. And see *Smith* v. *Clarke*, 2 Dowl. 218: *Firley* v. *Hallett*, Id. 708: *Cox* v. *Tullock*, Id. 478. Sed vide *Hill* v. *Mills*, Id. 696; semble contra.

(*b*) *Shield* v. *Quick*, 8 M. & W. 289. And see *Weedon* v. *Garcia*, 2 Dowl., N. S. 64, where the defendant became a bankrupt, and the application was by his assignees.

(*c*) Tidd, 9th ed. 930: *Blackburn* v. *Kymer*, 5 Taunt. 672; 1 Marsh. 278: *Butler* v. *Bulkeley*, 1 Bing. 233; 8 Moore, 104.

(*d*) *Fraas* v. *Paravicini*, 4 Taunt. 545.

(*e*) See Ord. LXX. r. 3; post, Ch. XLII.

(*f*) *Classey* v. *Drayton*, 6 M. & W. 17; 8 Dowl. 184.

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ing it afresh if the facts warrant the latter (*g*). It seems that, in the discretion of the master, a judgment may be set aside at the instance of the plaintiff even after it has been satisfied, for the purpose of enabling him to correct a mistake in his claim, the defendant being put into the same position as if the mistake had not been made, and the application being made within a reasonable time (*h*).

Setting aside regular judgment on terms.

—*Where Judgment regular.*]—See *R. of S. C., Ord. XIII. r.* 10, *ante*, p. 264. An application under this rule should be made to a master at chambers upon summons. A *regular* judgment may be set aside upon an affidavit of merits, and in ordinary cases it is almost a matter of course to grant the application for this purpose if some reason for the non-appearance is stated (*i*). The application, however, will not be granted in order to give the defendant an advantage of any nicety of pleading (*k*), or of any matter which does not go to the merits of the cause (*l*). But a plea of the Statute of Limitations is considered a plea to the merits (*m*). So is a plea of bankruptcy (*n*), or infancy (*o*).

Application by stranger.

A person who is not a party to an action, but who is injuriously affected by a judgment in default of appearance or pleading suffered in it, may apply to set the judgment aside (*p*). If he is entitled to use the defendant's name, or if not so entitled if he gets the defendant's consent, he may apply by summons in the defendant's name in the usual way. Or if he is not entitled to use the defendant's name, and cannot get his consent, he may take out a summons at chambers in his own name, which must be served on both the plaintiff and the defendant, asking leave to have the judgment set aside, that he may be at liberty either to defend the action for the defendant on such terms as to indemnifying the defendant as may be just, or at all events to be at liberty to intervene in the action under the *Judicature Act*, 1873, *s.* 24, *sub-s.* 5 (*p*).

Time for applying.

The application should be made as soon as possible after the judgment is signed and comes to the knowledge of the defendant, but mere delay is no objection to it, unless the circumstances are such that the parties cannot be restored to their former position, and the plaintiff compensated by payment of costs (*q*).

On what terms.

When a regular judgment is set aside, it is usually upon such terms as will place the plaintiff as nearly as possible in the same situation as though the action had proceeded in its regular course (*r*).

(*g*) *Bennett* v. *Simmons*, 2 D. & L. 98. See *Doe* d. *Gretton* v. *Roe*, 4 C. B. 576.

(*h*) *Cannan* v. *Reynolds*, 5 E. & B. 301; 26 L. J., Q. B. 62, *Erle*, J., dub.

(*i*) *Wood* v. *Cleveland*, 2 Salk. 518: *Sisted* v. *Lee*, 1 Salk. 402.

(*k*) *Forbes* v. *Middleton*, 2 Str. 1242.

(*l*) *Willett* v. *Atterton*, 1 W. Bla. 35: *Beck* v. *Mordaunt*, 2 Bing. N. C. 140; 4 Dowl. 112: *Wood* v. *Cleveland*, 2 Salk. 518: *Anon.*, 4 Taunt. 885.

(*m*) *Maddocks* v. *Holmes*, 1 B. & P. 228. See *Forbes* v. *Middleton*, 2 Str. 1242: *Willett* v. *Atterton*, 1 W. Bla. 35.

(*n*) *Evans* v. *Gill*, 1 B. & P. 52; Tidd, 9th ed. 568.

(*o*) *Delafield* v. *Tanner*, 5 Taunt. 856; 1 Marsh. 391.

(*p*) *Jacques* v. *Harrison* (C. A.), 12 Q. B. D. 165; 53 L. J., Q. B. 137; 50 L. T. 246; 32 W. R. 470. See the Jud. Act, s. 24, sub-s. 5, post, Ch. XXX., "*Staying Proceedings.*"

(*q*) *Atwood* v. *Chichester*, 3 Q. B. D. 722; 38 L. T. 48: *Davis* v. *Ballenden*, 46 L. T. 797.

(*r*) See *Anon.*, 3 Doug. 431: *Smith* v. *Blundell*, 1 Chit. Rep. 226. And see *Picker* v. *Webster*, Id. 232.

The terms generally imposed are, that the defendant pay the costs of the application (*s*), plead instanter (which means on the same day at all events) (*t*), and take short notice of trial (*u*), or such notice of trial as the plaintiff can give. In some cases, especially where plaintiff has lost a trial, the defendant will be ordered to bring the money sought to be recovered, or part of it, into Court (*x*). In all cases of regular judgment and execution, the defendant will be restrained from bringing an action.

—after substituted service.

An order for substituted service is not absolutely final and conclusive, but it is competent to the Court to set aside a judgment regularly signed after such order. This is, however, a matter of discretion, and a defendant will not be let in to defend as of right merely because he was ignorant of the fact that process had been issued against him. Where such ignorance appeared upon affidavits which also alleged that the defendant had a good defence upon the merits, the Court set aside the judgment upon the terms of the defendant giving security for the amount of the judgment and costs (*y*).

"Merits" must be sworn to.

The application must be supported by an affidavit of merits (*y*), which should show what the defence is, and state, in express terms, that the defendant has "a good defence to this action upon the merits" (*a*). It may be made either by the defendant himself or his solicitor or agent, or the clerk of the solicitor who has the sole management of the cause, or some person who has had such a connection with the cause as acquaints him with its merits, and this must appear on the face of the affidavit (*b*). Where it is made by the party himself, the words, "as I am *advised* and believe," are added (*c*). Where it is made by the solicitor or managing clerk to the solicitor, the form is, "as I am *informed* and verily believe" (*d*), or, "as I am instructed and verily believe" (*e*). An affidavit merely that the defendant is advised and believes he has "a good and meritorious defence" (*f*); or, that the defendant "hath merits and good cause of defence to this action" (*g*); or, that he "is informed and believes that he has a good, substantial, and available defence to this action" (*h*); or, that he has "merits to defend, or a good defence to the action" (*i*); or that he has "a good and sufficient defence on the merits," not saying "to this action" (*k*), or the like, will not

(*s*) *Sisted* v. *Lee*, 1 Salk. 402. See *Prudhoe* v. *Armstrong*, Barnes, 256.

(*t*) Tidd, 9th ed. 567.

(*u*) *Matthews* v. *Stone*, Barnes, 242.

(*x*) *Welland* v. *Rock*, Barnes, 243. See *Wade* v. *Simeon*, 13 M. & W. 647: *Austin* v. *Mills*, 9 Exch. 730; 22 L. J., Ex. 263.

(*y*) *Watt* v. *Barnett*, 3 Q. B. D. 183, affirmed Id. 363; 47 L. J., Q. B. 329: *Smith* v. *Dobbin*, 37 L. T. 777, per *Brett*, L. J.: *Whiley* v. *Wiley*, 4 C. B., N. S. 653; 27 L. J., C. P. 305. But see *Warrington* v. *Leake*, 11 Ex. 304; 25 L. J., Ex. 27, *Pollock*, C. B., dub., *Martin*, B., diss.

(*a*) *Lane* v. *Isaacs*, 3 Dowl. 652. See Chit. Forms.

(*b*) *Rowbotham* v. *Dupree*, 5 Dowl. 557: *Morris* v. *Hunt*, 1 Chit. Rep. 97.

(*c*) *Crossby* v. *Innes*, 5 Dowl. 566.

(*d*) Per Cur. *Bromley* v. *Gerish*, 6 M. & G. 750; 1 D. & L. 768.

(*e*) *Schofield* v. *Huggins*, 3 Dowl. 427: *Worthington* v. ——, 2 C. M. & R. 315. "Apprised and believed" will not do: *Bromley* v. *Gerish*, supra.

(*f*) *Bower* v. *Kemp*, 1 Dowl. 281; 1 C. & J. 287.

(*g*) *Lane* v. *Isaacs*, 3 Dowl. 652.

(*h*) *Page* v. *South*, 7 Dowl. 412.

(*i*) *Pringle* v. *Marsack*, 1 D. & R. 155.

(*k*) *Crossby* v. *Innes*, 5 Dowl. 566.

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suffice. An affidavit by an agent, that, from the instructions he had received from the country, he believed that the defendant had a good defence to the action on the merits, was, under the old practice, held sufficient (*l*); but under the present practice the affidavit should show what the defence is. The plaintiff cannot, in general, in answer to the affidavit of merits, make an affidavit to show that the defendant has no merits (*m*).

(*l*) *Schofield* v. *Huggins*, 3 Dowl. 427.

(*m*) *Heane* v. *Battersby*, 3 Dowl. 213, per *Gurney*, B.; *Warrington* v. *Leake*, 11 Ex. 304; 25 L. J., Exch. 27. And see per *Coleridge*, J., in 1 Dowl., N. S. 820.

CHAPTER XVII.

PROCEEDINGS TO OBTAIN JUDGMENT UNDER ORDER XIV. ON SPECIALLY INDORSED WRIT.

In what cases.

WHERE the writ of summons is specially indorsed under *Ord. III. r.* 6 (see *ante*, p. 221), and the defendant enters an appearance, the plaintiff may apply for immediate judgment.

By *R. of S. C., Ord. XIV. r.* 1, "Where the defendant appears to a writ of summons specially indorsed under *Ord. III. r.* 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The judge may thereupon, unless the defendant by affidavit or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly."

In what cases applicable.

In what Cases applicable.]—The rule, it will be observed, is confined to cases where the writ is specially indorsed under *Ord. III. r.* 6. Under it judgment may, it appears, be given against the separate estate of a married woman (*a*), though not against her personally (*b*). The rule does not apply to a case where an injunction is claimed (*c*). It does apply to a case when the defendant is a corporation (*d*). As to the proceedings in an action for recovery of land, *see post, Vol.* 2, *Ch. CVI.*

Special indorsement.

The Special Indorsement.]—The rule (*Ord. III. r.* 6) under which the special indorsement is made, and the decisions as to what claims can be specially indorsed, and as to what is and what is not a sufficient special indorsement, are fully discussed *ante*, pp. 221 *et seq.* If any unliquidated claim is indorsed on the writ the appli-

(*a*) *Bursill* v. *Tanner*, 13 Q. B. D. 691: *Moore* v. *Mulligan*, W. N. 1884, 34; Bitt. Ch. Cas. 127: *Perks* v. *Mylrea*, W. N. 1884, 64; Bitt. Ch. Cas. 128: *Saville* v. *Kain*, 28 Sol. J. 548: *Durrant* v. *Ricketts*, 8 Q. B. D. 177; 51 L. J., Q. B. 425. But see *Ormer* v. *Fitzgerald*, 50 L. J., Ch. 17; 43 L. T. 60, V.-C. M: *Butterworth* v. *Tee*, W. N. 1876, 9, per *Quain*, J.

(*b*) *Durrant* v. *Ricketts*, and cases supra.

(*c*) *Yeatman* v. *Snow*, 42 L. T. 502; 28 W. R. 574, V.-C. M.

(*d*) *Shelford* v. *Louth and East Coast R. Co.*, 4 Ex. D. 317; 28 W. R. 407, C. A.

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cation cannot be made (*e*); but a claim for interest (*f*), or for the expenses of noting a bill (*f*), does not preclude the plaintiff from applying. The indorsement may be and often is amended on the hearing, either by making the necessary addition, or by striking out so much of the claim as is unliquidated (*g*).

General principles as to giving or refusing leave to defend.

General Principles as to giving or refusing Leave to defend.]—If the defendant does not satisfy the master that he has a good defence to the action, or disclose facts which the master may deem sufficient to entitle him to defend, leave to defend will be refused. Where, therefore, the facts stated by him do not suggest any real or valid defence (*h*), leave to sign judgment will be given.

But leave to defend will only be refused in clear cases (*i*). The master does not profess to try the action on affidavits (*k*), and therefore, if the defendant states facts constituting, or which might constitute, a *bonâ fide* defence (*l*), or from which he may plausibly argue that he has a defence (*m*), or which are sufficient to entitle him to interrogate the plaintiff (*n*), or to cross-examine the plaintiff's wit-

(*e*) *Hill* v. *Sidebottom*, 47 L. T. 224: *Peal* v. *Smith*, cor. Master *Dodgson* at Jud. Ch., 6th August, 1880, *Ex rel. ed.*

(*f*) See the rule. *Smith* v. *Wilson*, C. A., 5 C. P. D. 25; 49 L. J., C. P. 96.

(*g*) See *Robinson* v. *Robinson*, 8 L. R., Ir. 26.

(*h*) *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197: *Thorne* v. *Seel*, W. N. 1878, 215: *Ray* v. *Barker*, 4 Ex. D. 279; 48 L. J., Ex. 569. See *Roberts* v. *Guest*, W. N. 1876, 10: *Lord Hanmer* v. *Flight*, W. N. 1876, 54: *Woolson* v. *Barnes*, W. N. 1876, 74: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 693, 704: *Oriental Bank Co.* v. *Fitzgerald*, W. N. 1880, 119, C. A.: *Clifford* v. *Budds*, W. N. 1884, 40; Bitt. Ch. Cas. 124, defence of bankruptcy in action for fraudulent breach of trust.

(*i*) *Thompson* v. *Marshall*, C. A., 41 L. T. 720; 28 W. R. 220: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 693: *Ray* v. *Barker*, 3 Ex. D. 279, per *Bramwell*, L. J., at p. 282: cp. *Ex p. Jacobson*, 48 L. T. 197.

(*k*) *Beech* v. *Moss*, Q. B. D., Nov. 17th, 1877; 64 L. T. Jour. p. 63: *Andrews* v. *Stewart*, W. N. 1876, 7.

(*l*) Per Lord *Coleridge*, C. J., *Yorkshire Banking Co.* v. *Beatson*, 4 C. P. D. at p. 215.

(*m*) Per *Cotton*, L. J., *Ray* v. *Barker*, 4 Ex. D. at p. 284: *Beckingham* v. *Owen*, W. N. 1878, 215, C. A.

(*n*) *Harrison* v. *Bottenheim*, C. A., 26 W. R. 362, where per *Bramwell*, L. J., "It seems to me that though a man cannot show a defence, still if he has shown enough to entitle him to interrogate the plaintiff, the case is not within Order XIV., and should not be pursued without his being allowed to defend. The very rule itself contemplates that a man is to be let in to defend who can [*sic; sed qu.* cannot] make out a defence, because the words are, 'unless the defendant can satisfy the Court or judge that he has a good defence to the action on the merits, or disclose such facts as the Court or a judge may think sufficient to entitle him to be permitted to defend them.' It is said that this order has only been made in the event of the defendant not paying money into Court; but in many cases this provision would be entirely nugatory—absolutely impossible to satisfy. What the learned judge should have considered here was, whether the facts were such as to entitle the defendant to be heard." And per *Brett*, L. J., "But there are one or two points here which are matter of principle. I quite agree that hearsay evidence is not to be shut out, and that it is not necessary the defendant should show a good defence on the merits. If he does, then I think the judge is bound to let him in to defend. But I cannot help thinking that some facts must be shown by him. If he discloses certain facts, whether by hearsay or otherwise, and if he can make such reasonable suggestion as to show he may be able to substantiate a defence, if he suggests a defence, and shows some probability of getting it from the plaintiff, or proving it himself, he ought to be allowed to defend."

nesses (*n*), or which make it doubtful whether he has or has not a defence (*o*), or which raise questions which ought to be submitted to a jury (*p*), or show that the amount of the plaintiff's claim depends on the settlement of disputed accounts (*q*), he will be allowed to defend.

In actions on bills of exchange by the indorsee against the acceptor, if the latter states facts sufficient to throw on the plaintiff the onus of proving that he is a *bonâ fide* holder for value, unconditional leave to defend should be given (*r*).

The master, in giving leave to defend, may impose as a condition that the defendant bring money into Court or give security (*s*), but this should only be done in cases where it is doubtful whether the defendant ought to be allowed to defend at all, and not in cases where the defendant gives reasons for supposing that he has a *bonâ fide* defence (*t*).

The mere fact that he claims an indemnity against some third party will not alone entitle the defendant to defend (*u*).

The order for judgment may be made though the defendant be a surety only (*x*); but in this case, if the defendant has had no means of verifying the debt, and may reasonably ask to have it strictly proved, he will be allowed to defend (*y*).

Set-off or counterclaim.

The fact that the defendant has, or says he has, a counterclaim against the plaintiff does not entitle him as a matter of right or necessity to leave to defend (*z*); but where the defendant, although he has no defence, swears in his affidavit that he has a valid counterclaim connected with the transaction out of which the plaintiff's claim arises, and states facts showing that the counterclaim is *bonâ*

(*n*) *Carta Para Gold Mining Co.* v. *Fastnedge*, C. A., 30 W. R. 880.

(*o*) See n. (*i*), ante.

(*p*) Per *Archibald*, J., W. N. 1876, 64: *Phillips* v. *Phillips*, Id. 54: per *Brett*, J., *Davis* v. *Spence*, 1 C. P. D. 721.

(*q*) *Wallingford* v. *The Mutual Society*, 5 App. Cas. 685; 50 L. J., Q. B. 49; 43 L. T. 258; 29 W. R. 81, which was an action by a mortgagee in possession against a mortgagor for the mortgage debt. The writ was specially indorsed for a certain sum; and upon an affidavit that there was no defence, notwithstanding counter-affidavits alleging questions of account, an order was made that unless the defendant paid 5,000*l.* into Court by a given day, the plaintiff might sign judgment. Judgment was signed, and execution levied under the order. The House of Lords held that the defendant ought to have been allowed to defend, for the purpose of taking an account, without any payment into Court, and that judgment ought to have been signed as security only for what should be found due on the account, without power to issue execution except by leave of the Court, the defendant being required as a condition to consent to the immediate taking of such account.

(*r*) *Fuller* v. *Alexander*, 52 L. J., Q. B. 103; 47 L. T. 443. See *Millard* v. *Baddeley*, W. N. 1884, 96; Bitt. Ch. Cas. 125; 28 Sol. J. 427; *Blaiberg* v. *Adams* (C. A.), 77 L. T. Jour. 255.

(*s*) Ord. XIV. r. 6, infra. See per *Bowen*, L. J., *Ex p. Jacobson, In re Pincoffs*, 22 Ch. D. at p. 315.

(*t*) *Runnacles* v. *Mesquita*, 1 Q. B. D. 416; 45 L. J., Q. B. 407, and cases cited supra.

(*u*) *Thorne* v. *Seel*, W. N. 1878, 215 (C. A.).

(*x*) *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197 (C. A.); *Thorne* v. *Seel*, supra.

(*y*) *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 262.

(*z*) *Anglo-Italian Bank* v. *Wells* (C. A.), 38 L. T. 197: *Rotherham* v. *Priest*, 41 L. T. 558; 49 L. J., Q. B. 104, n. (4), where the defendant sought to set up a counterclaim for libel in an action for rent, the two matters being quite unconnected, and leave to do so was refused.

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fide, and that it is likely to be established, this will suffice to entitle him to defend unconditionally (*a*). In an action for calls brought by the official liquidator of a company which was being voluntarily wound up, where the defendant had a set-off exceeding the amount of the claim, he was allowed to defend unconditionally (*b*).

Other facts.

Where it was shown at chambers that the defendant having been served out of the jurisdiction had not had time to communicate with his solicitors when the application was made, this was considered a sufficient ground for its refusal (*c*); but the mere fact that the defendant was at sea on his way to join his regiment, and had been served with the writ on the day before he left England, has been held not to be a sufficient cause (*d*).

The application.

The Application.]—By *R. of S. C., Ord. XIV. r.* 2, "The application by the plaintiff for leave to enter final judgment under the last preceding rule shall be made by summons returnable not less than four clear days after service accompanied by a copy of the affidavit and exhibits referred to therein."

No time is limited within which the application must be made, but it should be made as soon as possible, so as to avoid unnecessary costs.

The summons is issued at the Central Office in the usual way on production of the affidavit in support. Although *r.* 1 says that the plaintiff may on affidavit apply for liberty to sign judgment, the affidavit is not a condition precedent to the issue of the summons, and any defect in it may be supplied afterwards (*e*).

Pending this application the time for delivering the defence does not run (*post*, p. 297); and an application to remit an action to a County Court will not generally be entertained (*f*); but an application to compel the plaintiff to give security for costs will (*g*).

The plaintiff's affidavit.

The Plaintiff's Affidavit.]—The application must be supported by an affidavit (*h*), which, however, as we have seen, is not a condition precedent to the issuing of the summons (*i*). The original rule required the affidavit to be made by the plaintiff himself (*k*), and, consequently, precluded a plaintiff corporation from applying (*l*); but under the present rule it may be made by any person who can swear positively to the debt or cause of action (*h*). The affidavit

(*a*) *Manley* v. *Gooch*, cor. *Huddleston*, B., and *Hawkins*, J., in Exch., June 3rd, 1881, which was an action by a builder for money due under a contract in respect of work done in rebuilding the Princess's Theatre, Oxford Street, and the defendant set up a counterclaim for negligence, whereby the adjoining shop fell down and he was made liable in damages to the lessee of it. See *Fowler* v. *Lee*, W. N. 1876, 86: *Andrews* v. *Stewart*, W. N. 1876, 7.

(*b*) *Groom* v. *Rathbone*, 41 L. T. 591.

(*c*) Per *Lindley*, J., W. N. 1876, 23.

(*d*) Per *Huddleston*, B., W. N. 1875, 260.

(*e*) *Begg* v. *Cooper*, 40 L. T. 29; 27 W. R. 224 (C. A.).

(*f*) *Smith* v. *Hurley*, W. N. 1884, 99; Bitt. Ch. Cas. 56.

(*g*) *La Banque des Travaux Publiques* v. *Wallis*, W. N. 1884, 64; Bitt. Ch. Cas. 52.

(*h*) Ord. XIV. r. 1, ante; Chitty's Forms, pp. 112, 113.

(*i*) Ante, n. (*e*).

(*k*) *Frederici* v. *Vanderzee*, 2 C. P. D. 70; 46 L. J., C. P. 194, C. A.

(*l*) *Bank of Montreal* v. *Cameron*, 2 Q. B. D. 536; 46 L. J. Q. B. 425, C. A.: cp. *Muirhead* v. *Direct United States Cable Co.* (*Limited*), 27 W. R. 708.

must verify the cause of action and state that in the deponent's belief there is no defence to it (*l*). In practice a short form, simply referring to the indorsement on the writ and swearing that the defendant is indebted in the amount of the claim, and that in the deponent's belief there is no defence to the action, is adopted (*m*); and this will generally suffice, but in many cases it is advisable to state the facts more fully so as to afford an answer to any defence the defendant may set up, and this is especially so where the right to recover depends on the performance of any condition precedent, or where there is some written admission by the defendant of his liability.

How defendant may show cause.

How Defendant may show Cause.]—By the terms of the before-mentioned rule (*Ord. XIV. r.* 1, *ante*, p. 269), the leave to sign judgment may be granted, unless the defendant, by affidavit or otherwise, satisfy the Court or judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend.

By *r.* 3 of the same Order, "The defendant may show cause against such application by affidavit, or (except in actions for the recovery of land) by offering to bring into Court the sum indorsed on the writ. Such affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant, or, in the case of a corporation, any officer thereof, to attend and be examined upon oath: or to produce any leases, deeds, books or documents, or copies of or extracts therefrom."

Under these rules the defendant in order to get leave to defend must satisfy the master that he has a good defence on the merits or disclose such facts as the master may think sufficient to entitle him to defend (*n*). This he may do either by affidavit (*o*), or by offering to bring into Court the sum claimed (*p*), or otherwise (*q*). The offer to bring the money into Court does not give him any absolute right to defend (*r*), but is merely a circumstance to be taken into consideration by the master (*s*), and in most cases, therefore, the defendant must show cause by affidavit. Inasmuch as it has been held that the affidavit must be made by the defendant himself (*t*), it is in some cases as, for instance, where a corporation is defendant (*u*), necessary to show the defence or disclose the necessary facts "otherwise" (*x*). But in practice this may be done by the affidavit of some other person.

Defendant's affidavit.

Defendant's Affidavit.]—The defendant's affidavit must state

(*l*) Ord. XIV. r. 1, ante, p. 269; Chit. Forms, pp. 112, 113.

(*m*) See forms, Chit. Forms, p. 112. See a form in *Runnacles* v. *Mesquita*, ante, p. 271, n. (*t*).

(*n*) Ord. XIV. r. 1, supra.

(*o*) Id. rr. 1 and 3; Chit. Forms, p. 114.

(*p*) Id. r. 3.

(*q*) Id. r. 1a: *Shelford* v. *Louth, &c. R. Co.*, 4 Ex. D. 317; 28 W. R. 407. See per *James*, L. J., at 4 Ex. D. pp. 318, 319: *Muirhead* v. *Direct United States Cable Co.*, 27 W. R. 708, Q. B. D.

(*r*) *Crump* v. *Cavendish*, 5 Ex. D. 211; 49 L. J., Ex. 491.

(*s*) Id.

(*t*) *Muirhead* v. *Direct United States Cable Co.*, supra: but see per *Cotton*, L. J., *Shelford* v. *Louth, &c. R. Co.*, 4 Ex. D. at pp. 319, 320.

(*u*) *Muirhead* v. *Direct United States Cable Co.*, supra.

(*x*) Id.

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whether the defence set up goes to the whole or to part only, and if so, to what part of the plaintiff's claim (*y*). A mere statement that the defendant has a good defence (*z*), or that he does not owe the money claimed (*a*), is not sufficient. The affidavit should state shortly the nature of the defendant's defence and the material facts necessary to support it, or should state concisely the facts on which the defendant relies as entitling him to defend. He may either deny the plaintiff's affidavit if it is untrue, and his defence partakes of the nature of a single traverse, or he may admit the plaintiff's statement and show facts which avoid and defeat his claim, or he may combine both traverse and matter in confession and avoidance. The forms of defences which will be found in the third edition of Bullen and Leake's Precedents of Pleadings, may be usefully consulted in framing the affidavit. If the defendant goes beyond the mere statement that he has a defence on the merits, and shows grounds for his defence, and gives reason to suppose that it is a substantial one, he will be let in to defend, and this without having to pay money into Court (*b*). The general principles on which leave to defend conditionally or unconditionally is given are discussed *supra*, p. 270.

It has been held that the affidavit must be made by the defendant himself (*c*), but it would appear open to question whether this is correct (*d*).

Examination of defendant, &c.

Examination of Defendant vivâ voce, &c.]—Under *r.* 3 (*supra*, p. 273), the master may, if he think fit, order the defendant, or if a corporation be defendant, any officer thereof, to attend and be examined on oath, or to produce any books or documents, or copies thereof or extracts therefrom.

Further affidavits.

Further Affidavits.]—By an order made at Judge's Chambers, dated December 12th, 1881, it is ordered that, "Either party may at any stage of the proceeding be allowed an opportunity to bring forward additional facts for the purpose of enabling the judge to determine whether the defendant ought or ought not to have an opportunity to defend the action."

This rule adopts and extends what it is submitted was the correct view, and was generally adopted, that is to say, that the master or judge might in the exercise of his discretion allow the plaintiff to read affidavits in reply to the defendant's affidavit (*e*).

Order for judgment.

Order for Judgment.]—If the defendant does not appear (*f*), or does not file any affidavit (*g*), or fails to satisfy the master that he has

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(*y*) See Ord. XIV. r. 3, ante.

(*z*) Per *Quain*, J., W. N. 1875, 249, 250.

(*a*) Per Lord *Blackburn*, *Wallingford* v. *Mutual Society*, 5 App. Cas. at p. 704.

(*b*) *Runnacles* v. *Mesquita*, 1 Q. B. D. 416; 45 L. J., Q. B. 407: *Morris* v. *Levison*, 45 L. J., C. P. 409.

(*c*) *Muirhead* v. *Direct United States Cable Co.*, 27 W. R. 708.

(*d*) *Shelford* v. *Louth and East Coast R. Co.* (C. A.), 4 Ex. D. 317, per *Cotton*, L. J., at pp. 319, 320: *S. C.*, 28 W. R. 407.

(*e*) *Davis* v. *Spence*, 1 C. P. D. 719; 25 W. R. 229: *Rotherham* v. *Priest*, 49 L. J., C. P. 104; 41 L. T. 558; 28 W. R. 277: *Geron* v. *Gresse* (M. R.), 13 Ch. D. 174; 49 L. J., Ch. 63. See *North Central Waggon Co.* v. *Wales Waggon Co.*, 39 L. T. 628, contra.

(*f*) Per *Huddleston*, B., Bitt. No. clxiv.

(*g*) Per *Lindley*, J., W. N. 1876, 12.

a good defence on the merits, or to disclose such facts as may be deemed sufficient to entitle him to defend (*h*), leave to sign judgment will be given.

An order giving leave to sign judgment unless a sum is paid before a day named, need not be served before judgment is signed (*i*).

Costs.

Costs.]—In cases where the plaintiff obtains an order for judgment under *Ord. XIV.*, although the amount of his claim does not exceed 50*l.*, provided it exceeds 20*l.*, he will be allowed for costs 6*l.* 10*s.* in town cases, and 7*l.* in country cases, with an additional allowance of 6*s.* for each additional defendant (*k*). Cases where the writ is issued in London and served in the country are country cases for this purpose (*l*). These amounts do not apply when substituted service has been ordered, in which case the costs should be taxed and a reasonable sum allowed (*m*).

Leave to defend.

Leave to defend.]—By *Ord. XIV. r.* 6, "Leave to defend may be given unconditionally or subject to such terms as to giving security, or time and mode of trial (in cases which, under these rules, may be tried without a jury), or otherwise, as the Judge may think fit." If the defendant obtains leave to defend, an order to that effect should be made. Though in a case where the master indorsed "No order" on the plaintiff's summons, this was held equivalent to leave to defend (*n*).

By *Ord. XIV. r.* 4, "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim" (*o*).

Where part of the claim is admitted, and a defence as to the residue sworn to, the proper order is that the plaintiff shall have judgment for the part admitted, and the defendant leave to defend as to the residue (*p*). There is no power to require payment of the amount admitted as a condition to being allowed to defend as to the residue (*p*).

Several defendants.

By *Ord. XIV. r.* 5, "If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment

(*h*) See ante, p. 273.
(*i*) *Hopton* v. *Robertson*, W. N. 1884, 77; Bitt. Ch. Cas. 203.
(*k*) *Bye* v. *Kirby*, W. N. 1883, 196; Bitt. Ch. Cas. 37.
(*l*) *Davies* v. *Stevens*, W. N. 1884, 9; Bitt. Ch. Cas. 41.
(*m*) *Peal* v. *Maudsley*, 77 L. T. Journ. 348.
(*n*) *Margate Pier, &c. Co.* v. *Perry*, W. N. 1876, 52.
(*o*) See *Anon.*, W. N. 1876, 53: cp. *Lord Hanmer* v. *Flight*, 35 L. T. 127, reversed, 36 L. T. 279.
(*p*) *Dennis* v. *Seymour*, 4 Ex. D. 80; 42 L. T. 31; 27 W. R. 475.

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without prejudice to his right to proceed with his action against the former."

The order may give the defendant the alternative of giving security for the amount to the satisfaction of one of the masters instead of paying it into Court (*q*).

The order should not say anything as to the time for delivering the defence (*r*), which, if no time is limited, must be delivered within eight days from the date of the making of the order (*s*). No statement of claim is or can be required in this case (*t*), unless it is specially ordered (*u*).

Fresh application.

Fresh Application.]—If the application is dismissed or refused, the plaintiff may apply again on fresh materials (*x*).

Appeal.

Appeal.]—Either party may appeal from the master to the judge and from the judge to the Court, and thence to the Court of Appeal and House of Lords (*y*). But the decision is looked upon as a matter of discretion, and especially in cases where leave to defend has been given, appeals are not looked upon with any favour by the Court (*z*). An order giving leave to sign judgment is an interlocutory order for the purpose of an appeal to the Court of Appeal (*a*), which must therefore be brought within twenty-one days (*a*). Further affidavits may be used on the appeal to the Court (*b*).

Payment into Court or giving security.

Payment into Court or giving Security.]—As to the mode of paying money into Court, see *post, Ch. XXIX.*, "*Payment into Court.*" As to the mode of giving security, see *post, Ch. XXXIII.*, "*Security for Costs.*"

Further proceedings.

Further Proceedings.]—If the plaintiff be given leave to sign judgment, he may sign it and proceed to execution in the usual way (*c*). If the defendant obtain leave to defend, the further proceedings are the same as usual. If the leave to defend be conditional on paying money into Court, the judgment may be signed without any further order if the condition is not complied with (*d*).

Plaintiff a secured creditor.

When money is paid into Court as a condition to leave to defend, the plaintiff cannot, of course, touch it or take it out of Court, unless and until he succeeds in the action, and then only to the amount for which he obtains judgment. He is, however, mean-

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(*q*) See form of bond, Chit. F.

(*r*) *Egerton* v. *Anderson*, W. N. 1884, 95; Bitt. Ch. Cas. 163. The forms in Appendix K., Nos. 7, 8 & 9, are now amended accordingly.

(*s*) R. of S. C., Ord. XXI. r. 8. See post, p. 297.

(*t*) *Atkins* v. *Taylor*, W. N. 1876, 11, per *Lindley*, J. See *Margate Pier, &c. Co.* v. *Perry*, Id. 52.

(*u*) See forms provided by the R. of S. C., April, 1880, in Chit. F.

(*x*) *Wagstaff* v. *Jacobowitz*, W. N. 1884, 17; Bitt. Ch. Cas. 123.

(*y*) See *Wallingford* v. *Mutual Society*, 5 App. Cas. 685; 50 L. J., Q. B. 49, where the House of Lords reversed the decisions of all the tribunals below from the master up to the Court of Appeal on a question under Ord. XIV.

(*z*) See *Papayanni* v. *Coutpas*, W. N. 1880, 109 (C. A.): *Wallington* v. *Mutual Society*, supra.

(*a*) *Standard Discount Co.* v. *De la Grange*, 3 C. P. D. 67; 47 L. J., C. P. 3.

(*b*) *Robinson* v. *Bradshaw*, 32 W. R. 95.

(*c*) See ante, p. 259. See form, Chit. F.

(*d*) See ante, p. 275, n. (*i*).

while a creditor holding a security within the Bankruptcy Act, 1883, and his right to the money if he succeeds is unaffected by the subsequent bankruptcy of the defendant (*d*).

When the defendant has paid money into Court as a condition to leave to defend, he is entitled to have the money paid out to him if he obtains the judgment of the Court in his favour, notwithstanding that notice of appeal is given by the plaintiff (*e*).

Return of money to successful defendant.

(*d*) *Ex p. Banner, In re Keyworth*, L. R., 9 Ch. 379; 43 L. J., Bk. 55, 102; 29 L. T. 849; 30 L. T. 620: *Ex p. Bouchard, In re Moojen*, 12 Ch. D. 26; 48 L. J., Bk. 105; 28 W. R. 129: *Murray* v. *Arnold*, 3 B. & S. 287; 32 L. J., Q. B. 11. See per Lord *Coleridge*, C. J., 4 C. P. D. at p. 215.

(*e*) *Yorkshire Banking Co.* v. *Beatson*, 4 C. P. D. 213; 41 L. T. 92; 27 W. R. 914.

PART IV.

THE PLEADINGS AND APPLICATIONS RELATING THERETO.

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CHAPTER XVIII.

PLEADINGS GENERALLY.

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The pleadings.

THE pleadings are written or printed statements showing the nature of the claim made by, and the answers thereto of, the respective parties (*a*). The first pleading is the statement of claim, which shows the nature of the plaintiff's claim against the defendant. This, as we have already seen (*ante*, p. 221), is, in some

(*a*) Before the Jud. Acts came into force, the first pleading, being the plaintiff's statement of his complaint against the defendant, was called a declaration; the defendant's pleading by way of answer thereto was called a plea:—the plaintiff's answer to the plea was called a replication, and the subsequent pleadings were called respectively rejoinder, surrejoinder, rebutter, and sur-rebutter, beyond which pleadings seldom went. There was also a pleading called a new assignment, which was in the nature of a replication, and was used when the plea was pleaded to a cause of action not sued for, but which, by reason of the generality of the declaration, might be supposed to be included therein. There was also a pleading called a demurrer which was used when a party insisted that his opponent's pleading was bad in law, as showing no cause of action, or defence, or the like; thus, if the plaintiff's declaration showed no cause of action, the defendant might demur to the same, and so if the plea offered no defence to the action, the plaintiff might demur to it.

cases, indorsed on the writ. The next pleading is the defendant's answer to the claim, called his defence, and also, if he has one, the defendant's set-off or counterclaim. Then follows the plaintiff's reply. The further pleadings, if any, are called respectively the rejoinder, the sur-rejoinder, rebutter and sur-rebutter.

The pleadings (*b*) under the present system are regulated by the *R. of S. C., Ord. XIX.*

By *Ord. XIX. r.* 1, "The following rules of pleading shall be used in the High Court of Justice."

By *r.* 2, "The plaintiff shall, subject to the provisions of *Ord. XX.* (c), and at such time and in such manner as therein prescribed, deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall, subject to the provisions of *Ord. XXI.* (*d*), and at such time and in such manner as therein prescribed, deliver to the plaintiff his defence, set-off or counterclaim (if any), and the plaintiff shall, subject to the provisions of *Ord. XXIII.* (*e*), and at such time and in such manner as therein prescribed, deliver his reply (if any) to such defence, set-off or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action shall at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same."

The rules relating particularly to each of these pleadings are treated of in the subsequent chapters of this Part. In the present chapter some rules relating to all pleadings are treated of.

Printing pleadings.

Printing Pleadings.]—By *Ord. XIX. r.* 9, "Every pleading which shall contain less than *ten* folios (every figure being counted as one word) *may* be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, *shall* be printed."

By *Ord. LXVI. r.* 3, "Proceedings required to be printed shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, or thereabouts, in pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches and a half wide." This rule is copied from the Consolidated Chancery Orders (*Ord. IX. r.* 3), under which rule it was held that, although the paper must be of the prescribed quality, it was not necessary that it should be weighed at the office of the Court, or that the margin should be of *exactly* the prescribed size (*f*).

Copies.

By *R. of S. C., Ord. LXVI. r.* 7 (c), "The party printing shall, on demand in writing, furnish to any other party any number of printed copies, not exceeding ten, upon payment therefor at the rate of 1*d.* per folio for one copy, and ½*d.* per folio for every other

(*b*) By sect. 100 of the Jud. Act, 1873, it is provided that "'Pleading' shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counterclaim of a defendant."

(*c*) See post, p. 288.

(*d*) See post, p. 297, 309.

(*e*) See post, p. 312.

(*f*) *Calthorp* v. *Rummens*, L. R., 6 Ch. 151.

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copy." And by *r.* 7 (m), "The folios of all printed and written office copies, and copies delivered or furnished to a party, shall be numbered consecutively in the margin thereof, and such written copies shall be written in a neat and legible manner on the same paper as in the case of printed copies."

Delivery of pleadings.

Delivery of Pleadings.]—By *Ord. XIX. r.* 10, "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer." When a statement of claim is served with the writ it is not necessary to file it in case of default of appearance (*g*).

By *Ord. XIX. r.* 11, *infra*, every pleading must be delivered between parties.

As to the service of pleadings and other proceedings, and as to filing pleadings when no appearance is entered, *see post, Ch. CXXVI.*

As to the time for delivering the different pleadings, *see the following chapters.*

Long vacation.

By *Ord. LXIV. r.* 4, "No pleadings shall be amended or delivered in the long vacation unless directed by a Court or a judge" (*h*).

It seems that a defence delivered in the long vacation without such a direction would be a nullity (*i*). Where the time for pleading expired *on* the 10th August, at a time when that was the last day for delivering pleadings before the long vacation, it was holden that judgment for want of a plea could not be signed on the 11th (*k*). And where a month's time had been given, and twenty-five days of it remained unexpired on 10th August, it was held that defendant had twenty-five days to plead after 24th October (*l*). This restriction as to the time for delivering pleadings is, however, frequently removed, where the time for pleading expires before 12th August, by plaintiff procuring the master, who makes the order for further time for delivering the defence, to grant it only upon the terms of defendant's pleading, and plaintiff being at liberty to reply without being subject to such restriction. It may also be removed by the consent of the parties.

Form of pleadings.

Form of the Pleadings.]—By *Ord. XIX. r.* 11, "Every pleading shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, the reference to the letter and number of the action, the Division to which the Judge (if any) to whom the action is assigned belongs, the title of the action and the description of the pleading, and shall be indorsed with the

(*g*) *Renshaw* v. *Renshaw*, 49 L. J., Ch. 127; 42 L. T. 353.

(*h*) See previous enactment, 2 W. 4, c. 39, s. 11.

(*i*) *Mills* v. *Brown*, 9 Dowl. 151: *Sharp* v. *Fay*, 28 L. T. 127.

(*k*) *Morris* v. *Hancock*, 11 L. J., Q. B. 12; 1 Dowl. N. S. 320: *Severin* v. *Leicester*, 12 Q. B. 949; 18 L. J., Q. B. 13: *Wilson* v. *Bradslocke*, 2 Dowl. 416.

(*l*) *Tyinder* v. *Smedley*, 3 Dowl. 87.

name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor."

The pleading, if not properly intituled, would be irregular only, and not a nullity (*m*), and might be set aside on an application made in due time (*n*), or amended at the instance of the opposite party (*o*). Unless under peculiar circumstances, a judge will generally allow the party in default to amend on payment of costs (*p*).

Forms prescribed by the Rules.

By *r.* 5, "The forms in Appendices C., D. and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be."

These forms will be found in Chitty's Forms (pp. 128 *et seq.*). In all cases to which they apply they should be followed as closely as possible, and in other cases they should be used as models. In no case, however, are they absolutely binding, and where they conflict, as they certainly do in some instances, with the rules, the latter prevail (*q*).

Contents of pleadings.

Contents of the Pleadings.]—By *Ord. XIX. r.* 4, "Every pleading shall contain, *and contain only*, a statement *in a summary form* of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, *when necessary*, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; *but where pleadings have been settled by counsel or a special pleader, they shall be signed by him; and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person.*"

This rule, with the exception of the words in italics, corresponds with the original *Ord. XIX. r.* 4. It prescribes what is of the very essence of the present system of pleading, that is to say, conciseness (*r*). The pleading should state all (*s*) the facts essential to constitute the cause of action or defence (*t*), and relevant facts which the party is entitled to prove at the trial (*u*), and those facts only (*u*). The facts should be stated in as concise a manner as

(*m*) See *Hodson* v. *Pennell*, 4 M. & W. 373: *Newnham* v. *Hanny*, 5 Dowl. 259.

(*n*) See *Newnham* v. *Hanny*, 5 Dowl. 259: *Hough* v. *Bond*, 1 M. & W. 314.

(*o*) *Semble*, *Wilkes* v. *Earl of Halifax*, 2 Wils. 256: *Thompson* v. *Marshall*, 1 Wils. 304.

(*p*) See post, Ch. XXIII.

(*q*) *The Iris*, 8 P. D. 227, 228; 53 L. J., P. 14; 49 L. T. 444; 32 W. R. 171.

(*r*) *Askew* v. *N. E. R. Co.*, W. N. 1875, 238: *Marsh* v. *Mayor, &c. of Pontefract*, W. N. 1876, 7: *Davy* v. *Garrett*, 7 Ch. D. 473; 38 L. T. 81, C. A.

(*s*) *Townsend* v. *Parton*, 45 L. T. 753, per *Kay*, J., at p. 754; 30 W. R. 755.

(*t*) See *Heap* v. *Marris*, 2 Q. B. D. 630: *Harbord* v. *Monk*, 38 L. T. 411: *Harris* v. *Warre*, 4 C. P. D. 125; 40 L. T. 429: *In re Rica Gold Washing Co.*, 11 Ch. D. 43: *Davis* v. *James*, 26 Ch. D. 778; 53 L. J., Ch. 523; 50 L. T. 115; 32 W. R. 406.

(*u*) *Lumb* v. *Beaumont*, 49 L. T. 772, *Pearson*, J.: *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J., Q. B. 214, C. A.

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possible, and should be stated in their legal aspect. Rules 2 and 5, *supra*, also prescribe brevity. If an unnecessarily prolix form is used, the costs occasioned thereby may be ordered to be borne by the party pleading it (*y*), or the Court may order it to be taken off the file (*z*).

Evidence.

Matters of evidence must not be pleaded (*a*). It is improper, therefore, to plead admissions (*b*) other than admissions by the party pleading of the statements contained in the pleadings of the other party (*c*).

Points of law.

Any party may raise any point of law (*d*), but this is probably confined to points of law arising by way of objection to his opponent's pleadings or case, and nothing like the charging part of a bill in chancery is admissible (*e*).

Damages.

Matters in aggravation of damages, such as seduction and infection in an action for breach of promise of marriage, may be pleaded (*f*). So all matters in mitigation of damages should be pleaded (*g*). In actions for libel or slander, where a justification is not pleaded, particulars of matters intended to be relied on in mitigation of damages, are expressly required by *Ord. XXXVI. r.* 37 (*h*).

No technical objection to be raised.

By *Ord. XIX. r.* 26, "No technical objection shall be raised to any pleading on the ground of any alleged want of form."

All defences, &c. must be raised.

All the Defences, &c. upon which a Party intends to rely must be pleaded.]—By *Ord. XIX. r.* 15, "The defendant or plaintiff as the case may be, must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law, or Statute of Frauds."

When the Statute of Limitations only bars the remedy, although the facts appear in the statement of claim, it must be pleaded. It could not under the former rules have been raised by demurrer (*i*), except when, as in an action for recovery of land, it takes away the title (*k*).

(*y*) See Rule 5, ante, p. 281: *Cracknell* v. *Janson*, 11 Ch. D. 1.

(*z*) *Hill* v. *Hart-Davis*, 26 Ch. D. 470.

(*a*) *Blake* v. *Albion Life Ass. Co.*, 46 L. J., C. P. 663; 35 L. T. 269.

(*b*) *Davy* v. *Garrett*, supra: *Askew* v. *N. E. R. Co.*, supra.

(*c*) See Ord. XXXII. r. 1, post, p. 284.

(*d*) See Ord. XXV. r. 2, post, p. 324. This was otherwise previously. *Stokes* v. *Grant* 4 C. P. D. 25; 40 L. T. 36.

(*e*) *Watson* v. *Rodwell*, 3 Ch. D. 380: *Davy* v. *Garrett*, supra: *Hanmer* v. *Flight*, 35 L. T. 127; 36 L. T. 279.

(*f*) *Millington* v. *Loring* (C. A.), 6 Q. B. D. 190; 50 L. J., Q. B. 214; 43 L. T. 657. See *Lumb* v. *Beaumont*, 49 L. T. 772.

(*g*) *Scott* v. *Sampson*, 8 Q. B. D. 491; 51 L. J., Q. B. 380; 46 L. T. 412; cp. Ord. XXXVI. r. 37, post.

(*h*) See post, Ch. XXXI., "*Particulars.*"

(*i*) *Wakalee* v. *Davies*, 25 W. R. 60, notwithstanding *Noyes* v. *Crawley*, 10 Ch. D. 31; 39 L. T. 267.

(*k*) *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318, C. A.; 4 App. Cas. 51, H. L.

Pleadings to be consistent.

Subsequent Pleadings not to be inconsistent with previous ones, or to raise new Claims.]—By *Ord. XIX. r.* 16, "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

The second pleading may add a fact but it must not contradict the first (*l*).

Denials to be specific.

Denials of Allegations of Fact must be specific and not general or evasive.]—By *Ord. XIX. r.* 19, "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he *must* not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances."

This rule and Rule 20 (*infra*) are similar in their terms to the former rules, and it would be difficult to express more clearly the intention that denials of fact must be specific and clear, and that anything like the old pleas of never indebted, or not guilty, is prohibited. In the Chancery Division, these former rules were strictly construed (*m*). If the defendant wished to deny a fact, he was compelled to do so substantially; thus, if he wished to deny the making of a contract he could not say that "it was not agreed as alleged," but must either have denied that any agreement at all was made, or else have stated what he contended really was agreed on, and that no other agreement was made (*m*). It was not sufficient simply to set out the plaintiff's statement in the negative, but *each* allegation must have been separately and specifically traversed (*n*); so as to show distinctly what was the issue which the defendant wished to raise (*o*).

In the Common Law Divisions the same strictness was not observed, and the most general and evasive denials were often allowed to pass muster. Some of the forms, in the Appendix to the present rules (such as App. D., sect. 4, sub-sect. 2, Nos. 1 and 2, and sub-sect. 3, No. 1 (*p*)) are most general, and appear to be in direct contravention of the provisions of the rules; but, as we have seen (*ante*, p. 281), the rules prevail over the forms (*q*), and the former should therefore be strictly observed.

Legality, &c. of contract.

Legality or Sufficiency of Contract not put in Issue by a bare Denial.]—By *Ord. XIX. r.* 20, "When a contract, promise, or

(*l*) Per *Brett*, L. J., *Breslauer* v. *Barwick*, 36 L. T. 53. In *Collett* v. *Dickinson*, W. N. 1878, 52, *Pollock*, B., in an action for goods sold where coverture was pleaded, a reply that the plaintiff believed defendant was a *feme sole* until he saw the defence, and that she had separate estate which she had charged, is reported to have been held regular. It is respectfully submitted that this is incorrect. Cp. per *Quain*, J., *Hancock* v. *De Niceville*, W. N. 1875, 230.

(*m*) *Thorpe* v. *Holdsworth*, 3 Ch. D. 641, M. R.

(*n*) *Byrd* v. *Nunn*, 5 Ch. D. 781, affirmed 7 Id. 284; 37 L. T. 585: *Jones* v. *Quinn*, 40 L. T. 135, Ir. Ex. D.

(*o*) Id. *Tildesley* v. *Harper*, 7 Ch. D. 403; 10 Id. 393; 38 L. T. 60. See *Collette* v. *Goode*, 7 Ch. D. 847, general denial followed by special.

(*p*) Chit. F., pp. 148, 149.

(*q*) *The Iris*, 8 P. D. 227, 228.

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agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise." The legality or sufficiency of a contract, if denied, must be specifically put in issue by the defence. It is not enough to traverse facts which the plaintiff has stated by way of anticipation to show the legality or sufficiency (*r*). A defence founded on the Statute of Frauds must be specifically pleaded (*r*). So must a defence under sect. 37 of the *Companies Act*, 1867 (*s*). It could not have been raised by demurrer (*t*). The particular provision of the statute on which the defendant intends to rely should be specified: a mere general statement that he intends to avail himself of the statute will not suffice (*u*).

Alleged capacity, &c.

Right to Claim in alleged capacity or Constitution of Firm to be specifically denied.]—By *Ord. XXI. r.* 5, "If either party wishes to deny the right of any other party to claim as executor, or as trustee whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically."

Admission—express;

Admissions in Pleadings—Express.]—By *Ord. XXXII. r.* 1, "Any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

As to moving for judgment on admission in the pleadings under *Ord. XXXII. r.* 6, *see post, Ch. LXIX.*, "*Motion for Judgment.*"

—by omission to deny.

—*By not denying Facts stated.*]—By *Ord. XIX. r.* 13, "Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

The defendant must be quite as specific when he says that he does not admit as when he denies (*x*). All facts not so specifically denied or stated to be not admitted, will be considered as admitted (*y*). A mere statement that the defendant "puts the plaintiff to the proof" of his statements will not suffice, but operates as an admission (*z*);

(*r*) *Clark* v. *Callow*, 46 L. J., Q. B. 53: *Towle* v. *Topham*, 37 L. T. 308.

(*s*) *Manchester and Oldham Bank* v. *Cook*, 49 L. T. 674.

(*t*) *Catling* v. *King*, 5 Ch. D. 660; *Morgan* v. *Worthington*, 38 L. T. 443: *Dawkins* v. *Lord Penrhyn*, ante, n. (*k*): *Shardlow* v. *Cotterell*, W. N. 1881, 2: *Futcher* v. *Futcher*, 45 L. T. 306.

(*u*) *Pullen* v. *Snellus*, 40 L. T. 363.

(*x*) Per *Jessel*, M. R., *Thorp* v. *Holdsworth*, 3 Ch. D. 640.

(*y*) Id.; *Byrd* v. *Nunn*, 5 Ch. D. 781; affirmed, 7 Id. 284; 37 L. T. 515: *Tildesley* v. *Harper*, 7 Ch. D. 403, C. A.; 10 Id. 393: *Collette* v. *Goode*, 7 Ch. D. 847; 38 L. T. 60; *Symonds* v. *Jenkins*, 34 L. T. 277: *Jenkins* v. *Davies*, 1 Ch. D. 696: *Jones* v. *Quin*, 40 L. T. 135, Ir. Ex. D.: *Rutter* v. *Tregent*, 12 Ch. D. 758; 41 L. T. 16.

(*z*) *Harris* v. *Gamble*, 7 Ch. D. 877; 38 L. T. 253.

so does a general statement that the matters alleged are untrue (*a*). It would seem that practically there is no difference between a denial and a refusal to admit (*b*). In the case of an action against executors, an allegation that the "defendants do not admit paragraph ——" was held sufficient to put in issue the paragraph referred to (*c*).

Pleading in abatement.

Pleading in Abatement.]—By *Ord. XXI. r.* 20, "No plea or defence shall be pleaded in abatement."

So far as the necessity of pleading in abatement arises from some disability or defect in the parties to the action, an application under *Ord. XVI. r.* 11 (*d*), now takes the place of the old plea; and in other cases an application to stay proceedings under the *Judicature Act*, 1873, *s.* 24, *sub-s.* 5 (*e*), is the proper course to adopt (*e*).

New assignment (*f*).

New Assignment.]—By *Ord. XXIII. r.* 6, "No new assignment (*f*) shall be necessary or used. But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim, or by way of reply."

This rule obviates the necessity of anticipating the defence, or amending, to which the former rule (*Ord. XIX. r.* 14) gave rise, and which was very awkward. In ordinary cases, defences, such as the Statute of Frauds, should not be anticipated (*g*).

Condition precedent.

Mode of Pleading particular Facts, &c.—Conditions Precedent.]—By *Ord. XIX. r.* 14, "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading."

There was no rule corresponding to this in the former rules. As an instance of a defence which was held to be a sufficient com-

(*a*) *Green* v. *Sevin*, 13 Ch. D. 589, *Fry*, J.; but see App. D., VI. 1, Chit. F., p. 149.

(*b*) Per *Grove*, J., *Hall* v. *L. & N. W. R. Co.*, 35 L. T. 848.

(*c*) *Smith* v. *Gamlen*, W. N. 1881, 110, *Jessel*, M. R.

(*d*) *Kendall* v. *Hamilton*, 4 App. Cas. 504, 516: *Scarf* v. *Jardine*, 7 App. Cas. 345. See post, Ch. LXXXVII.

(*e*) See post, Ch. XXX.

(*f*) A new assignment was a pleading in the nature of a replication and was used when the defendant's plea was pleaded to a cause of action not sued for, but which by reason of the generality of the declaration might be supposed to be included therein. The new assignment was pleaded for the purpose of correcting this mistake, and pointed out the cause of action really sued for, distinguishing it from that covered by the plea. Thus, if there had been two assaults on the plaintiff by the defendant, one of which was justifiable and the other not, and the declaration complained only of one assault, if the defendant by his plea treated the declaration as applying to the former assault, and pleaded the justification thereto, the plaintiff might new assign that he sued not for the assault pleaded to but for the other assault. This new assignment was, in fact, a repetition of the declaration differing only in this, that it distinguished the true ground of complaint, as being different from that which was covered by the plea. The defendant might plead to the new assignment in the same way as he could plead to the declaration.

(*g*) *Clark* v. *Callow*, 46 L. J., Q. B. 53. See per *James*, L. J., *Hall* v. *Eve*, 4 Ch. D. 345.

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pliance with the rule, *see Whiting* v. *East London Waterworks Co.*, W. N. 1884, 10.

Contents of documents.

Contents of Documents.]—By *Ord. XIX. r.* 21, "Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document, or any part thereof, are material" (*h*). This does not dispense with the statement of the exact words of a libel (*i*).

Malice, &c.

Malice, Fraudulent Intention, Knowledge, &c.]—By *Ord. XIX. r.* 22, "Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred" (*k*).

If a party intends to charge fraud, he must do so distinctly (*l*), and he should state the facts constituting the fraud (*m*).

Notice.

Notice.]—By *Ord XIX. r.* 23, "Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, *or the circumstances from which such notice is to be inferred*, be material." The words in *italics* are new.

Contract, &c.

Contract or Relation implied from Letters, &c.]—By *Ord. XIX. r.* 24, "Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative."

Under the former rules, it appears that it was proper, if not necessary, to state whether a contract relied on was made in writing or otherwise (*n*); but the forms under the present rules (*o*) do not appear to require this (*p*).

(*h*) See *Davy* v. *Garrett*, 7 Ch. D. 473: cp. *Philipps* v. *Philipps*, 4 Q. B. D. 130.

(*i*) *Harris* v. *Warre*, 4 C. P. D. 125.

(*k*) *Herring* v. *Bischoffsheim*, W. N. 1876, 77.

(*l*) *Davy* v. *Garrett*, 7 Ch. D. 489, C. A.

(*m*) See per *Jessel*, M. R., and *Brett*, L. J., *In re Rica Gold-washing Co.*, 11 Ch. D. 36, 43, 47; 40 L. T. 531: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 701, 709; 43 L. T. 258: *Smith* v. *Chadwick* (C. A.), 20 Ch. D. 27; 46 L. T. 702: *Redgrave* v. *Hurd* (C. A.), 20 Ch. D. 1, 12; 45 L. T. 485, 488.

(*n*) *Turquand* v. *Fearon*, 48 L. J., Q. B. 703; 40 L. T. 543, 544: *Smyth* v. *Levinge*, 39 L. T. 579: *Pascal* v. *Richards*, 44 L. T. 87, per *Jessel*, M. R., at p. 88. See contra, per *Hawkins*, J., at chambers, *Strick* v. *Oleaga*, 69 L. T. Journ. 249.

(*o*) See App. C., s. 5, Nos. 1 and 2, Chit. F. p. 129.

(*p*) Cp. *Philipps* v. *Philipps*, 4 Q. B. D. 127, 130; 39 L. T. 329, 556.

Legal presumptions.

Legal Presumptions.]—By *Ord. XIX. r.* 25, "Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

(*E. g.*—Consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.)"

Costs of copies of.

Copies of Pleadings, Costs of.]—The costs of copies of the pleadings for the use of counsel and the Court on interlocutory applications will be allowed on taxation (*q*).

(*q*) *Warner* v. *Mosses*, 19 Ch. D. 72; 51 L. J., Ch. 86; 45 L. T. 354.

CHAPTER XIX.

THE STATEMENT OF CLAIM.

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Statement of Claim—When to be delivered.]—By *R. of S. C., Ord. XX. r.* 1, "The delivery of statements of claim shall be regulated as follows:—

When to be delivered.

Where writ specially indorsed.

"(a) Where the writ is *specially indorsed* under *Ord. III. r.* 6, no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim (*a*):

When not required by notice.

"(b) Subject to the provisions of *Ord. XIII. r.* 12 (*b*), as to filing a statement of claim when there is no appearance, no statement of claim need be delivered unless the defendant at the time of entering appearance, or within eight days thereafter, gives *notice in writing* to the plaintiff or his solicitor that he requires a statement of claim to be delivered:

When required by notice.

"(c) If no statement of claim has been delivered and the defendant gives notice requiring the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver it *within five weeks from the time of the plaintiff receiving such notice:*

When optional.

"(d) The plaintiff *may* (except as in (a) mentioned) deliver a statement of claim, either with the writ of summons or notice in lieu of writ of summons, or at any time afterwards either before or after appearance, notwithstanding that the defendant may have appeared and not required the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than *six weeks* after the appearance has been entered unless otherwise ordered by the Court or a judge:

Costs, when unnecessary.

"(e) Where the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the Court or a judge may make such order as to the *costs* occasioned thereby as shall be just, if it appears that the delivery of a statement of claim was unnecessary or improper."

The effect of this rule is that when the writ is specially indorsed under *Ord. III. r.* 6 (*ante*, p. 221), no statement of claim can be required or delivered (*a*). In other cases a statement of claim is only *necessary* when the defendant gives notice that he requires one. In the latter cases the plaintiff *may* deliver one, although the defendant does not require it, but if he does so, he may have to pay the costs of it if it is considered unnecessary. As the writ is specially indorsed the defendant cannot require a statement of

(*a*) *G.* v. *H.*, W. N. 1883, 233. (*b*) Ante, p. 263.

claim, and if he gives notice that he does so the plaintiff may disregard it, and sign judgment if no defence is delivered within the time limited (*a*).

Of course plaintiff cannot deliver a statement of claim pending an order staying proceedings (*b*).

Where several defendants.

Where plaintiff is in a position to deliver a statement of claim against one of several defendants, but not against the others, he should, if required to deliver such statement by that one defendant, obtain time to do so until he is in a position to deliver a statement of claim against all (*c*). It may be added that plaintiff may, if he think fit, in an action against several defendants, deliver a statement of claim against only one or some of them, provided he discontinues his proceedings against the others (*d*).

Delivering the statement of claim.

Delivering the Statement of Claim.]—The statement of claim must be delivered to the defendant's solicitor or agent, if the appearance is by solicitor, or to defendant himself if he has appeared in person (*e*). If an appearance has been entered by a solicitor, a delivery to the party himself would be irregular (*f*). The delivery must take place before six o'clock P.M. and on Saturday before two P.M. (*g*). If it be necessary to serve a statement of claim in a special manner, an application for that purpose must be made previous to its being served out of the ordinary course (*h*). As to the mode of service in general, *see post, Ch. LXXVI.*

Filing it.

Where no appearance has been entered by the defendant, the statement of claim, when one is necessary, must be filed at the proper office (*i*). And this, though defendant has been arrested and is in custody under a judge's order for his arrest (*k*).

It is not necessary to give notice to defendant of the filing, unless it is specially ordered (*l*).

Printing, &c.

As to when the statement of claim should be printed, *see ante*, p. 279.

How to deliver it.

If it is to be delivered, deliver it to the defendant's solicitor or agent, or to the defendant himself if he defend in person (m). If there be several (n) defendants, all those who have appeared should be served with a copy of the statement of claim. If they have appeared by one solicitor, service of a copy on him would suffice. If they have appeared by separate solicitors, a copy should be served on each of those solicitors. If the statement of claim is to be filed, file it with the proper officer.

(*a*) *G.* v. *H.*, W. N. 1883, 233.
(*b*) *Horne* v. *Tooke*, 2 Dowl. 776; 4 M. & Sc. 183: cp. C. L. P. Act, 1852, s. 226.
(*c*) *Morton* v. *Grey*, 9 B. & C. 544: *Williams* v. *Manwairing*, Barnes, 401.
(*d*) *Evans* v. *Whitehead*, 2 M. & R. 367: *Bowles* v. *Bilton*, 2 C. & J. 447. See Ord. XXVI. r. 1, post, p. 337.
(*e*) As to the delivery of pleadings, see ante, pp. 279, 280.
(*f*) Lofft, 332.
(*g*) R. of S. C., Ord. LXIV. r. 11.
(*h*) *Troughton* v. *Craven*, 3 Dowl. 436. See *Martin* v. *Colvill*, 2 Dowl. 694: *Layton* v. *Mason*, 6 Dowl. 275: *Davis* v. *Jenner*, 2 Sc. N. R. 202; 9 Dowl. 45: *Broom* v. *Stittle*, 1 H. & W. 672.
(*i*) Ord. XIX. r. 10, ante, p. 263.
(*k*) See *Neale* v. *Smoulten*, 2 C. B. 322. As to proceedings against a prisoner in general, see Vol. 2, Ch. LV.
(*l*) See *Goodliffe* v. *Neaves*, 8 Ex. 134; 21 L. J., Ex. 338.
(*m*) The statement of claim should be delivered before 6 p.m., and on Saturday before 2 p.m.
(*n*) As to signing judgment against one of several defendants who does not appear, see ante, pp. 261, 262.

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It is not necessary to give any notice to the defendant of the filing, unless ordered (*n*).

See as to extending the time for delivering the statement of claim, *post*, p. 296.

As to the mode of printing the statement of claim, *see ante*, p. 279.

Form of.

Form of Statement of Claim.]—Forms of statement of claim are given in the Appendix C. to the *R. of S. C.*, and will be found in Chitty's Forms, pp. 128—142.

Title of Court, &c.

Title of Court—Reference to Record.]—*See Ord. XIX. r.* 11, *ante*, p. 280.

Under the *Com. Law Proc. Act*, 1852, which enacted that every declaration and other pleading should be intituled in the proper Court, and of the day of the month and the year when the same was pleaded, and should bear no other time or date, it was held that it must be so intituled on the face of it, and that intituling it on the back only would make it irregular (*o*). If it was not intituled of any day or year (*p*), or was intituled of a day different from that on which it was actually filed or delivered, it was deemed irregular (*q*), and the defendant might either, by a judge's order, compel the plaintiff to put it right (*r*), or else get it set aside (*s*), on an application made for that purpose within the time allowed for pleading (*t*). A mistake in the date, or there being no date at all, would not entitle the defendant to treat the declaration as a nullity (*s*). In general an amendment would be allowed, as of course, on payment of a trifling amount of costs, and in some cases without (*see post*, p. 316, "*Amendment of Pleadings*").

Date of writ.

Date of Issue of Writ.]—This is stated in all the forms in Appendix C.; and although the rules do not expressly require it, it should always be stated.

Title of action, &c.

The Title of the Action.]—The statement of claim must be marked on the face with "the title of the action" (*Ord. XIX. r.* 11, *ante*, p. 280). This should correspond with the title on the writ of summons (*see ante*, p. 217).

Statement of claim should correspond with writ.

The statement of claim should correspond with the writ: 1*st*. In the names of the parties; 2*ndly*. In the number of the parties; and 3*rdly*. In the character in which they sue and are sued.

In names of parties.

1*st*. In the names of the parties:—The statement of claim should correspond with the writ in the parties' names, if they have been correctly stated therein. Where the plaintiff's christian name was rightly stated in the writ, but wrongly in the declaration, which was filed, and the time for pleading having expired without defen-

(*n*) See *Goodliffe* v. *Neaves*, 8 Ex. 134; 21 L. J., Ex. 338.

(*o*) *Ripling* v. *Watts*, 4 Dowl. 290.

(*p*) *Holland* v. *Tealdi*, 8 Dowl. 320.

(*q*) *Hodson* v. *Pennell*, 4 M. & W. 373.

(*r*) Semble, *Wilkes* v. *Earl of Halifax*, 2 Wils. 256: *Thompson* v. *Marshall*, 1 Wils. 304.

(*s*) *Hodson* v. *Pennell*, supra: *Topping* v. *Fuge*, 1 Marsh. 341; 5 Taunt. 330: *Rowles* v. *Lawrence*, 11 Moore, 338.

(*t*) *Newnham* v. *Hanny*, 5 Dowl. 259: *Hough* v. *Bond*, 1 M. & W. 314.

dant pleading, plaintiff signed judgment for want of a plea, it was held, that defendant could not set aside the judgment on the ground of the above irregularity; that it was in reality an objection to the declaration, and ought to have been taken at all events within the time for pleading (*u*). If plaintiff has been wrongly named in the writ, he should be correctly described in the statement of claim, stating therein that he sued by the wrong name. If defendant has been sued by a wrong name, and appear by such name, plaintiff may so describe him in his statement of claim; but if defendant appear by his right name, plaintiff may so describe him in the statement of claim, stating therein that he was sued by the wrong name (*v*). If defendant appears in his wrong name, he should be so described in the statement of claim. And, in general, if the parties be incorrectly named in the writ, and the mistake be carried into the statement of claim, no material advantage can be taken of it (*y*); but the mistake may be cured by amending the statement of claim, at the cost of the plaintiff, upon a master's summons, founded on an affidavit of the right name; and, in case such summons be discharged, the costs of such application must be paid by the party applying, if the master so thinks fit (*z*). This, it seems, applies to a misnomer of plaintiff (*a*). Where, in an action not on a written instrument, defendant is described in the writ and statement of claim by his initials, the only remedy is by summons to amend, and the proceedings will not be set aside for irregularity (*b*). The application for the amendment should, it seems, be made within the time formerly allowed for pleading in abatement (*c*), and at all events before the time for pleading has expired (*d*).

2ndly. In the number of the parties:—The statement of claim should correspond with the writ in the number of plaintiffs (*e*). As regards defendants, plaintiff may deliver a statement of claim against one or more only of several defendants, provided he drops all proceedings in the action against the others (*f*). No person, however, not named in the writ as a defendant can be included as a defendant in the statement of claim; therefore, upon a writ against A. and another against B., plaintiff cannot deliver a joint

In the number of the parties.

(*u*) *Kitchen* v. *Brooks*, infra, n. (*d*).

(*v*) See *Doe* v. *Butcher*, 3 T. R. 611: *Hole* v. *Finch*, 2 Wils. 393: *R.* v. *Roper*, 6 M. & Sel. 327, 339; 3 & 4 W. 4, c. 42.

(*y*) *Lindsay* v. *Wells*, 3 Bing. N. C. 777; 4 Scott, 471.

(*z*) 3 & 4 W. 4, c. 42, s. 11: *Heneley* v. *Earl Strathmore*, 13 Leg. Obs. 45. This enactment applies in cases where a misnomer was formerly pleadable in abatement.

(*a*) See *Kitchen* v. *Brooks*, infra. But see *Lindsay* v. *Wells*, supra. It was decided before this enactment, that, though plaintiff declared by a wrong christian name, it was no ground of nonsuit at the trial, if it were shown that defendant knew that the action was brought by the person who actually sued. *Boughton* v. *Frere*, 3 Camp. 29.

(*b*) *Rust* v. *Kennedy*, 4 M. & W. 586; 7 Dowl. 199.

(*c*) *Hinton* v. *Stevens*, 1 H. & W. 521.

(*d*) *Kitchen* v. *Brooks*, 5 M. & W. 522; 8 Dowl. 232, nom. *Kitchen* v. *Roots*.

(*e*) *Rogers* v. *Jenkins*, 1 B. & P. 383.

(*f*) *Coldwell* v. *Blake*, 3 Dowl. 656; 2 C., M. & R. 249; 5 Tyr. 618: *Evans* v. *Whitehead*, 2 M. & R. 367: *Bowles* v. *Bilton*, 2 C. & J. 474: *Holland* v. *Johnson*, 4 T. R. 605: *Spencer* v. *Scott*, 1 B. & P. 49. See per *Parke*, B., in *Davies* v. *Thomson*, 14 M. & W. 165: *Hamlet* v. *Bingham*, 5 Sc. N. R. 889.

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statement of claim against both (*g*). We have already seen, *ante*, p. 289, that if the process be against several, and plaintiff wishes to proceed against them all, he cannot be forced to proceed against one until he is in a position to proceed against the others.

In the character in which they sue and are sued.

3rdly. In the character in which the parties sue and are sued:—Before the *Judicature Acts* there seems to have been a distinction, on this point, between general process, and process sued out *en autre droit* or *qui tam*. On a writ sued out generally in plaintiff's name, he might have declared for a cause of action *en autre droit*, as executor, &c., or *qui tam* (*h*). But if he were described in the writ as suing "*as*" executor, or "*as*" assignee, &c., or *qui tam*, he could not declare for a cause of action in his own right (*i*), but he might do so, if the writ merely described the plaintiff "executor," &c., not stating that he sued "*as* executor" (*k*). *Ord. III. r.* 4, *ante*, p. 226, requires that the indorsement on the writ should show in what capacity the plaintiff sues, or defendant is sued, where the suing or being sued is in a representative character. The statement of claim should correspond in this respect with the indorsement on the writ.

Alternative statement.

The facts may be stated in the alternative (*l*), and several distinct statements may be contained in one claim (*Ord. XVII. r.* 1, *see post, Ch. XXXV.*).

Distinct claims.

By *Ord. XX. r.* 7, "Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct *grounds*, they shall be stated as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts" (*m*). This does not, however, compel the plaintiff to assign each of the facts he states to a particular prayer for relief (*n*).

The statement must, if necessary, be divided into paragraphs numbered consecutively, and each containing, as far as may be, a separate allegation of fact (*Ord. XIX. r.* 4, *ante*, p. 281). Dates, sums and numbers are to be expressed in figures, and not in words (*Id.*).

Description of pleading.

Description of Pleading.]—The description of the pleading must appear on the face of it at the commencement of the statement of facts (*Ord. XIX. r.* 11, *ante*, p. 280). In the case of an action by the Attorney-General at the relation of a plaintiff, the pleading should be intituled "statement of claim," and not "information" (*o*).

(*g*) See *Haigh* v. *Conway*, 15 East, 1. As to adding persons as defendants, see ante, Ch. LXXXVII.

(*h*) *Watson* v. *Pilling*, 6 Moore, 66: *Lloyd* v. *Williams*, 2 W. Bl. 722; 1 B. & P. 383, n. (*b*): *Knowles* v. *Johnson*, 2 Dowl. 653: *Ashworth* v. *Ryal*, 1 B. & Ad. 19.

(*i*) See *Douglas* v. *Irlam*, 8 T. R. 416: *Anon.*, 1 Dowl. 97: *Ashworth* v. *Ryal*, 1 B. & Ad. 19: *Delves* v. *Strange*, 6 T. R. 158.

(*k*) *Free* v. *White*, 1 Dowl., N. S. 586. See ante, p. 220.

(*l*) *Bagot* v. *Easton*, 7 Ch. D. 1; 37 L. T. 266. See *Evans* v. *Buck*, 4 Ch. D. 432: *Evans* v. *Davis*, 39 L. T. 391.

(*m*) See *Davy* v. *Garrett*, 7 Ch. D., per *Thesiger*, L. J., at p. 489.

(*n*) *Watson* v. *Hawkins*, 24 W. R. 884.

(*o*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 42 L. T. 79, M. R.

Statement of facts.

Statement of Facts.]—This statement must be made as concise as possible (*p*). It must contain a statement of the facts essential to show the plaintiff's cause of action and on which he relies (*q*), but not the evidence by which they are supported (*r*).

All the facts necessary to constitute the cause of action must be stated. Thus in an action for negligence brought by a servant against his master for personal injuries resulting from the unsafe state of the premises upon which the servant was employed, it must be stated not only that the master knew, but that the servant did not know of the danger (*s*). In an action for recovery of land, the plaintiff must state the nature of the deeds and documents which he relies on as supporting his title (*t*). In an action by an assignee of the reversion for breach of covenant in a lease, the claim should state the nature of the reversion, that the plaintiff is an assignee of it, and in what manner he became so, tracing each step in his title back to the original lessor (*u*). In an action for obstruction of a right of way, the plaintiff should state whether he claims the way by prescription or by grant, and he should also state the termini of the way (*x*).

In an action for negligence it must be clearly shown that negligence is charged and the nature of it stated (*y*). In an action for fraud, the facts constituting the alleged fraud must be fully stated (*z*).

Facts which the plaintiff is entitled to prove and rely on at the trial in aggravation of damages, such as seduction and infection in an action for breach of promise of marriage (*a*), should be stated (*a*).

May alter, &c. claim on writ.

By *Ord. XX. r.* 4, "Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

Account stated.

By *Ord. XX. r.* 8, "In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings."

As to the mode of pleading particular facts, provided by the *R. of S. C., see ante*, pp. 285 *et seq.*

Various forms of statement are prescribed by the *R. of S. C., App. C. See Chitty's Forms*, 12*th ed.*, pp. 128 *et seq.*

(*p*) See Ord. XIX. r. 4, ante, p. 281.

(*q*) Ibid.

(*r*) Ibid.

(*s*) *Griffiths* v. *London and St. Katharine's Docks Co.* (C. A.), 13 Q. B. D. 259; 53 L. J., Q. B. 504.

(*t*) *Philipps* v. *Philipps* (C. A.), 4 Q. B. D. 127; 48 L. J., Q. B. 135; 39 L. T. 329: *Evelyn* v. *Evelyn*, 42 L. T. 248: *Hodgens* v. *Hickson*, Ir. Q. B. D.; 39 L. T. 644. See post, Ch. CVI., "*Recovery of Land.*"

(*u*) *Davis* v. *James*, 26 Ch. D. 778; 53 L. J., Ch. 523; 50 L. T. 115; 32 W. R. 406.

(*x*) *Harris* v. *Jenkins*, 22 Ch. D. 481; 52 L. J., Ch. 437.

(*y*) *Bettyes* v. *Maynard* (C. A.), 49 L. T. 389.

(*z*) *Seligmann* v. *Young*, W. N. 1884, 93; Bitt. Ch. Cas. 154: *In re Rica Gold Washing Co.*, 11 Ch. D. 43, 47; 40 L. T. 531; per *Jessel*, M. R., and *Brett*, L. J.: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 701, 709; 43 L. T. 258: *Smith* v. *Chadwick* (C. A.), 20 Ch. D. 27, 68; 46 L. T. 702; affirmed in D. P., 9 App. Cas. 187: *Redgrave* v. *Hurd* (C. A.), 20 Ch. D. 1, 12; 45 L. T. 485, 488.

(*a*) *Millington* v. *Loring* (C. A.), 6 Q. B. D. 190; 50 L. J., Q. B. 214; 43 L. T. 657. See *Lumb* v. *Beaumont*, 49 L. T. 772: *Scott* v. *Sampson*, 8 Q. B. D. 491.

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The Claim.

The Claim.]—By *Ord. XX. r.* 6, "Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given, as the Court or a judge may think just, to the same extent as if it had been asked for. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his defence."

This statement should be made as concise and clear as possible, and should include all the relief or remedies which the plaintiff seeks. In ordinary cases it will simply be, "The plaintiff claims £——." If interest is sought to be recovered, a claim should be added for it. A claim for the costs of the action may be and sometimes is added; but this, it is submitted, is not necessary. A claim for general relief is rendered unnecessary by the above rule. Formerly, if there were no prayer for general relief, the plaintiff could not get any relief for which he had not asked specifically (*b*).

If the plaintiff claims or the defendant is sued in a representative capacity, this should appear in this statement (*c*); and this should correspond with the capacity indorsed on the writ (*see Id.*). Formerly, on a writ sued out generally in the plaintiff's name, he might declare for a cause of action *en autre droit*, as executor, &c., or *qui tam* (*d*). But if he were described in the writ as suing "*as*" executor, or "*as*" assignee, &c., or *qui tam*, he could not declare for a cause of action in his own right (*e*); but he might do so if the writ merely described the plaintiff "executor," &c., not stating that he sued "*as* executor" (*f*).

Place for trial.

Place for Trial—Venue.]—By *Ord. XX. r.* 5, "The statement of claim must in all cases in which it is proposed that the trial should be elsewhere than in Middlesex, show the proposed place of trial." By *Ord. XXXVI. r.* 1, local venues are abolished, except in cases provided for by special statutes. When the plaintiff proposes to have the action tried elsewhere than in Middlesex, he must in his claim state the name of the county or place where he proposes to try (*g*). If the plaintiff proposes to try in Middlesex, this statement may be omitted. If no place is named, the action will be tried in Middlesex. See the rule and applications to change the place of trial, *post, Ch. LIX.*, "*Place of Trial.*" It may be added, that, when it is proposed to try the case at Manchester, the place for trial stated in the indorsement or statement of claim should be "Lancashire, Salford Division;" when at Lancaster, "Lancashire, Northern Division;" when at Liverpool, "Lancashire, West Derby Division;" when at Leeds, "Yorkshire, West Riding Division;" when at York, "Yorkshire, North and East Riding Divisions;" when at Warwick, "Warwickshire, Warwick Division;" when at Birmingham, "Warwickshire, Birmingham Division."

(*b*) *Holloway* v. *York*, 25 W. R. 627.

(*c*) See forms, Chit. F.

(*d*) *Watson* v. *Pilling*, 6 Moore, 66; 3 B. & P. 4: *Lloyd* v. *Williams*, 2 Bl. 722: *Anon.*, 1 Dowl. 97: *Knowles* v. *Johnson*, 2 Dowl. 653: *Ashworth* v. *Ryal*, 1 B. & Ad. 19.

(*e*) See *Douglas* v. *Irlam*, 8 T. R. 416: *Anon.*, 1 Dowl. 97: *Ashworth* v. *Ryal*, supra: *Delves* v. *Strange*, 6 T. R. 158.

(*f*) *Free* v. *White*, 1 Dowl., N. S. 586.

(*g*) See *Ridge* v. *Ridge*, 35 L. T. 428.

Signature.

Signature.]—Signature by counsel is not necessary; but where the pleading is settled by counsel or special pleader, it must be signed by him, and if not so settled, it must be signed by the solicitor or by the party if he sues in person. *R. of S. C., Ord. XIX. r. 4, ante*, p. 281.

Date of delivery.

Date of Delivery and Name, &c. of Solicitor or Party delivering.]—The date of the delivery of the claim should be stated after the signature.

The name and address of the solicitor delivering the pleading should not be stated at the end of it, but should be indorsed outside (*see Ord. XIX. r. 11, ante*, p. 280).

Irregularity, in what time to be taken advantage of.

Irregularity in Statement of Claim—Taking Advantage of same.]—In the preceding pages will be found the cases in which there may be an irregularity in the statement of claim. As regards the time within which defendant must take advantage of an irregularity in general, *see post, Ch. XLII.* An irregularity in the delivery of the statement of claim, as a general rule, should be taken advantage of within ten days. It must in general, at all events, be taken advantage of before the time for delivering the statement of defence has expired (*h*). If the original time for pleading be suspended during the long vacation, the application ought not to be delayed during that period (*i*).

Waiver of irregularity.

The defendant cannot take advantage of any irregularity after he has done an act to waive it, with notice or full means of notice of it (*k*). An irregularity in the statement of claim when filed is not waived by taking it out of the office (*l*). By taking the statement of claim out of the office, the defendant waives all objections to the writ of summons (*m*) and to the service of it (*n*). Pleading to the statement of claim (*o*) will be a waiver of any irregularity in it. Where a defendant, after having applied within the proper time and in a proper manner to set aside a declaration for irregularity, was refused an order, and to save a judgment delivered a plea under protest, it was held, that he might move the Court in the following term to set aside the proceedings (*p*).

Application to take advantage of.

The application should be made to a master at chambers. It should, in general, be supported by an affidavit of the facts, showing the grounds for making it. The several objections intended to be insisted on should be stated in the summons (*q*).

(*h*) See *Newnham* v. *Hanny*, 5 Dowl. 259: *Kitchen* v. *Brooks* or *Roots*, 5 M. & W. 522; 8 Dowl. 232: *Willis* v. *Ball*, 1 Dowl., N. S. 303: *Ramme* v. *Duncombe*, 8 Sc. N. R. 172: *Hinton* v. *Stevens*, 4 Dowl. 283; 1 H. & W. 521.

(*i*) *Tory* v. *Stevens*, 6 Dowl. 275.

(*k*) See *Cumming* v. *Elwin*, 5 Scott, 149: *Tarber* v. *French*, 5 N. & M. 658: *Esdaile* v. *Davis*, 6 Dowl. 465: *Gilbert* v. *Kirkland*, 1 Dowl. 153: *Archer* v. *Barnes*, 3 East, 342.

(*l*) *Driver* v. *Harrison*, 1 D. & L. 72. And see per *Littledale*, J., 5 Dowl. 263: *Robins* v. *Richards*, 1 Dowl. 378: *Gilbert* v. *Kirkland*, 1 Dowl. 153.

(*m*) *Caswall* v. *Martin*, 2 Stra. 1072.

(*n*) *Holmes* v. *Russell*, 9 Dowl. 489.

(*o*) *Bartrum* v. *Williams*, 4 Bing. N. C. 301: *Hudson* v. *Nicholson*, 5 M. & W. 437.

(*p*) *Tory* v. *Stevens*, 6 Dowl. 275. And see *Woodcock* v. *Kilby*, 1 M. & W. 41: *Bellotti* v. *Barella*, 4 Dowl. 719.

(*q*) Ord. LXX. r. 3. See this rule, post, Ch. XLII.

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Further time for delivery of.

Further Time for Delivery of.]—If the plaintiff wants further time to deliver a statement of claim to prevent the action being dismissed for want of prosecution (under *Ord. XXIX. r.* 1), his course is to apply to the other side for a consent in writing for time (*Ord. LXIV. r.* 8). If this be refused, he should take out a summons before a master for an extension of the time under *Ord. LXIV. r.* 7. A master has power to enlarge the time appointed by the rules for doing or taking any proceeding, even though the application is not made until after the expiration of the time appointed.

In a case (*r*) where the writ was issued in time to save the Statute of Limitations, but, owing to a mistake on the part of the plaintiff's solicitor's clerk, the statement of claim was not delivered in time, and the period of limitation had meanwhile elapsed, the Court gave him further time to deliver it.

(*r*) *Canadian Oil Works Corporation* v. *Hay*, 38 L. T. 549, V. C. M.

CHAPTER XX.

THE DEFENCE.

The defence.

The Defence.]—By *Ord. XIX. r.* 2 (*ante*, p. 279), "The defendant shall, subject to the provisions of *Ord. XXI.* and at such time and in such manner as therein prescribed, deliver to the plaintiff his defence, set-off, or counterclaim (if any)."

As to printing and delivering the defence, *see ante*, pp. 279, 280.

Time for delivering; — where statement of claim delivered;

Time for Delivery of—where Statement of Claim delivered.]—By *Ord. XXI. r.* 6, "Where a statement of claim is delivered to a defendant he *shall* deliver his defence within *ten days* from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge."

— where no statement of claim;

—Time, where no Statement of Claim delivered.]—By *Ord. XXI. r.* 7, "A defendant who has appeared in an action and who has neither received nor required the delivery of a statement of claim, must deliver his defence, if any, at any time within *ten* days after his appearance, unless such time is extended by the Court or a judge."

The time for delivering a defence does not run whilst a summons for judgment under *Ord. XIV.* is pending (*a*).

— where leave to defend under Ord. XIV.

—Where Leave to defend given under Ord. XIV.]—By *Ord. XXI. r.* 8, "Where leave has been given to a defendant to defend under *Ord. XIV.*, he *shall* deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order" (*b*). Where the writ is specially indorsed, and leave to defend is given, no statement of claim beyond that indorsed on the writ can be delivered (*c*).

How delivered, &c.

How delivered.]—*An appearance being entered, the solicitor or agent for the defendant, or the defendant himself if he has appeared in person, may deliver his defence. If the statement of claim is filed, the defendant should, before he pleads, take it out of the office; it does not, however, appear to be clear whether the plaintiff can take any advantage of his not having done so* (*d*). *Deliver the defence to the plaintiff's solicitor or agent, or to the plaintiff himself if he sue*

(*a*) *Hobson* v. *Monks*, W. N. 1884, 8.

(*b*) See *Egerton* v. *Anderson*, W. N. 1884, 95; Bitt. Ch. Cas. 163, cited ante, p. 276.

(*c*) *G.* v. *W.*, W. N. 1883, 233: Cp. *Atkins* v. *Taylor*, W. N. 1876, 11: *Margate Pier Co.* v. *Perry*, Id. 52. See ante, p. 276.

(*d*) See *Keeling* v. *Newton*, 1 Wils. 173: *Bond* v. *Smart*, 1 Chit. R. 735; Tidd, 9th ed. 476, 566.

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in person, before six o'clock P.M., *or on Saturday before two o'clock* P.M. (*e*). But although delivered after that time, plaintiff cannot treat it as a nullity (*f*); inasmuch, however, as the defence must be dated of the day on which it is pleaded, it might be set aside as irregular (*g*); but defendant would in general be allowed to amend.

A defence delivered after the proper time, but before judgment has actually been signed, cannot be treated as a nullity, nor can judgment in default be signed (*h*).

The defence should be pleaded in the name of the solicitor by whom defendant has appeared, unless there has been a notice duly served to change the solicitor, or unless plaintiff has recognized the new solicitor as the solicitor in the cause (*i*). But pleading by a wrong solicitor does not make the plea a nullity, and entitle plaintiff to sign judgment; it is only an irregularity for which the defence might be set aside (*k*). And it seems that the defence being delivered by an uncertificated solicitor (*l*), or even by a person not on the rolls (*m*), does not make it a nullity, but only affords a ground for setting it aside as irregular. Pleading in the name of the country solicitor, where the appearance is entered in the name of the town agent (*n*), or, it would seem, pleading by solicitor where the appearance is in person (*o*), or perhaps *vice versâ*, is not such an irregularity as would warrant plaintiff in signing judgment.

Form of.

Form of.]—Various forms of defences are provided by Appendix D. to the *Rules of the S. C.* 1883. These will be found in *Chitty's Forms*, pp. 146 *et seq.* They should be followed in all cases to which they apply (*p*).

Title of Court, &c.

Title of Court, &c.]—The title of the Court, reference to the record, and the names of the parties should be inserted as in a statement of claim. *See ante*, pp. 290 *et seq.*

The pleading is called a "defence," and should be headed with that title.

The defence.

The Defence.]—This statement, like the plaintiff's claim, must be as brief and concise as possible (*Ord. XIX. rr.* 2, 4, *ante*, pp. 279, 281), and must state all the facts, if any, upon which the defendant relies, but not the evidence in support of them (*ante*,

(*e*) See R. of S. C., Ord. LXIV. r. 11. Where on Friday defendant had one day's time to plead, and plaintiff signed judgment for want of a plea shortly before 5 p.m. on Saturday, it was set aside as irregular; *Connelly* v. *Bremner*, 35 L. J., C. P. 319; L. R., 1 C. P. 557.

(*f*) See *Horsley* v. *Purdon*, 2 Dowl. 228.

(*g*) See *Hodson* v. *Pennell*, 4 M. & W. 373; 7 Dowl. 208; ante, p. 290.

(*h*) *Gill* v. *Woodfin*, 25 Ch. D. 707; 53 L. J., Ch. 617; 50 L. T. 490; 32 W. R. 393; *Gibbings* v. *Strong* (C. A.), 26 Ch. D. 66; 50 L. T. 578; 32 W. R. 757.

(*i*) See *Mercero* v. *Mickle*, 2 New Rep. 509. See *Perry* v. *Fisher*, 6 East, 549; Tidd. 9th ed. 94.

(*k*) See *Doe* v. *Bransom*, 6 Dowl. 490.

(*l*) *Hill* v. *Mills*, 2 Dowl. 696.

(*m*) *Bayley* v. *Thompson*, 2 Dowl. 655; 4 Tyr. 955; 2 C. & M. 673.

(*n*) *Buckler* v. *Rowlings*, 3 B. & P. 111.

(*o*) See *Kerrison* v. *Walkingborough*, 5 Dowl. 564.

(*p*) See ante, p. 281.

p. 281). If the defendant relies upon what formerly would have been an equitable defence (*cp. Judicature Act*, 1873, *s.* 24, *sub-s.* 2), he may plead it, but must do so in as concise a manner as possible (*q*).

Every defence upon which the defendant relies must be distinctly raised in his pleading (*Ord. XIX. r.* 15, *ante*, p. 282). The Statutes of Limitation, or a release, must be specifically pleaded (*Id.*), and so must the Statute of Frauds, or facts impugning the legality, validity, or sufficiency of any contract set up by the plaintiff (*Ord. XIX. r.* 20; see cases cited *ante*, p. 284). The defendant may set up any number of defences, whether consistent or inconsistent (*r*), and either conjointly or in the alternative; but if he does so, he must state them as far as possible separately and distinctly (*Ord. XX. r.* 7, *supra*, p. 292).

Traverses.

All the facts stated by the plaintiff, of which the defendant does not admit the truth, must be traversed or stated to be not admitted (*Ord. XIX. r.* 13; see *ante*, p. 284, where the cases are collected); but facts should not be traversed unnecessarily, because, by *Ord. XXI. r.* 9, "Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted" (*s*).

Denials of facts must be specific, and not general, and must answer the point of substance, and not evasively, so that a fair and substantial answer may be given. In addition to the general rules on this subject, *Ord. XIX. rr.* 13, 19 (*ante*, pp. 283, 284, where the cases are collected and cited), it is specially provided by *Ord. XIX. r.* 17, that "It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal *specifically* with *each* allegation of fact of which he does not admit the truth, except damages." (*See the cases ante*, p. 283.) It does not appear easy to reconcile this rule with some of the forms given in the Appendix, and particularly that in App. D. s. 6, r. 1.

If the defendant denies a statement collectively and generally, and then afterwards traverses a particular fact involved in that statement, he will be confined to his particular denial at the trial (*t*).

Points of law may now be raised in the defence. (*See Ord. XXV.*, *post*, p. 324.)

As to the mode of pleading particular facts specially provided for by the rules, *see ante*, p. 285.

Alleged capacity.

The right of the plaintiff to sue in a representative or other capacity, or the alleged constitution of any partnership firm, must be denied specifically, if at all. (*Ord. XXI. r.* 5, *ante*, p. 284.)

(*q*) *Heap* v. *Marris*, 2 Q. B. D. 630.

(*r*) *Berdan* v. *Greenwood*, 3 Ex. D. 251; see per *Thesiger*, L. J., at p. 255; *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 302.

(*s*) Cp. *Lee Conservancy Board* v. *Button*, 12 Ch. D. 383.

(*t*) *Collette* v. *Goode*, 7 Ch. D. 843.

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Mere denial of debt inadmissible.

By *Ord. XXI. r.* 1, "In actions for a debt or liquidated demand in money comprised in *Ord. III. r.* 6, a mere denial of the debt shall be inadmissible."

A paragraph therefore stating that the defendants deny that they are indebted to the plaintiffs in any sum of money whatever, was ordered to be amended (*u*).

Actions on bill, &c.

By *Ord. XXI. r.* 2, "In actions upon bills of exchange, promissory notes or cheques, a defence in denial must deny some matter of fact; *e. g.*, the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill or note."

Liquidated claims.

By *Ord. XXI. r.* 3, "In actions comprised in *Ord. III. r.* 6, classes (A) and (B), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed; *e. g.*, in actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff."

Damages.

By *Ord. XXI. r.* 4, "No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted."

Abatement.

No plea can be pleaded in abatement. (*Ord. XXI. r.* 20, *ante*, p. 285.)

Payment into Court.

As to pleading payment of money into Court, *see post*, *Ch. XXIX.* "*Payment of Money into Court.*"

Land.

As to the defence in an action for the recovery of land *see post*, *Ch. CVI.*, "*Recovery of Land.*"

Not guilty by statute.

Not Guilty by Statute.]—By *Ord. XXI. r.* 19, "In every case in which a party shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of his pleading the words "by statute," together with the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and shall specify whether such Act is public or otherwise; otherwise such defence shall be taken not to have been pleaded by virtue of any Act of Parliament."

The defendant may still plead not guilty by statute, but cannot plead any other defence together with it, without leave.

Leave to plead together with other defences.

By *R. of S. C., Ord. XIX. r.* 12, "Nothing in these Rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead he shall not plead any other defence to the same cause of action without the leave of the Court or judge."

Leave to plead not guilty by statute, together with other defences, may be obtained on a summons before a master.

Further time.

Further Time to deliver Defence.]—If further time to plead become necessary, the defendant should, in the first instance, apply for

(*u*) *Copley* v. *Jackson*, W. N. 1884, 39; Bitt. Ch. Cas. 165.

a written consent to his having it under *Ord. LXIV. r.* 8 (*post*, *Ch. CXXV.*). If this be refused, he may obtain it by a master's order on a summons, if the master, in his discretion, think it reasonable that it should be granted (*see Ord. LXIV. r.* 9; *Ord. LXV. r.* 27, *sub-r.* 24). Formerly when the time was extended the defendant might have demurred within the extended time (*x*). Where a defendant has taken out a summons for further time to deliver his defence, returnable before the time for pleading has expired, which is dismissed after his time for pleading has expired, he is in general entitled to the remainder of that day to deliver his defence (*y*).

Summons for, when a stay of proceedings.

Care should be taken that the summons be returnable at or before the time at which plaintiff is at liberty to sign judgment, or otherwise proceed for want of a defence; otherwise it will not stay the plaintiff's proceeding (*z*). But if plaintiff, in a case where he is entitled to sign judgment, does not do so before such summons is returnable, he cannot sign it afterwards, it being a rule, that if the summons be returnable before judgment is signed, it prevents plaintiff from afterwards signing it until the summons is disposed of (*a*). The summons stays the signing of judgment for default of a defence, if it is returnable at or before the time the judgment-office opens on the day after the time for pleading expires (*b*). It cannot regularly be made returnable before the usual time, without express sanction; but if it be made so returnable, it operates as a stay (*c*).

What time given.

The time to be given is entirely in the discretion of the master. In ordinary cases, a month is the extreme limit; but, under special circumstances, an order might be obtained for a longer period (*d*). Where a plaintiff, indicted for a felony, sued for money surmised to be the produce of the felony, the Court gave defendant time to plead until a month after the trial of the indictment (*e*). But the Court refused to grant an indefinite time to plead on the ground that defendant could not safely plead till a rule pending in another Court, and involving the same matter of defence, was determined, though they granted time to plead until a day fixed (*f*). And in an action by a common informer to recover penalties under an Act of Parliament, the Court refused to give defendant time to plead until a certain day, upon a suggestion, that an Act was expected to pass in the interim that would have the effect of relieving defendant from the penalties (*g*).

The time how reckoned.

As to the mode of reckoning the further time to plead: if it be a

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(*x*) *Hodges* v. *Hodges*, 2 Ch. D. 112.

(*y*) See *Evans* v. *Senior*, 4 Exch. 818; 1 L., M. & P. 170: *Mengens* v. *Perry*, 15 M. & W. 537.

(*z*) *Ottiwell* v. *D'Aeth*, Barnes, 254; Say. 165; Ca. Pr., C. B. 137, 142. And see Barnes, 225; Ca. Pr., C. B. 144: *Barnett* v. *Newton*, 1 Chit. Rep. 689: *Calze* v. *Lord Lyttleton*, 2 W. Bl. 954: *Cumberlege* v. *Carter*, 6 M. & Gr. 748.

(*a*) *Morris* v. *Hunt*, 2 B. & Ald. 355; 1 Chit. Rep. 93: *Abernethy* v. *Paton*, 6 Sc. 586.

(*b*) *Wells* v. *Secret*, 2 Dowl. 447: *Spenceley* v. *Shouls*, 5 Dowl. 562: *Barton* v. *Warren*, 14 L. J., Q. B. 312.

(*c*) *Byles* v. *Walter*, 5 Dowl. 232.

(*d*) *Whitter* v. *Cazalet*, 2 T. R. 683: *Hunt* v. *Barclay*, 3 Dowl. 646; 1 Hodges, 103.

(*e*) *Deakin* v. *Praed*, 4 Taunt. 825. And see *Sibson* v. *Nivin*, Barnes, 224.

(*f*) *Clarke* v. *Allnutt* (or *Allbut*), 1 Gale, 358; 4 Dowl. 684; 1 T. & G. 71.

(*g*) *Grant qui tam* v. *Ridley*, 6 Sc. N. R. 176.

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month, it is to be considered a calendar month (*h*). Whatever time is given, unless it be otherwise clearly expressed, it is reckoned exclusive of the first day, but inclusive of the last (*i*). If a number of clear days are given, the time is reckoned exclusive both of the first and last days (*k*). If only one day's time be given, defendant has the whole of the next day to plead in (*k*). If the order be obtained on a day prior to the time which defendant originally, or by a prior order, had to plead in, and is not for "further" time to plead, the time limited by the last order begins to run from the day of that order, and not from the expiration of the original time allowed for pleading, nor, in the case of a prior order for time, from the expiration of that order (*l*). Where plaintiff obtains an order to amend his statement of claim, and defendant at the same time obtains an order for time to deliver his defence, that time must be calculated from the time that plaintiff amends, and not from the date of the order for time, although the latter order does not refer to the former (*m*). If the time given does not expire *before* the Long Vacation, defendant is entitled to the whole of the time for pleading *after* 24th October that he had at the commencement of the Long Vacation (*n*). And where defendant, on 5th September, obtained a month's further time to plead, taking short notice of trial for the first sittings in term, it was held, nevertheless, that the enlarged time did not commence till after 24th October (*o*).

Judgment after time given.

If defendant do not deliver his defence on or before the day on which the time expires, plaintiff may, in a case where he is entitled to sign judgment, do so on the opening of the office on the morning of the following day, unless in the meantime, and before the signing of it, defendant has delivered his defence (*p*).

Where summons for time to plead dismissed.

Where a summons for further time to deliver a defence is dismissed, after the time for doing so has expired, defendant is entitled to the remainder of the day upon which the summons is dismissed to plead (*q*).

Upon what terms, and their consequences in general.

The order is usually drawn up upon the terms of defendant "*taking short notice of trial (or inquiry) if necessary*" (*r*). When an order is drawn up on what are technically called "the usual terms," it means these terms (*s*). Sometimes the order requires the defendant to take such notice of trial as plaintiff can give. Where

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(*h*) Ord. LXIV. r. 1.

(*i*) Ord. LXIV. r. 12, post, Ch. CXXV. And see *Liffin* v. *Pitcher*, 1 Dowl., N. S. 767: *Aspinal* v. *Smith*, 8 Taunt. 592; 2 Moore, 695: *Pepperell* v. *Burrell*, 2 Dowl. 674. When less than six days given, Sunday, &c. are not counted, Ord. LXIV. r. 2, post, Ch. CXXV.

(*k*) See, however, *Liffin* v. *Pitcher*, 1 Dowl., N. S. 767, per *Coleridge*, J.

(*l*) *Lane* v. *Parsons*, 3 Bing. N. C. 264; 5 Dowl. 359: *Simpson* v. *Cooper*, 2 Sc. 840; 1 Hodges, 448. In *Aspinal* v. *Smith*, 8 Taunt. 592, defendant had four days to plead after delivery of particulars, and there the case would be different.

(*m*) *Davies* v. *Stanley*, 8 Dowl. 433.

(*n*) *Trinder* v. *Smedley*, 3 Dowl. 87: *Wilson* v. *Bradslocke*, 2 Dowl. 416.

(*o*) *Le Fevre* v. *Molyneux*, 6 Dowl. 153.

(*p*) Post, p. 328.

(*q*) *Evans* v. *Senior*, 4 Ex. 818; 1 L., M. & P. 170; 19 L. J. [illegible] 59: *Mengens* v. *Perry*, 15 M. & W. 37. See *Darrington* v. *Price*, 6 C. B. 518, per *Cresswell*, J.

(*r*) 1 Sellon, 307. As to short notice of trial, see Ch. LXII.

(*s*) Tidd's Pract. 471; 1 Sellon, 307: *Brettargh* v. *Dearden*, M'Clel. & Y. 106: *Russell* v. *Hurst*, 1 Cr. & M. 184: *Waring* v. *Hall*, 3 Price, 3: *Clulee* v. *Bradley*, 13 C. B. 601; 23 L. J., C. P. 38.

the term as to taking short notice of trial is imposed the words "if necessary" are usually added; but, notwithstanding this, the judges will not generally inquire strictly into whether short notice is really necessary or not (*t*); and the plaintiff is entitled to give such notice if he cannot, using reasonable diligence, give full notice, although the regular course of pleading is not such as to render short notice *necessary* (*u*). It is entirely discretionary to impose these terms or not; and they are consequently imposed only in cases where the master thinks it reasonable that plaintiff should not experience any inconvenience or injury, otherwise likely to arise to him from the indulgence thus granted to defendant. If defendant be an executor or administrator, the master may also order that he shall not plead any judgment which may be obtained against him since the time for pleading expired (*x*). It is also not unusual, on granting further time, to plead just before the Long Vacation, to preclude defendant from taking advantage of the rule (*y*) restraining pleadings being delivered in the vacation, and to order that the pleadings may be delivered during such time. An application to compel plaintiff to give security for costs, on the ground of his residing out of the jurisdiction of the Court, may be made after an order for time to deliver defence, on the usual terms (*z*). It may be added, that, after serving the order, defendant cannot abandon it, but must abide by its terms (*a*).

Pleading by executors.

Security for costs.

Terms must be abided by.

An order for time to deliver a defence "peremptory" does not preclude defendant from again applying by summons for further time (*b*); but in most cases further time would be refused.

Order peremptory for time to plead.

Proceedings where Defendant makes Default in delivering Defence.]—As to this, *see post, Ch. XXVI.* It will there be seen that in some cases when default is thus made plaintiff may sign judgment, and in others he may set down the action on motion for judgment. In some cases also, it will be seen that a defence delivered may be treated as a nullity, and proceedings taken as if no such statement had been delivered; but a defence delivered after the time, but before judgment is actually signed, cannot be treated as a nullity (*c*).

Proceedings where defendant makes default in delivering defence.

Withdrawing Defence.]—Leave to withdraw a defence will, in general, be granted upon such terms as to costs and otherwise as the master may deem fit (*see post, Ch. XXVIII.*). It may be granted, in order that defendant may pay money into Court (*d*).

Withdrawing defence.

Amending and striking out Statement of Defence.]—*See post*, p. 315.

Amendment and striking out of statement of defence.

(*t*) See *Drake* v. *Pickford*, 15 M. & W. 607: *Flowers* v. *Welch*, 23 L. J., Exch. 7.

(*u*) *Pretty* v. *Nauscawen*, L. R., 9 Ex. 42.

(*x*) *Anon.*, 8 Mod. 308: *Hughes* v. *Pellett*, Barnes, 330.

(*y*) Ante, p. 280.

(*z*) *Dowling* v. *Harman*, 6 M. & W. 131; 8 Dowl. 165.

(*a*) *Griffin* v. *Dickinson*, 7 Dowl. 880.

(*b*) *Beazley* v. *Bailey*, 16 M. & W. 58.

(*c*) See the cases cited, ante, p. 298, n. (*h*).

(*d*) *Tarlton* v. *Wragg*, 2 Str. 1271: *Devaynes* v. *Boys*, 7 Taunt. 33; 2 Marsh. 356: *Elworthy* v. *Cowell*, 6 Moo. 495: *Price* v. *Severn*, 7 Bing. 402: *Free* v. *Hawkins*, 7 Taunt. 278; 1 Moo. 28: *Law* v. *Law*, 2 Str. 960: *Martindale* v. *Galloway*, Barnes, 330: *Cox* v. *Rolt*, 2 Wils. 253: *Rucker* v. *Hannay*, 3 T. R. 124: *Maddocks* v. *Holmes*, 1 B. & P. 228.

CHAPTER XXI.

COUNTER-CLAIM AND SET-OFF.

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Sect. 1.—*In ordinary Cases.*

PART IV. Counter-claim and set-off.

UNDER sect. 24, sub-sect. 3 of the *Judicature Act*, 1873, and the Rules of Court, the defendant may set up, by way of set-off or counter-claim, any claim which he may have against the plaintiff (*infra*), or against the plaintiff together with a third party (*post*, Sect. 2, p. 307). If the plaintiff is not involved in the claim against the third party, it cannot be raised by counter-claim; but if it consists of a claim to contribution or indemnity, it may be raised so as to decide the question once for all by a notice under *Ord. XVI. r.* 48 *et seq.* (*see post, Ch. XXXVIII.*). In other cases claims against persons not parties to the suit can only be raised in a separate action.

By the *Judicature Act*, 1873, *sect.* 24, *sub-sect.* 3, "The said Courts respectively and every judge thereof, shall have power to grant to any defendant, in respect of any equitable estate, or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief *relating to or connected with the original subject of the cause or matter*, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

By *Ord. XIX. r.* 3, "A defendant in an action may set off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the

same effect as a cross-action (*a*), so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

When admissible.

A counter-claim must claim relief against the plaintiff, and he must be a party to it (*b*). It is not sufficient if it only claims relief against him in one of two inconsistent alternatives (*c*). In cases where the relief claimed by the defendant is not claimed against the plaintiff, a notice under *Ord. XVI. rr.* 48 *et seq.*, is the only mode of procedure (*d*). When two or more plaintiffs sue for a joint claim, it has been held that the defendant may set up a separate counter-claim against each or either of them (*e*). But several claims cannot be *set off* against a joint liability (*f*).

Under the above rule the defendant may set up by way of set-off or counter-claim any claim, liquidated or otherwise, which he may have against the plaintiff which is not so incongruous as to be incapable of being conveniently tried together with the original claim (*g*). It is not *necessary* in this case that the claim of the defendant should be connected with that of the plaintiff (*h*). Nor is it essential that the amount claimed by the counter-claim should equal that claimed by the plaintiff (*i*). The power to set up a counter-claim creates no new rights. It does not enable a defendant to counter-claim in respect of a matter which would not form a cause of action (*k*). A claim which could not have been set off under the Statute of Set-off (2 Geo. 2, c. 22, s. 13), and in respect of which the Court of Chancery would have restrained any action at law, cannot be set up as a counter-claim (*l*).

A defendant in an action for calls by a company which is being wound up, cannot set up a counter-claim for debt or damages due to him from the company (*m*).

(*a*) The words in the former rule were "shall have the same effect as a statement of claim in a cross action."

(*b*) *Harris* v. *Gamble*, 6 Ch. D. 748: *Furness* v. *Booth*, 4 Ch. D. 586: *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145: *Shephard* v. *Beane*, 2 Ch. D. 223.

(*c*) *Evans* v. *Buck*, 4 Ch. D. 432.

(*d*) *Central African Trading Co., Ltd.* v. *Grove*, 40 L. T. 540 (C. A.).

(*e*) *Manch. Shef. and Linc. R. Co. and L. & N. W. R. Co.* v. *Brooks*, 2 Ex. D. 243.

(*f*) *Re Exchange Banking Co.*, 46 L. T. 474. See Lindley, 4th ed., 507 et seq. But in *Eyre* v. *Moring*, W. N. 1884, 58; Bitt. Ch. Cas. 146, where the defendant set up a counter-claim in respect of a debt due to him by the plaintiff, jointly with another person, without joining the latter, *Field*, J., refused to order him to be joined without the defendant's consent or to exclude the counter-claim.

(*g*) Per *Archibald*, J., *Bartholomew* v. *Rawlings*, W. N. 1876, 56.

(*h*) *Gray* v. *Webb*, 21 Ch. D. 802; 51 L. J., Ch. 815: *Quin* v. *Hession*, 40 L. T. 70, Ir. Ex. D.

(*i*) *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. D. 145; 34 L. T. 325.

(*k*) *Pellas* v. *Neptune Marine Ins. Co.*, 5 C. P. D. 35 (C. A.): *Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506: *Gathercole* v. *Smith*, 7 Q. B. D. 626; 50 L. J., Q. B. 680; 45 L. T. 106.

(*l*) *Newell* v. *National Provincial Bank of England*, 1 C. P. D. 496; 34 L. T. 533.

(*m*) *Government Security Investment Co.* v. *Dempsey*, 50 L. J., Q. B. 199. See *Mersey Steel and Iron Co.* v. *Nayler*, 9 App. Cas. 434; 32 W.

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Where plaintiff misjoined.

The rule forbidding the joinder of causes of action with claims for recovery of land applies to a counterclaim (*n*).

By *R. of S. C., Ord. XVI. r.* 3, "Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counter-claim or set-off, he may obtain the benefit thereof by establishing his set-off or counter-claim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon."

Form of, &c.

Form of, &c.]—By *Ord. XXI. r.* 10, "Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim." The counter-claim must contain in itself a specific statement of the facts on which the defendant relies as entitling him to the relief or remedy which he claims (*o*). It is not sufficient that the facts appear in the statement of defence (*p*), but if such of the facts stated in the defence as the defendant relies on as supporting his counterclaim are sufficiently identified and distinguished by reference in the latter, this will suffice (*q*). The mere omission of the formal heading "counterclaim" is not fatal (*r*). The facts should be stated in the same manner as in a statement of claim, and the rules applicable to the latter must be attended to. (*See rules and cases, ante*, pp. 290 *et seq.*)

When the defendant relies on several distinct grounds of set-off or counterclaim, founded upon separate and distinct facts, they must be stated as far as may be separately and distinctly. (*Ord. XX. r.* 7, *ante*, p. 292.)

The requirements of *Ord. XIX. r.* 11 (*ante*, p. 280) must be attended to in framing the pleading.

The counter-claim is often entitled thus:—"Between A. B. plaintiff, and C. D. defendant by original action, and between C. D. plaintiff and A. B. defendant by counterclaim." But except in the case under *Ord. XXI. r.* 11 (*post*, p. 308), where a person not already a party to the action is made a defendant to the counter-claim, this is unnecessary (*s*).

The counterclaim must state specifically the relief which the defendant claims either simply or in the alternative, and if the defendant seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they must be stated, as far as may be, separately and distinctly (*Ord. XX. rr.* 6, 7, *ante*, pp. 292, 29[illegible]). The nature of the claim should be stated as in a statement of claim as to which and the forms which may be used, *see ante*, p. [illegible]94.

R. 989: *In re Milan Tramways Co. Ex p. Theys* (C. A.), 25 Ch. D. 587; 50 L. T. 545; 32 W. R. 601.

(*n*) *Compton* v. *Preston*, 21 Ch. D. 138; 51 L. J., Ch. 680. See post, Ch. CVI.

(*o*) *Crowe* v. *Barnicott*, 6 Ch. D. 753: *Holloway* v. *York*, 25 W. R. 627: *Hillman* v. *Mayhew*, 24 W. R. 485.

(*p*) Id.

(*q*) *Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506; 42 L. T. 111: *Benbow* v. *Low*, 13 Ch. D. 553; 42 L. T. 14: *Lees* v. *Patterson*, 7 Ch. D. 866.

(*r*) *Lees* v. *Patterson*, supra.

(*s*) Per *Quain*, J., *Williams* v. *Wright*, W. N. 1875, 232.

The defendant may set up a counterclaim arising after action brought, and relief may be granted to him in respect of it (*t*). Arising after action brought.

A counterclaim arising after action brought must be pleaded as so arising (*see post*, p. 320), so that the plaintiff may be able to confess it.

The plaintiff may counterclaim to a counterclaim, that is to say, he may in his reply to a counterclaim set up a cause of action arising after action brought, in respect of the same transaction as that out of which the defendant's counterclaim arises (*u*). Counterclaim to counterclaim.

By *R. of S. C., Ord. XXI. r.* 16, "If, in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with" (*x*). Effect of discontinuance.

When a defendant who has set up a counterclaim dies, his personal representatives if they are desirous of continuing the counterclaim should obtain leave to do so (*y*). The plaintiff's order to continue the action against them will not entitle them to continue the counterclaim (*y*). Effect of death, &c.

The Courts have power to give effect to the equitable rights of defendants appearing on the defence, though not set up by way of counterclaim (*z*). Equitable rights.

As to the plaintiff's reply, *see post*, p. 312. Reply.

Sect. 2. *Where Third Party brought in as Co-defendant to Counterclaim.*

Under the *Judicature Act*, 1873, *s.* 24, *sub-s.* 3 (*ante*, p. 304), where the defendant has a cross claim against the plaintiff and a third person connected with the subject-matter of the suit, he may raise it by counterclaim. Where third party brought in as co-defendant.

The power to set up a counterclaim claiming relief against a third person not already a party to the action, is limited to cases where both (1) the relief sought relates specifically to, or is connected with, the subject-matter of the action (*a*), and (2) the relief sought is claimed against the plaintiff as well as the third person (*b*). This power is a matter of procedure only and creates no new rights against third parties which did not previously exist (*c*).

The fact that the third party could not have been a party to the

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(*t*) *Beddale* v. *Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401, *Fry*, J., where *The Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713, *Jessel*, M. R., was not followed. Cp. *Ellis* v. *Munson*, 35 L. T. 586 (C. A.): *McGowan* v. *Middleton*, 11 Q. B. D. 464 (C. A.).

(*u*) *Toke* v. *Andrews*, 8 Q. B. D. 428; 51 L. J., Q. B. 281. See post, p. 320.

(*x*) This follows *McGowan* v. *Middleton*, 11 Q. B. D. 464; 52 L. J., Q. B. 355 (C. A.); overruling *Vavasseur* v. *Krupp*, 15 Ch. D. 474.

(*y*) *Andrew* v. *Aitken*, 21 Ch. D. 175; 51 L. J., Ch. 528; 46 L. T. 689.

(*z*) *Mostyn* v. *West Mostyn Coal and Iron Co.*, 1 C. P. D. 145; *Eyre* v. *Hughes*, 2 Ch. D. 148: *Breslauer* v. *Barwick*, 36 L. T. 52; 24 W. R. 901.

(*a*) *Padwick* v. *Scott*, 2 Ch. D. 736: *Barber* v. *Blaibery*, 19 Ch. D. 473; 51 L. J., Ch. 509: *Trelevan* v. *Bray*, 45 L. J., Ch. 113; 33 L. T. 827: *S. C.*, 1 Ch. D. 176: *Quin* v. *Hession*, 40 L. T. 70, Ir. Ex. Div.

(*b*) *Fairness* v. *Booth*, 4 Ch. D. 586: *Harris* v. *Gamble*, 6 Ch. D. 748: *Warner* v. *Twining*, 24 W. R. 536: *Evans* v. *Buck*, 4 Ch. D. 432: *Dear* v. *Sworder*, 4 Ch. D. 476: *McLay* v. *Sharp*, W. N. 1877, 216, M. R.

(*c*) *In re Milan Tramways Co., Ex p. Theys*, 22 Ch. D. 122, *Kay*, J.

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plaintiff's original claim is no objection (*d*). A third party cannot be joined against whom there is only a claim for relief in one of two inconsistent alternatives (*e*). Leave to serve the parties joined as co-defendants to the counterclaim out of the jurisdiction may be given (*f*).

The third party cannot interrogate the original plaintiff (*g*).

As between co-defendants, where one defendant claims to be entitled to contribution or indemnity against a co-defendant, a notice, under *Ord. XVI. r.* 48 (*post, Ch. XXXVIII.*), is the proper procedure (*see Ord. XVI. r.* 55, *post, Ch. XXXVIII.*). Under the former rules, it was held that the notice might in this case be given without leave (*h*), by delivering a pleading disclosing a defence as against the plaintiff, and a claim as against the co-defendant (*i*); but under the present rule it would appear that this is not the proper course and that an ordinary notice should be given (see fully *post, Ch. XXXIII.*).

Additional title.

Additional Title.]—By *Ord. XXI. r.* 11, "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

The further title is only necessary when the counter-claim is against the plaintiff and another person (*see ante*, p. 306, n. (*s*)).

Service on third party.

Service on Third Party.]—By *Ord. XXI. r.* 12, "Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 2 in Appendix B., or to the like effect" (*k*). The defendant may get leave to serve a third party out of the jurisdiction with a counter-claim (*l*).

Appearance by third party.

Appearance by Third Party.]—By *Ord. XXI. r.* 13, "Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action." The third party cannot appear until he has been duly served with the counter-

(*d*) *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145 (C. A.).
(*e*) *Evans* v. *Buck*, supra. See *Child* v. *Stenning*, 5 Ch. D. 695 (C. A.).
(*f*) *In re Luckie, Nixon* v. *Luckie*, W. N. 1880, 12. But see *Potter* v. *Miller*, 31 W. R., V. C. H., which qy.
(*g*) *Molloy* v. *Kilby*, 15 Ch. D. 162.
(*h*) *Butler* v. *Butler*, 14 Ch. D. 329.
(*i*) *Bright* v. *Marner*, 11 Ch. D. 394: *Bagot* v. *Easton*, 11 Ch. D. 392: *Furness* v. *Booth*, supra: *Harris* v. *Gamble*, supra, overruling *Shephard* v. *Beane*, 2 Ch. D. 233, contra; cp. *Steel* v. *Dixon*, 42 L. T. 765.
(*k*) See the form, Chit. F. 159.
(*l*) See note (*f*), supra.

claim properly indorsed. If he does so appear, the appearance may be struck out on the defendant's application (*m*).

See fully as to entering appearance, *ante*, p. 251.

Application to exclude counter-claim.

Application to exclude Counter-Claim.]—As to the application by the third party to have the counter-claim excluded, *see post*, p. 310.

Reply by third party.

Reply by Third Party.]—By *Ord. XXI. r.* 14, "Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim."

The time for delivering a defence is eight days from the delivery of the statement of claim (*Ord. XXI. r.* 6, *ante*, p. 297).

The third party cannot set up a counter-claim against the defendant who has brought him in (*n*).

Sect. 3. *Judgment.*

Judgment.

By *Ord. XXI. r.* 17, "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." The "balance" here referred to is the balance upon the hearing of the action (*o*); a defendant cannot, therefore, obtain a judgment on his counter-claim until the plaintiff's claim has been tried (*p*). When the claim is admitted, but the defendant sets up a counter-claim, the plaintiff may, under *Ord. XXVII. r.* 9, *post*, p. 332, apply for judgment on his claim, but he cannot issue execution (*q*).

As a general rule where the issues of fact raised by the claim and counter-claim are practically the same, the plaintiff will not at the close of the defendant's case be allowed to call fresh evidence to rebut the counter-claim (*r*).

Sect. 4. *Costs.*

Costs.

Costs.]—In all cases, except where the matter is tried by a jury, the costs are in the discretion of the judge (*Ord. LXV. r.* 1).

By *Ord. LXV. r.* 2, "When issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively both in law and fact shall, unless otherwise ordered, follow the event."

After a trial by jury the costs, unless otherwise ordered, follow the event (*Ord. LXV. r.* 1, *post*, *Ch. LXVII.*).

There have been numerous cases as to the payment of costs where both a claim and counter-claim or set-off are set up. It is

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(*m*) *Fraser* v. *Cooper*, 23 Ch. D. 685; 52 L. J., Ch. 684.

(*n*) *Street* v. *Gover*, 2 Q. B. D. 498; 36 L. T. 766.

(*o*) *Rolfe* v. *Maclaren*, 3 Ch. D. 106.

(*p*) Id. See *Aitken* v. *Dunbar*, 46 L. J., Ch. 489.

(*q*) Cp. *Mersey Steamship Co.* v. *Shuttleworth* (C. A.), 11 Q. B. D. 531; 52 L. J., Q. B. 522; 48 L. T. 625, where *Showell* v. *Bowen*, 52 L. J., Q. B. 284; 48 L. T. 613; 31 W. R. 550, is practically overruled.

(*r*) *Green* v. *Sevin*, 41 L. T. 724, *Fry*, J.

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now, however, pretty clearly settled that there is a distinction between a counter-claim and a set-off (*s*).

In the case of a counter-claim, the plaintiff should get the costs of the issues (if any) on which he succeeds, and the defendant should get the costs of the issues (if any) on which he succeeds, and the general costs of the cause abide the result of the plaintiff's claim. If the plaintiff succeeds, he gets the general costs of the cause; and if he fails, the defendant gets them, irrespective of the result of the counter-claim (*t*).

In the case of a set-off the latter is treated as if it were a defence, and the plaintiff only gets the general costs if he overtops the defendant's set-off (*t*).

In the case of a set-off the plaintiff only "recovers" within the meaning of the County Courts Act, 1867, sect. 5, the excess of his claim over that of the defendant (*u*). But in the case of a counter-claim he "recovers" the whole amount found due to him on his claim (*x*). The County Courts Act does not affect the defendant's right to costs on his counter-claim (*y*).

As to the effect of the rule that, after a trial with a jury, costs are to abide the event, *see post, Ch. LXVII.* As to the costs on a reference to arbitration, *see post, Ch. CXXXVI.*

Sect. 5. *Application to exclude or separate Counterclaim inconveniently joined.*

Exclusion or separation of counterclaim inconveniently joined.

Ord. XIX. r. 3 (*ante*, p. 304), after giving the defendant leave to set up a set-off or counterclaim, provides that "The Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

By *Ord. XXI. r.* 15, "Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may, *at any time before reply*, apply to the Court or a judge for an order that such counterclaim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just."

(*s*) *Stooke* v. *Taylor*, 5 Q. B. D. 569: *Gathercole* v. *Smith*, 7 Q. B. D. 626; 50 L. J., Q. B. 681: *Lowe* v. *Holme*, 10 Q. B. D. 286.

(*t*) *In re Brown, Ward* v. *Morse*, 23 Ch. D. 377; 52 L. J., Ch. 524; 49 L. T. 68, C. A.: *Lowe* v. *Holme*, supra: *Mason* v. *Brentini*, 15 Ch. D. 287; 43 L. T. 537: *Saner* v. *Bilton*, 11 Ch. D. 416: *Davidson* v. *Gray*, 5 Ex. D. 189; 42 L. T. 834: *Cole* v. *Firth*, 4 Ex. D. 301; 40 L. T. 861: *Baines* v. *Bromley*, 6 Q. B. D. 691: *Sparrow* v. *Hill*, 8 Q. B. D. 479: *Neale* v. *Clarke*, 4 Ex. D. 286; 41 L. T. 438: *Hallinan* v. *Price*, 41 L. T. 627; 27 W. R. 490. See *Ellis* v. *De Silva*, 6 Q. B. D. 521; 50 L. J., Q. B. 328.

(*u*) *Stooke* v. *Taylor*, 5 Q. B. D. 569: *Neal* v. *Clarke*, 4 Ex. D. 286; 41 L. T. 438.

(*x*) *Stooke* v. *Taylor*, supra, per *Cockburn*, C. J., at pp. 577, 578: *Baines* v. *Bromley*, 6 Q. B. D., per *Brett*, L. J., at pp. 694, 695; per *Pollock*, B., 6 Q. B. D., at pp. 199, 200; 50 L. J., Q. B. 465; per *Hawkins*, J., *Neal* v. *Clarke*, 4 Ex. D., at p. 295.

(*y*) *Blake* v. *Appleyard*, 3 Ex. D. 195.

The result of these rules is to render it practically, though not entirely (*z*), a matter of discretion with the judge whether he will allow the counterclaim to be set up (*a*). The Court of Appeal will rarely interfere with the decision of the Court on this point (*z*). As a rule the counterclaim should have some connection with the claim (*b*), though, except in the case where a third party is joined, this is not essential (*c*).

In an action by executors against husband and wife seeking to charge the separate estate of the wife, a counterclaim for money due to the wife from the testator and for chattels of the husband in the possession of the testator at his death was allowed (*d*). But where the plaintiff was suing only in her personal capacity, a counterclaim against her both in her personal capacity and also as executrix was excluded (*e*).

A counterclaim in respect of short deliveries of cargoes of goods has been allowed in an action for the price of other goods (*f*). So a set-off in respect of a County Court judgment has been allowed in an action on a judgment of the Court of Exchequer (*g*). In an action for rent, upon an application under the above rule, the judge refused to strike out a set-off for butcher's meat sold, and a counterclaim for damages for breach of an agreement to let, and for specific performance of such agreement (*h*). So in an action for the balance of the purchase-money of a public-house, a counterclaim against the plaintiff and his agent for a return of the deposit on the ground of fraudulent representation, has been allowed (*i*).

But in an action for assault and slander, a counterclaim for breach of an agreement to repair was struck out, though the assault was committed whilst the parties were disputing about the repairs (*k*). So in an action for a libel published by a director of a company, a counterclaim against him for damages sustained in respect of shares bought on a false representation was disallowed, but without prejudice to any action that the defendant might bring, and on the terms that the plaintiff should not issue execution without leave of the Court or a judge (*l*). So in an action for dissolution of an alleged partnership in the manure trade, a counterclaim for services as a traveller in the manure trade was allowed, but one for services in the building trade was excluded (*m*).

In *Thompson* v. *Woodfine* (*n*), the claim and counterclaim were ordered to be separately tried, and the mode of trial explained. But an order of this sort will only be made in very special cases (*o*).

(*z*) *Huggons* v. *Tweed*, 10 Ch. D. 359; 40 L. T. 284, C. A.

(*a*) *Gray* v. *Webb*, 21 Ch. D. 802. See *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197, C. A. See per *Jessel*, M. R., and *Thesiger*, L. J.

(*b*) *Padwick* v. *Scott*, 2 Ch. D. 736. *Harris* v. *Gamble*, 6 Ch. D. 748: *Naylor* v. *Farrer*, W. N. 1878, 187.

(*c*) *Gray* v. *Webb*, supra: *Quin* v. *Hession*, 40 L. T. 70, Ir. Ex. D.

(*d*) *Hodgson* v. *Mochi*, 8 Ch. D. 569; 38 L. T. 635.

(*e*) *Macdonald* v. *Carington*, 4 C. P. D. 28; 39 L. T. 426.

(*f*) *Cappeleus* v. *Brown*, W. N. 1875, 231.

(*g*) *Sandys* v. *Lewis*, Id. 249.

(*h*) *Atwood* v. *Miller*, W. N. 1876, 11.

(*i*) *Bartholomew* v. *Rawlings*, Id. 56.

(*k*) *Lee* v. *Colyer*, Id. 8: *Rotheram* v. *Priest*, 41 L. T. 558.

(*l*) *Nicholson* v. *Jackson*, W. N. 1876, 38, *Lindley*, J.

(*m*) *Naylor* v. *Farrer* (M. R.), W. N. 1878, 187.

(*n*) 38 L. T. 753, *Fry*, J.

(*o*) *Piercy* v. *Young*, 15 Ch. D. 745; 42 L. T. 292.

CHAPTER XXII.

THE REPLY AND SUBSEQUENT PLEADINGS—ISSUE.

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The reply;

The Reply.]—*Ord. XIX. r.* 2 of the *R. of S. C., supra*, p. 279, requires the plaintiff to deliver "his reply," if any, to the defendant's "defence, set-off, or counter-claim," in the manner hereinafter prescribed.

— time;

By *Ord. XXIII. r.* 1, "A plaintiff shall deliver his reply, if any, in Admiralty actions within six days, and in other actions *within twenty-one days*, after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a judge."

— traversing defence;

Reply traversing Defence.]—Where the plaintiff merely wishes to deny the truth of the matters alleged by way of defence, he may simply join issue on them, for by *Ord. XIX. r.* 18, "Subject to the last preceding Rule (*a*), the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted." In this case no reply is *necessary*. (*See Ord. XXVII. r.* 13, *post*, p. 327).

— by confession and avoidance;

Reply by Confession and Avoidance.]—The plaintiff may, in his reply, either together, with or apart from a traverse of the defence, plead matter in confession and avoidance (*b*). The reply must not refer to independent documents, or plead new evidence or argument (*c*).

By *Ord. XIX. r.* 16, "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same" (*see ante*, p. 283). The second pleading may add to, but must not contradict, the first (*d*).

— to counter-claim.

Reply to Counter-claim.]—If the defendant sets up a counter-claim, the reply as to it must be special, and will be similar to a defence, and may be framed accordingly.

(*a*) See Rule 17, ante, p. 299.

(*b*) *Hall* v. *Eve* (C. A.), 4 Ch. D. 341; 35 L. T. 926: *Earp* v. *Henderson*, 3 Ch. D. 254; 34 L. T. 844: and *London and St. Katherine Docks Co.* v. *Metropolitan R. Co.*, 35 L. T. 733, contra, are not correct.

(*c*) *Williamson* v. *L. & N. W. R. Co.*, 12 Ch. D. 787; 27 W. R. 724.

(*d*) *Brett*, J., *Breslauer* v. *Barwick*, 36 L. T. 52: *In re Smith, Rigg* v. *Hughes* (C. A.), 9 P. D. 68.

By *R. of S. C., Ord. XXIII. r.* 4, "Where a counter-claim is pleaded a reply thereto shall be subject to the Rules applicable to statements of defence."

By *Ord. XIX. r.* 17, "It shall not be sufficient . . . for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages." Where no facts are stated specifically in support of the counter-claim, but a reference is made to the defence, the reply should deal specifically with the facts referred to (*e*). In *Benbow* v. *Low* (*e*), a reply joining issue on a counter-claim was struck out.

See, as to the statements that must appear in every pleading, *Ord. XIX. r.* 11, *ante*, p. 280.

Pleadings subsequent to reply.

Pleadings subsequent to Reply.]—By *R. of S. C., Ord. XXIII. r.* 2, "No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then shall be pleaded only upon such terms as the Court or judge shall think fit."

If the defendant wish simply to deny all the material allegations in the reply, he need not deliver any further pleading (*see Ord. XXVII. r.* 13, *post*, *p.* 327); but he may deliver a joinder of issue. If he wish to plead special matter or matter in confession or avoidance, he must, under this rule, obtain leave of a master to do so (*f*). The rules with respect to the reply (*ante*, p. 312) must be attended to in drawing the subsequent pleadings.

When the Court considers the special rejoinder unnecessary, the leave will be refused (*g*).

Time for delivering.

Time for delivering subsequent Pleading.]—By *Ord. XXIII. r.* 3, "Subject to the last preceding rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge."

Time will generally be given even after the expiration of the time limited, unless there has been wilful or obstructive delay (*h*).

Joinder of issue.

Joinder of Issue.]—See *Ord XIX. r.* 18, *ante*, p. 312.

Close of pleadings.

Close of Pleadings.]—By *R. of S. C., Ord. XXIII. r.* 5, "As soon as any party has joined issue upon the preceding pleading of the opposite party *simply* without adding any further or other pleading thereto, or has made default as mentioned in *Ord. XXVII. r.* 13, the pleadings as between such parties shall be deemed to be closed." (*See Ord. XXVII. r.* 13, *post*, p. 327.)

Issue.

Issue.]—Under the practice that existed before the Judicature Acts came into operation the plaintiff before proceeding to trial prepared what was called "the issue." This issue was supposed

(*e*) *Benbow* v. *Low*, 13 Ch. D. 553; 42 L. T. 14; *Green* v. *Sevin*, 13 Ch. D. 589, leave to amend given at trial. See *Hillman* v. *Mayhew*, 24 W. R. 485, M. R.

(*f*) See Chitty's Forms, p. 166, for form of summons, &c.

(*g*) *Norris* v. *Beazley*, 35 L. T. 845, C. P. D.: *Harry* v. *Dary*, 34 L. T. 842, V.-C. B.

(*h*) *Eaton* v. *Storer*, 22 Ch. D. 91.

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to be a transcript of the record containing an entry of all the pleadings, including demurrers, in the order in which they were pleaded, with their dates, and concluded with an award for a jury to come and try the matters in issue. Under the present practice this is not necessary, the pleadings being considered to show the matters in issue between the parties, and two complete copies of them are required to be delivered to the officer by the party entering the cause for trial. (*Ord. XXXVI. r.* 30.)

If the pleadings do not sufficiently define the issues of fact which constitute the real matter of dispute in the action, an application may be made under *Ord. XXXIII. r.* 1, which provides that "Where in any cause or matter it appears to the Court or a judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and such issues shall, if the parties differ, be settled by the Court or a Judge" (*i*).

(*i*) *West* v. *White*, 4 Ch. D. 631: *Wood* v. *Anglo-Italian Bank*, 34 L. T. 255.

CHAPTER XXIII.

AMENDMENT OF, AND STRIKING OUT PLEADINGS.

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Sect. 1. *Amendment by Parties of their own Pleadings.*

Amending without leave —claim;

Amending without Leave—Claim.]—By *Ord. XXVIII. r.* 2, "The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply, and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared."

The time limited for reply is twenty-one days from delivery of defence. (*Ord. XXIII. r.* 1, *ante*, p. 312.)

—set-off or counter-claim;

—Set-off or Counter-claim.]—By *Ord. XXVIII. r.* 3, "A defendant who has set up any counter-claim or set-off may, without any leave, amend such counter-claim or set-off at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence."

—costs.

Costs of Amendments made without Leave.]—By *Ord. XXVIII. r.* 13, "The costs of and occasioned by any amendment made pursuant to Rules 2 and 3 of this order shall be borne by the party making the same unless the Court or a judge shall otherwise order" (*a*).

Mode of making amendments.

Mode of making Amendments.]—By *Ord. XXVIII. r.* 8, "An indorsement or pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended."

(*a*) Cp. *Finch* v. *Westrope*, L. R., 12 Eq. 24.

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It would appear that the officer has a discretion to refuse to file an amended pleading without a reprint when the amendments, though they do not exceed two folios in any one place, are numerous and complicated (*b*).

By *Ord. XXVIII. r.* 9, "Whenever any indorsement or pleading is amended, the same when amended, shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: 'Amended ——— day of ———, pursuant to order of ———, dated the ——— of ———, ———.'"

Time for delivering.

Time for delivering Amended Pleadings.]—By *Ord. XXVIII. r.* 10, "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same" (*c*).

Application to disallow amendment.

Application to disallow Amendment made without Leave.]—By *Ord. XXVIII. r.* 4, "Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a judge to disallow the amendment, or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just."

Where a plaintiff amended by setting up an entirely new cause of action, he was ordered to pay all the costs up to the time of his amending (*d*).

Pleading or amending where opposite party amends without leave.

Pleading or Amending where Opposite Party amends without Order.]—By *Ord. XXVIII. r.* 5, "Where any party has amended his pleading under Rules 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead, or within eight days from the delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment."

Leave to amend pleadings.

Leave to amend Pleadings.]—By *R. of S. C., Ord. XXVIII. r.* 1, "The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

By *Ord. XXVIII. r.* 6, "In all cases not provided for by the preceding Rules of this Order, application for leave to amend may be made by either party to the Court or a judge, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just."

(*b*) *John* v. *Lloyd*, L. R., 1 Ch. 64.
(*c*) *The Cassiopeia*, W. N. 1879, 106; 27 W. R. 703.
(*d*) *Blackmore* v. *Edwards*, W. N. 1884, 175: *Bourne* v. *Coulter*, 53 L. J., Ch. 699; 50 L. T. 321.

The power of amendment given by these rules is very extensive, and, subject to the discretion of the master or judge, which is exercised in accordance with settled principles, is unlimited (*e*). As a general rule leave should always be given, unless the party applying is acting *mala fide*, or has, by his blunder, done some injury to his opponent which cannot be compensated for by costs or otherwise (*f*). The rule, it will be observed, says "shall," and therefore, unless some strong reason to the contrary be shown, requires that the amendment be made (*g*).

At what stage of proceedings.

The leave may be granted at any stage of the proceedings (*h*). It is often granted at the trial (*i*), but more care is exercised in granting the application at that stage, and it is often refused (*k*). And as a general rule the plaintiff will not be allowed at the trial to amend so as to introduce or substitute a new case (*l*). It has been refused after verdict (*m*). After final judgment it will rarely, if ever, be given (*n*). Where an unauthorized and defective defence has been fraudulently delivered by the defendant's solicitor, and judgment has been signed on it, the judgment was set aside, and leave given to the defendant to deliver a proper defence (*o*).

Fraud.

Leave to amend so as to introduce a charge of fraud (*p*), or so as to make a case independently of a charge of fraud which has failed (*q*), will not generally be given.

The application.

If the application be made before the trial, it should be made to a master at chambers by summons in ordinary cases. If made at the hearing, it is made to the judge before whom the case comes on for trial (*r*). An affidavit is not in general necessary in support

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(*e*) *Roe* v. *Davies*, 2 Ch. D. 729, 733: *Chesterfield Co.* v. *Black*, 25 W. R. 409; W. N. 1877, 65. See *Caldwell* v. *Paglan Harbour, &c. Co.*, 2 Ch. D. 221, action turned into information: *Winkley* v. *Winkley*, 44 L. T. 572; 29 W. R. 628.

(*f*) *Tildesley* v. *Harper*, 10 Ch. D. 393, per *Bramwell*, L. J., at pp. 396, 397, reversing *Fry*, J., 7 Ch. D. 403: *Clarapede & Co.* v. *Commercial Union Association*, 32 W. R. 262, C. A., reversing *S. C.*, Id. 151.

(*g*) *Roe* v. *Davies*, 2 Ch. D. 729, per V.-C. B., at p. 733: *Blenkhorn* v. *Penrose*, 43 L. T. 668, per *Fry*, J., at p. 670: *Dallinger* v. *St. Albyn*, 41 L. T. 406, per *Fry*, J., at p. 407. See *Tildesley* v. *Harper*, supra.

(*h*) See Ord. XXVIII. r. 1, supra.

(*i*) *King* v. *Cooke*, 1 Ch. D. 57: *Roe* v. *Davies*, 2 Ch. D. 729: *Nobels' Explosives Co.* v. *Jones*, 17 Ch. D. 721: *De Burgue* v. *De Burgue*, W. N. 1880, 191: *Dallinger* v. *St. Albyn*, 41 L. T. 406; *Mozley* v. *Cowie*, 38 L. T. 908: *Budding* v. *Murdoch*, 1 Ch. D. 42. See infra, n. (*l*).

(*k*) *Byrd* v. *Nunn*, 5 Ch. D. 781, affirmed 7 Id. 284: *Collette* v. *Goode*, 7 Ch. D. 842. See cases post, n. (*l*).

(*l*) *Newby* v. *Sharpe*, 8 Ch. D. 39, 49, 51; 47 L. J., Ch. 617, C. A.: *Blenkhorn* v. *Penrose*, 43 L. T. 668, 670: *Clarke* v. *Yorke*, 31 W. R. 62; 47 L. T. 381: *Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13, 16. As to *Budding* v. *Murdoch*, 1 Ch. D. 42, see per *Jessel*, M. R., 12 Ch. D. at p. 92.

(*m*) *Noad* v. *Murrow*, 40 L. T. 100.

(*n*) *Att.-Gen.* v. *Birmingham Corporation* (C. A.), 15 Ch. D. 423, amendment as to parties after judgment refused: *Keith* v. *Butcher*, W. N. 1884, 37, amendment as to parties allowed after judgment pronounced, but before drawn up. See *In re Mason*, W. N. 1883, 134, 147.

(*o*) *Williams* v. *Preston*, 20 Ch. D. 672.

(*p*) *Hendricks* v. *Montague*, 50 L. J., Ch. 257, 260.

(*q*) *Halsey* v. *Brotherhood*, 43 L. T. 366, 370.

(*r*) Where there is a variance between the claim and the proof, the proper time for the plaintiff to amend is at the conclusion of his case. *Rainy* v. *Brave*, L. R., 4 P. C. 287.

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of the application (*s*); but in special cases, as where there is great delay to account for, or the position of the other side has been altered, an affidavit may be required.

Terms.

The terms imposed are usually that the costs of and occasioned by the application and the amendment shall be paid by the party amending in any event.

Amending.

As to the mode of making the amendment, *see Ord. XXVIII. r.* 8, *ante*, p. 315. As to the time for delivering the amended pleadings, *see ante*, p. 316. An order, giving general leave to amend, does not authorize the striking out of the name of one of the parties (*t*).

Appeal.

The Court of Appeal will sometimes grant the leave when it has been refused by the Court below (*u*), or when it has been refused at the trial (*v*). Where there is an appeal from the judgment, it is not necessary to appeal separately from the refusal of leave to amend (*u*).

Effect of not amending pursuant to leave.

Effect of not amending pursuant to Leave.]—By *Ord. XXVIII. r.* 7, "If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a judge."

Sect. 2. *Compelling Amendment of or striking out Pleadings of opposite Party.*

Compelling amendment of or striking out.

By *R. of S. C., Ord. XIX. r.* 27, "The Court or a judge may, at any stage of the proceedings, order to be *struck out or amended* any matter in any indorsement or pleading which may be *unnecessary* or *scandalous*, or which may *tend to prejudice, embarrass or delay the fair trial* of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client."

The striking out and amendment of pleadings under this rule is a matter of discretion, and, as a general rule, no appeal will be entertained (*x*), unless the judge has acted on a wrong principle (*y*).

Any matter introduced into a pleading for the mere purpose of prejudice, or which is indecent or against good manners, or offensive or abusive, is scandalous (*z*). But nothing that is relevant can be struck out as scandalous (*a*). By "embarrassing," the rule means

(*s*) *Conybeare* v. *Lewis*, 44 L. T. 242, *Jessel*, M. R.: *Chesterfield Co.* v. *Black*, 25 W. R. 409; W. N. 1877, 65, V.-C. B.: *Cargill* v. *Bower*, 4 Ch. D. 78, 81; 35 L. T. 621.

(*t*) *Wymer* v. *Dodds*, 11 Ch. D. 436.

(*u*) *Laird* v. *Briggs*, C. A., 16 Ch. D. 663.

(*v*) Id. (C. A.), 19 Ch. D. 22; 45 L. T. 238, reversing *Fry*, J., 16 Ch. D. 440; 50 L. J., Ch. 260: cp. *New Zealand, &c. Co.* v. *Watson*, 7 Q. B. D. 374, 382.

(*x*) *Golding* v. *Wharton Salt Works Co.*, 1 Q. B. D. 374; 34 L. T. 474.

(*y*) *Watson* v. *Rodwell*, 3 Ch. D. 380; 35 L. T. 86 (C. A.) See *Dary* v. *Garrett*, 7 Ch. D. 473; 38 L. T. 77 (C. A.).

(*z*) See *Christie* v. *Christie*, L. R., 8 Ch. 503: *Coyle* v. *Cuming*, 40 L. T. 455; 27 W. R. 529: *Duncan* v. *Vereker*, W. N. 1876, 64.

(*a*) *Christie* v. *Christie*, L. R., 8 Ch. 499, 503: *Cracknall* v. *Janson*, 11 Ch. D. 1, 13.

bringing forward a defence which the party is not entitled to make use of (*b*). Where, therefore, in an action to enforce a contract for the sale of a patent without a warranty, the defendant set up a defence disputing the validity of the patent, the defence was struck out as embarrassing (*c*). So a defence to an action of libel denying that the defendant published the words "falsely or maliciously," was struck out (*d*). But a pleading is not "embarrassing" merely because it is untrue (*e*).

For various instances where the power given by this rule has been exercised, see the cases cited in the preceding chapters of this Part (*ante*, pp. 281 *et seq.*). A paragraph of a defence set up for the mere purpose of discrediting the plaintiff has been struck out (*f*). See also *Cashin* v. *Craddock*, 3 Ch. D. 376; 35 L. T. 452; *Blake* v. *Albion Life Ass. Soc.*, 35 L. T. 269; *Davy* v. *Garrett*, *ante*, n. (*y*), where statements of claim containing immaterial, irrelevant and improper matter were struck out. The application to strike out scandalous matter may be made by any person (*g*).

Improper matter should be struck out, and not left to be dealt with as a matter of costs (*h*).

By *R. of S. C., Ord. XIX. r.* 26, "No technical objection shall be raised to any pleading on the ground of any alleged want of form."

As to striking out pleadings disclosing no reasonable cause of action or answer, or where the claim or defence is frivolous or vexatious, see *Ord. XXV. r.* 4, *post*, p. 325.

See also *post*, *Ch. XLII.*, "*Setting aside Proceedings for Irregularity.*"

(*b*) Per *Jessel*, M. R., *Heugh* v. *Chamberlain*, W. N. 1877, 128; 25 W. R. 742. See *Berdan* v. *Greenwood*, 3 Ex. D. 251; 47 L. J., Ex. 628.

(*c*) *Liardet* v. *Hammond Electric Light, &c. Co.*, 31 W. R. 710.

(*d*) *Belt* v. *Lawes*, 51 L. J., Q. B. 359.

(*e*) *Turquand* v. *Fearon*, 40 L. T. 544.

(*f*) *Smith* v. *British Marine, &c. Association*, W. N. 1884, 232: *Lumb* v. *Beaumont*, 49 L. T. 772.

(*g*) Per *Fry*, J., *Cracknall* v. *Janson*, 11 Ch. D. at p. 13.

(*h*) *Watson* v. *Rodwell*, supra, n. (*y*).

CHAPTER XXIV.

PLEADING MATTERS ARISING AFTER THE COMMENCEMENT OF THE ACTION (a).

PART IV.

Pleading matter of defence, &c. arising after action brought and before delivery of defence or reply.

Pleading Matter of Defence to Claim, Set-off or Counterclaim arising after Action brought and before Delivery of Defence or Reply.]—By *R. of S. C., Ord. XXIV. r.* 1, "Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be raised by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counterclaim alleged therein by the defendant, it may be raised by the plaintiff in his reply, either alone or together with any other ground of reply" (b).

Before the *Judicature Acts*, if any matter of defence arose after the defendant had pleaded, and before the jury had actually delivered their verdict (c), the defendant might, within eight days after such matter of defence arose, unless further time were allowed by the Court or a judge, avail himself of it by a plea termed a "*plea puis darrein continuance.*" Thus, if after plea pleaded, the plaintiff gave the defendant a release, the latter might within such eight days afterwards plead the release, and if he omitted to plead it, it would not be otherwise available for him (d). So, if the plaintiff had become bankrupt, &c., or the defendant had become so, and obtained his certificate, the same might within that time be pleaded (e). If a defendant became bankrupt and obtained his order of discharge after plea and before verdict, and he did not plead the same, and judgment was obtained against him, he could not afterwards do so to an action on such judgment (f). So, an award made in the cause after issue joined might be thus pleaded (g).

(a) As to the effect of death, &c. of the parties pending the action, see post, Vol. 2, Ch. LXXXVIII.

(b) R. 22, T. T. 1853, was the former rule on this subject. See C. L. P. Act, 1852, s. 68: *Cook* v. *Hopewell*, 25 L. J., Ex. 71: *Howarth* v. *Brown*, 1 H. & C. 694; 32 L. J., Ex. 99. As to this rule not applying where the plea was pleaded by one of several defendants, see R. 23, T. T. 1853.

(c) *Todd* v. *Emly*, 1 Dowl., N. S. 598; 9 M. & W. 606; 2 Lutw. 1143; Bull. N. P. 304: *Stamp* v. *Parker*, Cro. Jac. 646. See *Lovell* v. *Eastaff*, 3 T. R. 554: *Fitch* v. *Toulmin*, 1 Stark. 62. See, in case of reference to arbitration, *Alder* v. *Park*, 5 Dowl. 16.

(d) As to replying the avoidance of the release by a condition subsequent, see *Newington* v. *Levy*, 40 L. J., C. P. 29.

(e) See *Lovell* v. *Eastaff*, 3 T. R. 554: *Duff* v. *Campbell*, 3 B. & Ald. 577: *Biggs* v. *Cox*, 4 B. & C. 920; 7 D. & R. 409: *Bretherton* v. *Osborne*, 1 Dowl. 457.

(f) *Todd* v. *Maxfield*, 6 B. & C. 105; 9 D. & R. 171.

(g) *Storey* v. *Bloxam*, 2 Esp. 502.

So, in an action against an executor, the defendant might plead a judgment recovered against him after plea pleaded (*h*). It may be useful here to state that the indorsee of a bill of exchange is entitled to proceed, in an action against the acceptor, for the recovery of costs, though, pending the action, payment in full satisfaction of the amount of the bill with interest, and all money due thereon, be made by another party to the bill and accepted by the plaintiff (*i*). Where in an action for goods sold and delivered, the defendant pleaded, except as to 22*l.* 8*s.* 3*d.*, never indebted, and as to that sum payment after action brought of 22*l.* 8*s.* 3*d.*, "in satisfaction of the claim of 22*l.* 8*s.* 3*d.*, and all damages accrued in respect thereof;" and at the trial, the plaintiff offered no evidence on the first issue, and the defendant proved that he paid 22*l.* 8*s.* 3*d.* to the plaintiff, who accepted it, no mention being made of costs: it was held that the plea was not proved, since the costs, which were part of the damages, were not paid, and, therefore, the plaintiff was entitled to a verdict with nominal damages (*k*).

A plea *puis darrein continuance* might be pleaded, though the defendant were under terms of pleading issuably and taking short notice of trial (*l*). It might be pleaded after the jury were sworn (*m*), or after judgment for the plaintiff on an issue tried by the record, if another issue remained to be tried (*n*), but not after a verdict (*o*). In an action which had been set down for trial in the term as undefended, and postponed on the condition of giving judgment of the term, a plea *puis darrein continuance* of the defendant's bankruptcy and certificate, the certificate having been obtained since the term, was held admissible (*p*).

Leave to deliver further defence or further reply to set-off or counterclaim.

Leave to deliver further Defence or further Reply to Set-off or Counterclaim.]—By *Ord. XXIV. r.* 2, "Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counterclaim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, *within eight days* after such ground of defence has arisen, *or at any subsequent time by leave* of the Court or a judge, deliver a further defence or further reply, as the case may be, setting forth the same."

It does not appear clear from the rule whether any leave is necessary when the further pleading is delivered within the eight days, but it would appear that it is not.

The application should be supported by an affidavit of the truth

(*h*) *Prince* v. *Nicholson*, 5 Taunt. 333; 1 Marsh. 70. And see *Prince* v. *Nicholson*, 5 Taunt. 665; 1 Marsh. 280: *Lyttleton* v. *Cross*, 3 B. & C. 317; 5 D. & R. 175.

(*i*) *Goodwin* v. *Cremer*, 22 L. J., Q. B. 30.

(*k*) *Cook* v. *Hopewell*, 11 Ex. 555; 25 L. J., Ex. 71: *Ash* v. *Pouppeville*, 37 L. J., Q. B. 55.

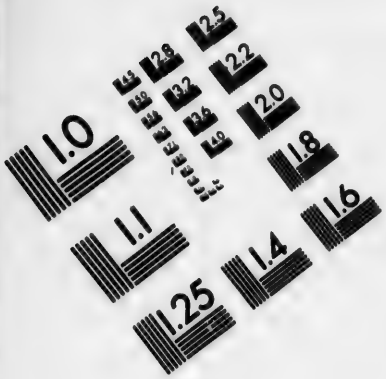
(*l*) *Bryant* v. *Perring*, 2 M. & P. 760; 5 Bing. 414.

(*m*) *Todd* v. *Emly*, 1 Dowl., N. S. 598; 9 M. & W. 606.

(*n*) *Wagner* v. *Imbrie*, 6 Ex. 380; 20 L. J., Ex. 235. As to pleading it after a demurrer, see *Day* v. *Savage*, Moore, 871: *Martin* v. *Wyvil*, 1 Str. 492.

(*o*) 2 Lutw. 1143; Bull. N. P. 305: *Stamp* v. *Parker*, Cro. Jac. 646. See *Lovell* v. *Eastaff*, 3 T. R. 554.

(*p*) *Whitmore* v. *Bantock*, 1 M. & M. 122.



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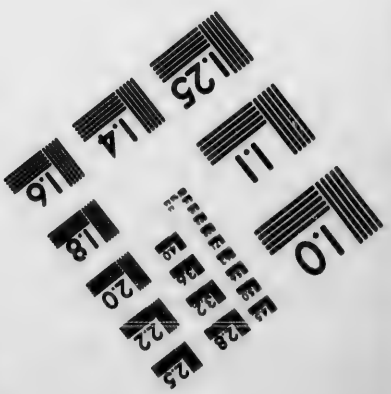

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PART IV.

of the new matter, and, also, showing when it arose, and if there has been any delay the same should be explained. Formerly, an affidavit of the truth of the plea was required to be delivered with it, but this is no longer necessary (*q*).

Counterclaim.

Counterclaim.]—A counterclaim arising after action may be set up by the defendant (*r*); it must, however, be properly pleaded as so arising (*s*). The plaintiff may in his reply set up a counterclaim, arising after action brought, against a counterclaim of the defendant's (*t*).

Effect of.

Effect of.]—Formerly, by pleading *puis darrein continuance*, the defendant abandoned all his other defences (*u*); and it has been said that this would be so under the present rules (*u*), but this, it is submitted, is doubtful.

How pleaded.

How pleaded.]—Matters arising after action brought should be pleaded as so arising (*x*). If it is not so pleaded the opposite party may apply to compel an amendment of the pleading (*y*).

Confession of defence.

Confession of Defence.]—By *Ord. XXIV. r.* 3, "Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (which confession may be in the form *No.* 5 in *Appendix B.* (*z*), with such variations as circumstances may require), and may thereupon sign judgment for his costs up to the time of the pleading of such defence; unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order." The form of judgment is given in the *R. of S. C., Appendix F., No.* 15 (*z*).

An application may be made under this rule to a judge at chambers to deprive the plaintiff of his costs. If such application be refused no appeal lies without leave (*a*).

Where the defendant, having pleaded in bar, afterwards obtained leave under sect. 142 of the *Com. Law Proc. Act*, 1852, to plead an additional plea of the plaintiff's bankruptcy since action brought, which plea the plaintiff confessed, it was held under *rr.* 22 and 23 of *T. T.* 1853, and this would be so also under the present rule, that the plaintiff was entitled to sign judgment for his costs up to the time of pleading the last plea (*b*). Where the defendant is adjudicated a bankrupt after action brought on an act of bankruptcy committed before, and pleads this as a defence arising after action

(*q*) See *Powell* v. *Duncan*, 5 Dowl. 550.

(*r*) *Wood* v. *Goodwin*, W. N. 1883, 17: *Beddall* v. *Maitland*, 17 Ch. D. 174; 44 L. T. 248, where *The Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713, was not followed.

(*s*) *Ellis* v. *Munson*, infra.

(*t*) *Toke* v. *Andrews*, 8 Q. B. D. 428; 51 L. J., Q. B. 281.

(*u*) *Foster* v. *Gamgee*, 1 Q. B. D. 666: *Barber* v. *Palmer*, 1 Salk. 178; per *Martin*, B., in *Howarth* v. *Brown*, 1 H. & C. at p. 696.

(*x*) *Ellis* v. *Munson* (C. A.), 35 L. T. 585. See *Jones* v. *Hill*, L. R., 5 Q. B. 230.

(*y*) Id.; see *Brooks* v. *Jennings*, L. R., 1 C. P. 476: *Tutley* v. *Wanless*, L. R., 2 Ex. 21, 24.

(*z*) See form in Chit. F. p. 176.

(*a*) *Perkins* v. *Bereeford*, 47 L. T. 515.

(*b*) *Foster* v. *Gamgee*, 1 Q. B. D. 666; 34 L. T. 248.

brought, the plaintiff may confess the defence and sign judgment for his costs under this rule (*c*).

Where the defendant pays money into Court, and sets up matter arising after action brought, but going only to the damages, this is not a "defence" within this rule (*d*).

The effect of *rr.* 22 and 23 of *T. T.* 1853, which were similar to the above rule, was not merely to enable the plaintiff to enter a *nolle prosequi* in the particular action, and get his costs, but to put an end to the litigation altogether, as it stood at the time of the confession (*e*).

Under the 22nd and 23rd *Rules of Pleading, T. T.* 1853, it was held by the Court of Exchequer that the plaintiff was entitled to his costs where he confessed a plea, notwithstanding it did not allege that the matter of it arose "after the last pleading," if in fact it did so (*f*); and that he was entitled to his costs on confessing the plea, even though it was plaintiff's conviction for felony, the legal effect of which then was to deprive him of the right of action (*g*).

(*c*) *Champion* v. *Formby*, 7 Ch. D. 373: *Dunn* v. *Hill*, 11 M. & W. 470.

(*d*) *Callendar* v. *Hawkins*, 2 C. P. D. 592.

(*e*) *Newington* v. *Levy*, L. R., 5 C. P. 607, affirmed in Exch. Ch., 6 Id. 180. See *Bennett* v. *Gamgee*, 2 Exch. D. 11; 35 L. T. 764, affirmed in C. A., 36 L. T. 48: cp. *Hale* v. *Levy*, L. R., 10 C. P. 154; 31 L. T. 727, where a ground of reply had arisen after the confession in a former action.

(*f*) *Howarth* v. *Brown*, 1 H. & C. 694; 32 L. J., Exch. 99. And see cases cited ante, n. (*y*).

(*g*) *Barnett* v. *L. & N. W. R. Co.*, 5 H. & N. 604; 29 L. J., Exch. 334.

CHAPTER XXV.

PLEADING MATTERS OF LAW—PROCEEDINGS IN LIEU OF DEMURRER.

PART IV.

Demurrers abolished.

FORMERLY, if a party wished to contend that the facts stated by his opponent in his pleading as constituting a cause of action or defence or answer to the last preceding pleading did not in point of law constitute a cause of action or defence or answer, his proper course was to demur, that is to say, to deliver a pleading stating that his opponent's pleading for certain grounds stated on the demurrer was bad in law. The demurrer admitted the facts stated in the pleading, and special leave was necessary to enable a party to plead and demur at the same time. Under the present system, by *Ord. XXV. r.* 1, "No demurrer shall be allowed."

Proceedings in lieu of demurrer.

In lieu of the old demurrer, a party who wishes to contend that his opponent's pleading is bad in law may adopt one of two courses. He may raise the point of law in his pleading under *Ord. XXV. r.* 2, or he may apply to strike out the pleading to which his contention applies. The latter course should only be resorted to in very clear cases.

Points of law may be raised in pleadings.

Points of Law may be raised in Pleadings.]—By *Ord. XXV. r.* 2, "Any party *shall be entitled* to raise by [illegible]pleading any point of law, and any point so raised shall be d[illegible] of by the judge who tries the cause at or after the trial, prov[illegible] that by consent of the parties, or by order of the Court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

It will be observed that the rule only says that the party shall "be entitled" to raise the point of law in his pleading. It is submitted that this does not render it obligatory on him to do so; but when a party intends to rely on a point of law, he should always raise it in his pleading at the earliest possible opportunity (*a*).

The point of law should be stated in a separate paragraph, and the grounds of the objection shortly stated as in a demurrer (*b*).

Objections founded on the Statute of Frauds or similar statutes must be raised by pleading (*see ante*, pp. 282, 284).

Objections founded on the misjoinder or nonjoinder of parties cannot be raised by pleading, but must be raised by an application under *Ord. XVI. r.* 11 (*c*). *See post, Ch. LXXXVII.*

(*a*) Cp. *Re The White Star Consolidated Gold Mining Co.*, 48 L. T. 815.

(*b*) See form, Chit. F. p. 178. A demurrer by a defendant to a claim, stating, as a ground of demurrer, "that the facts alleged do not show any cause of action to which effect can be given as against this defendant," was held sufficient. *Bidder v. McLean*, 20 Ch. D. 512.

(*c*) *Werdemann v. Société Général d'Électricité*, 19 Ch. D. 246; 45 L. T. 514, C. A.

Striking out pleading disclosing no cause of action or answer.

Striking out Pleading disclosing no Cause of Action or Answer.]—By *Ord. XXV. r.* 4, "The Court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The application should be made to a master at chambers by summons. It may be made wherever the pleading objected to clearly presents no cause of action or defence (*d*).

Declaratory judgment or order may be sought.

Declaratory Judgment or Order may be sought.]—By *r.* 5, "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

Order that point of law be disposed of before the trial.

Order that Point of Law be disposed of before the Trial.]—Rule 2 (*supra*, p. 324) provides that by order of the Court or a judge, on the application of either party, or by consent, a point of law raised in the pleadings may be set down for hearing and disposed of before the trial. The application for this purpose may be included in the "summons for directions" (*post*, p. 335). In some cases it may be advisable to take out a separate summons for this purpose (*e*).

The order for the separate trial of a point of law should only be made when the decision of that point will dispose of the whole action or defence, or a substantial part of it, and avoid any trial of the issues of fact (*f*). When there are issues of fact, which must be tried sooner or later, and *à fortiori* when the points of law depend on the decision of those questions of fact, no order should be made.

Formerly, when a demurrer was set down for argument, the copies of the pleadings involved and the points for argument called "demurrer books" had to be delivered, but nothing of the sort is necessary now.

Order on hearing point of law.

By *r.* 3, "If in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court or judge may thereupon dismiss the action, or make such other order therein, as may be just."

(*d*) *Burstall* v. *Beyfus* (C. A.), 26 Ch. D. 35; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418: *Johnston* v. *Johnston*, W. N. 1884, 193; 32 W. R. 1016, where, as the plaintiff's statement of claim disclosed no cause of action, it was struck out, and the action dismissed with costs. See contra *Parsons* v. *Burton*, W. N. 1883, 215, *Field*, J., at chambers: *In re Batthyany, Batthyany* v. *Walford*, 32 W. R. 379, *Chitty*, J.

(*e*) See form, Chit. F. p. 179.

(*f*) Cp. *Leyman* v. *Latimer*, 3 Ex. D. 352, 358: *Hayton* v. *Irwin*, 41 L. T. 666, 667: *Hornby* v. *Cardwell*, 8 Q. B. D. 329, 335.

CHAPTER XXVI.

DEFAULT OF PLEADING AND PROCEEDINGS THEREON.

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[As to moving for judgment on admissions in the pleadings, see *post, Ch. LXIX.*, "*Motion for Judgment.*"]

Sect. 1. *Where Plaintiff makes Default.*

PART IV.

Default in delivering statement of claim.

Default in delivering Statement of Claim.]—By *R. of S. C., Ord. XXVII. r.* 1, "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just." As to when the plaintiff is bound to deliver a statement of claim, and the time within which he must do so, *see ante*, p. 288.

When an application is made under this rule, a short time will generally be given to the plaintiff to deliver his statement of claim (*a*). If an order is made that unless the statement be delivered within a stated time the action shall be dismissed, and no statement be delivered before the expiration of that time, the action is at an end, and no time for delivering the claim can be afterwards given (*b*); but the time for appealing from the order itself may be enlarged even after the expiration of the time limited by it (*c*).

Where the plaintiff had become bankrupt after making default, the Court ordered the notice of motion to dismiss to be

(*a*) See *Higginbottom* v. *Aynsley*, 3 Ch. D. 288, a week given: *Eaton* v. *Storer*, 22 Ch. D. 91, 92: cp. *Evelyn* v. *Evelyn*, 13 Ch. D. 138.

(*b*) *Whistler* v. *Hancock*, 3 Q. B. D. 83: *Wallis* v. *Hepburn*, 3 Q. B. D. 84, n.: *King* v. *Davenport*, 4 Q. B. D. 402: *Welply* v. *Buhl*, 4 C. P. D. 80; affirmed, Id. 353.

(*c*) *Carter* v. *Stubbs*, 6 Q. B. D. 116; 29 W. R. 132, C. A., in which the above cases are distinguished, but not overruled. See per *Brett*, L. J., 6 Q. B. D. at pp. 120, 121: *Burke* v. *Rooney*, 4 C. P. D. 226: *Metcalfe* v. *British Tea Association*, 46 L. T. 31.

served on his trustees (*d*). Where a sole plaintiff died, the Court appointed a person to represent him, so as to enable the defendant to move to dismiss the action (*e*).

The fact that the defendant has obtained an order for security for costs, proceedings being stayed in the meantime (*f*), or has filed interrogatories for the plaintiff's examination, which the latter has obtained time to answer which has not expired (*g*), does not prevent the judge from dismissing the action.

As to the effect of an order dismissing an action on subsequent proceedings in respect of the same claim, *see In re Orrell Colliery, &c. Co.*, 12 Ch. D. 681. It appears that such a dismissal does not preclude the plaintiff from commencing a fresh action for the same cause.

Default in delivering reply or subsequent pleading.

Default in delivering Reply or subsequent Pleading.]—By *Ord. XXVII. r.* 13, "If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."

Ord. XXXVI. r. 12, provides that "if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms as to the Court or judge may seem just."

The effect of these rules is that if the plaintiff makes default in delivering a reply or subsequent pleading, the defendant must wait until six weeks after the time limited for delivering the pleading, and then, if notice of trial is not given, two courses are open to him—he may either give notice of trial himself, and this he will do if he has a counterclaim which he is desirous of having tried; or he may apply to dismiss the action for want of prosecution.

Instead of adopting either of the above courses, the defendant may move for judgment for his costs, and on the counterclaim, if any (*h*).

The motion cannot be made successfully if the reply is delivered before notice of it is served (*i*).

If the plaintiff has agreed to one of several defendants having further time for delivering his defence, another defendant cannot in

(*d*) *Wright* v. *Swindon, &c. R. Co.*, 4 Ch. D. 164.

(*e*) *Wingrove* v. *Thompson*, 11 Ch. D. 419.

(*f*) *La Grange* v. *McAndrew*, 4 Q. B. D. 210; 39 L. T. 500.

(*g*) *Jackson* v. *Ivimey*, L. R., 1 Ex. 693.

(*h*) *Street* v. *Crump*, 25 Ch. D. 68; 49 L. T. 397; 32 W. R. 89: *Lumsden* v. *Winter*, 8 Q. B. D. 650; 51 L. J., Q. B. 413: *Pascal* v. *Richards*, 44 L. T. 87: *Caroli* v. *Hirst*, 48 L. T. 759; 31 W. R. 839, not following *Litton* v. *Litton*, 3 Ch. D. 703.

(*i*) *Graves* v. *Terry*, 9 Q. B. D. 170; 51 L. J., Q. B. 464: cp. *Eaton* v. *Storer*, 22 Ch. D. 91; 48 L. T. 204: *Gill* v. *Woodfin* (C. A.), 25 Ch. D. 707; 53 L. J., Ch. 617; 50 L. T. 490; 32 W. R. 393. See *Gibbings* v. *Strong*, post, p. 331, n. (*s*).

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the meantime apply to dismiss the action (*k*). On the hearing of the application, further time to deliver the reply will generally be given to the plaintiff on payment of costs (*l*). But where the judge at chambers refused to extend the time, the Court declined to interfere with his discretion (*m*). If the plaintiff having given notice of trial omits to enter the action for trial within the time limited by *Ord. XXXVI. r.* 16 (*see post, Ch. LXI.*), the defendant may apply to dismiss the action for want of prosecution (*n*).

A form of order dismissing an action for want of prosecution, is given in the *R. of S. C., Appendix K., No.* 15 (*o*).

Sect. 2. *Where Defendant makes Default.*

Where the defendant makes default.

Where the Defendant makes Default.]—In cases within the rules which will be found below, viz., where the claim is for a debt or liquidated demand, or for detention of goods, or pecuniary damages, or recovery of land (*see post, Vol.* 2, *Ch. CVI.*), or a combination of two or more of such claims, the plaintiff may sign judgment if the defendant makes default in delivery of a defence. In other cases he must set down the action on motion for judgment under *Ord. XXVII. rr.* 11, 12, which are as follows:—

"11. In all other actions than those in the preceding Rules of this Order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to.

"12. Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either (if the cause of action is severable) set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants."

See post, Ch. LXIX., "*Motion for Judgment.*" No affidavit in support of the application is necessary (*p*).

If there are admissions in the pleadings entitling him to relief, the plaintiff may move for it under *Ord. XXXII. r.* 6. *See post, Ch. LXIX.*, "*Motion for Judgment.*"

Where the default is in delivering a pleading subsequent to the reply, the pleadings are considered closed, and the statements in the last one delivered deemed to be denied (*Ord. XXVII. r.* 13, *ante*, p. 327), and the plaintiff may either give notice of trial (*Ord. XXXVI. r.* 11) or move for judgment on admissions under *Ord. XXXII. r.* 6, *post, Ch. LXIX.*, "*Motion for Judgment.*"

Where claim for debt or liquidated demand only.

Where Claim for Debt or Liquidated Demand only.]—By *Ord. XXVII. r.* 2, "If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for

(*k*) *Ambroise* v. *Evelyn*, 11 Ch. D. 759.
(*l*) *Eaton* v. *Storer*, 22 Ch. D. 92.
(*m*) *Gilder* v. *Morrison*, 30 W. R. 815.
(*n*) *Crich* v. *Hewlett*, W. N. 1884, 182; 32 W. R. 922.
(*o*) See this form, Chit. F. p. 182.
(*p*) *Perpetual Investment Building Society* v. *Gillespie*, W. N. 1882, 4.

that purpose, deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed with costs."

A form of judgment is given in the *R. of S. C., Appendix F., No.* 1. *See Chit. F.*, p. 184.

In an action on a replevin bond claiming the amount for which the bond is given, if the defendant makes default, final and not interlocutory judgment should be signed (*q*).

As to when a defence must be delivered, *see ante*, p. 297.

How signed, &c.

How signed, &c.]—The mode of signing the judgment can be gathered from what is stated *ante*, p. 260. It will be there seen that a copy of the pleadings must be left with the officer at the time of signing judgment. As to taxing the costs, &c. *see post, Ch. LXVII.* Execution is issued as in ordinary cases. If a year has expired since the last proceeding was had, the defendant will be entitled to a calendar month's notice of proceeding (*r*) before plaintiff can sign judgment. The judgment cannot, it would seem, be signed on a *dies non* (*s*). The plaintiff may sign judgment for want of a plea between 12th August and 24th October, if the time for pleading expired *before* the former day (*t*). But if the time for pleading expire *on* that day, judgment cannot be signed between those days (*u*).

Where defence delivered is a nullity.

If the defendant delivers a defence which may be treated as a nullity, it is the same as if no defence were delivered; thus, if the defence pleaded be clearly not adapted to the statement of claim (*x*), plaintiff, after the time for delivering the defence has expired, may sign judgment. So, if the defendant deliver for a defence a document not in any way framed like one, it may be treated as a nullity, *ex. gr.* a document, "general issue *non assumpsit*" (*y*), "I plead *nil debet*, yours, &c." (*z*), or the like. So the defence may be treated as a nullity, if it be so ridiculous as to amount to a contempt of Court (*a*). If defendant plead before he has entered an appearance, plaintiff may treat the plea as a nullity (*b*), unless he has waived his right of doing so.

The omission of "*qui tam*," &c. to the plaintiff's name, in the title of the defence in a penal action, does not warrant the plaintiff treating it as a nullity (*c*); nor will a mis-statement of defendant's

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(*q*) *Dix* v. *Groom*, 5 Ex. D. 91.

(*r*) Post, Ch. CXXV. See *Lancaster* v. *Fraser*, 1 M. & Sel. 478.

(*s*) *Harrison* v. *Smith*, 9 B. & C. 243. And see *Bennett* v. *Potter*, 2 C. & J. 622.

(*t*) *Morris* v. *Hancock*, 1 Dowl., N. S. 320. But see *Anon.*, 13 Leg. Obs. 120; Tidd's New Pract. 483.

(*u*) *Morris* v. *Hancock*, 1 Dowl., N. S. 320: *Unthank* v. *Layfield*, cor. *Patteson*, J., at Chambers, 26th Aug. 1841.

(*x*) See *Holliday* v. *Bohn*, 3 Sc. N. R. 496; 3 M. & Gr. 115: *Badman* v. *Pugh*, 6 Sc. N. R. 150; 1 Saund. 28, n.: *Stafford* v. *Little*, Barnes, 257: *Perry* v. *Fisher*, 6 East, 549: *Brennan* v. *Egan*, 4 Taunt. 164: *Ford* v. *Bernard*, 4 M. & P. 302: *King* v. *Myers*, 5 Dowl. 686.

(*y*) *Gibson* v. *Houseman*, 1 Chit. Rep. 647, n. And see *Albany* v. *Griffin*, Ca. Pr. C. P. 126.

(*z*) *Martyn* v. *Skinner*, Barnes, 239.

(*a*) See per *Wilde*, C. J., *Davidson* v. *Bohn*, 5 C. B. 176.

(*b*) See *Nolleken* v. *Severn*, 2 Tyr. 304. And see *Douglas* v. *Green*, 1 Chit. 7.

(*c*) *Dale* v. *Beer*, 7 East, 333; 3 Smith, 243.

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christian name in the commencement of the defence (*d*). It is apprehended, however, that a substantial mis-statement of the names of the parties in the cause might render the defence a nullity. If defendant deliver the plea to the country solicitor instead of the town agent (*e*), plaintiff may treat it as a nullity.

Though, before the Judicature Acts, the *R.* of *T. T.* 1853 prohibited defendant pleading *non assumpsit* or never indebted to a declaration on a bill or note, or the plea of *nil debet* in any action, plaintiff could not, unless defendant were under terms of pleading issuably (*f*), treat such plea as a nullity and sign judgment (*g*). The plaintiff's course, in any of these cases, unless he would join issue on, or demur to, the plea, was either to obtain a judge's order, under the *Com. Law Proc. Act*, 1852, *s.* 52, to strike it out (*h*), or to compel defendant to amend it. Where to an action against defendant as indorser of a bill he pleaded that "he did not make or draw the bill:" it was held that the plaintiff could not treat the plea as a nullity, and sign judgment (*i*). And in general plaintiff cannot treat a defence as a nullity which will be rendered a good one by rejecting surplusage (*k*), or merely because it is informal (*l*).

Where it is a sham one.

A sham defence, though bad in law or a trick upon the face of it, and false, cannot be considered a nullity, so as to warrant plaintiff in signing judgment (*m*). But it may be laid down as a general rule, that, when the defence is upon the face of it palpably a tricky one, framed only for the purpose of delaying the plaintiff, a master will order it to be struck out, and, in some cases, give plaintiff leave to sign judgment (*n*). But the master will not interfere and strike out a defence upon the mere ground of its being false, although plaintiff swear that it is so in every respect (*o*). Nor will he do so in general where plaintiff has consented to defendant's pleading it (*p*).

(*d*) *Anon.*, 7 D. & R. 511.

(*e*) *Taylor* v. *Lawson*, C. P. Cas. Prac. 123.

(*f*) *Kelly* v. *Villebois*, 3 Jur. 1172, Q. B. And see *Sewell* v. *Dale*, 8 Dowl. 309: *Eddison* v. *Pigram*, 16 M. & W. 137; 16 L. J., Ex. 33: *Humphrey* v. *Earl Waldegrave*, 6 M. & W. 622.

(*g*) See *Finlayson* v. *Mackenzie*, 3 Bing. N. C. 824: *Hay* v. *Fisher*, 2 M. & W. 722: *Fraser* v. *Newton*, 8 Dowl. 773.

(*h*) See per *Littledale*, J., in *Horner* v. *Keppel*, 19 A. & E. 17; 2 P. & D. 234: *Robeson* v. *Ellis*, 2 B. C. R. 185.

(*i*) *Allen* v. *Walker*, 5 Dowl. 460; 2 M. & W. 317.

(*k*) *Risdale* v. *Kelly*, 1 Dowl. 285; 1 C. & J. 410; 1 Tyr. 387. See *Attwood* v. *Bonacich*, 1 D. & R. 473: *Edyington* v. *Town*, 1 M. & P. 276: *Macdonnell* v. *Macdonnell*, 3 B. & P. 174.

(*l*) *Bousfield* v. *Edge*, 1 Ex. 89; 5 D. & L. 99; 17 L. J., Ex. 169: *Vere* v. *Goldsborough*, 1 Bing. N. C. 353; 1 Sc. 265: *Worley* v. *Harrison*, 3 A. & E. 669; 5 N. & M. 173; 1 H. & W. 426.

(*m*) See *Waterman* v. *Carden*, 6 M. & Gr. 752.

(*n*) Ord. XXV. r. 4, ante, p. 325: cp. *Balmanno* v. *Thomson*, 8 Sc. 306; 6 Bing. N. C. 153; 8 Dowl. 76: *Mitford* v. *Finden*, 8 M. & W. 511; 9 Dowl. 813: *Murray* v. *Boucher*, 9 Dowl. 537: *Emanuel* v. *Randall*, 8 Dowl. 238: *Horner* v. *Keppel*, 10 A. & E. 17; 2 P. & D. 234: *Knowles* v. *Burward*, 10 A. & E. 19; 2 P. & D. 235.

(*o*) *Merrington* v. *Beckett*, 2 B. & C. 81; 3 D. & R. 231: *Smith* v. *Backwell*, 1 M. & P. 338; 4 Bing. 512: *Edwards* v. *Greenwood*, 5 Bing. N. C. 476, per *Tindal*, C. J.: *Mitford* v. *Finden*, supra. See *Levy* v. *Railton*, 14 Q. B. 418; 19 L. J., Q. B. 16: *Nutt* v. *Rush*, 4 Ex. 490; 7 D. & L. 192; 19 L. J., Ex. 54.

(*p*) *Howen* v. *Carr*, 5 Dowl. 305. See *Forteseue* v. *Holt*, 1 Vent. 213,

As to the course to be pursued where the defendant pleads a tender, or a payment of money into Court, without paying the money into Court, *see Vol.* 2, *Ch. XXIX.* (*q*).

When money not paid in on plea of tender.

If defendant deliver a defence which is a nullity, the plaintiff cannot sign judgment before the time for delivering the defence has expired, for the defendant may still plead properly before that time (*r*). So, if a defence is delivered after the time at which plaintiff is entitled to sign judgment, but before judgment is signed, judgment cannot be signed (*s*). Where after the time for pleading had expired, defendant's solicitor tendered a plea at plaintiff's solicitor's office, just after plaintiff's solicitor's clerk had set out to sign judgment, and defendant's solicitor followed him, and, arriving immediately after judgment had been signed, again tendered the plea, the judgment was held to be regular, having been signed in ignorance of the tender of the plea (*t*).

At what time it may be signed.

Against one of several Defendants.]—By *Ord. XXVII. r.* 3, "When in any such action as in the last preceding rule mentioned there are several defendants, if one of them make default as mentioned in the last preceding rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants" (*u*).

Against one of several defendants.

Where Claim for Damages or Detinue as well as Debt.]—By *Ord. XXVII. r.* 6, "If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and any defendant make default as mentioned in *r.* 2, the plaintiff may enter final judgment, for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in rules 4 and 5."

Where claim for damages or detinue as well as debt.

Where Claim for Detention of Goods or Damages.]—By *Ord. XXVII. r.* 4, "If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant, or all the defendants if more than one, make default as mentioned in

Where claim for detention of goods or damages.

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where *Hale*, C. J., blamed the bad practice that is amongst counsel in advising such pleas, and said that it was within the penalty of Westminster 1, Serjeants, Comptors, &c.; and that although counsel were obliged to be faithful to their clients, yet they ought not to manage their causes in such a manner as justice would be delayed or truth suppressed, to promote which was as much the duty of their calling as it was the office of the judges, though not in so eminent a degree. As to fining a solicitor for pleading a sham plea, &c., see ante, p. 178.

(*q*) See *Pether* v. *Shelton*, 1 Str. 638: *Chapman* v. *Hicks*, 2 Dowl. 641; 2 C. & M. 633.

(*r*) *Warne* v. *Beresford*, 4 Dowl. 361; 1 T. & G. 230: *Hough* v. *Bond*, 1 M. & W. 314; 1 T. & G. 617: *Macher* v. *Billing*, 3 Dowl. 246: *Dakins* v. *Wagner*, 3 Dowl. 535.

(*s*) *Gibbings* v. *Strong* (C. A.), 26 Ch. D. 66: 50 L. T. 578; 32 W. R. 757: *Gill* v. *Woodfin*, 25 Ch. D. 707; 50 L. T. 490: *Ampthill* v. *Semple*, 1 Dowl. 316; 2 C. & J. 358: *Gray* v. *Pennell*, 1 Dowl. 120: *Leigh* v. *Bender*, 4 Dowl. 201: *Minns* v. *Baxter*, 1 T. R. 16. But see *Thompson* v. *Ryall*, 4 T. R. 195.

(*t*) *Stafford* v. *Nichols*, 4 Bing. N. C. 693; 6 Sc. 577.

(*u*) See *Jenkins* v. *Davies*, 1 Ch. D. 696.

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rule 2, the plaintiff may enter an interlocutory judgment against the defendant or defendants, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or judge may direct."

As to assessment of damages by a writ of inquiry, *see post, Ch. CXV.*, "*Writ of Inquiry*," and by a master, *see post, Ch. CXV.*, "*Assessment of Damages by Master.*"

As to signing judgment for return of specific goods, *see ante*, p. 264, and as to execution by writ of delivery, *see post, Ch. LXXVIII.*, "*Writ of Delivery.*"

The form of interlocutory judgment is *No.* 2 in *Appendix F.* to the *R. of S. C.* The form of final judgment is *No.* 4 (*x*).

See as to the damages on a judgment by default in an action on a contract in the alternative, *Deverill* v. *Burnell*, L. R., 8 C. P. 475.

Having signed interlocutory judgment, proceed to get the damages the plaintiff is entitled to recover ascertained by a writ of inquiry, or in some other way, as directed by the above rule. As to the writ of inquiry, and as to the other modes of assessing damages, see Ch. CXV. As to the form of judgment after the damages have been assessed, *see Chitty's Forms, p.* 185.

Costs.

The plaintiff should apply on summons to a judge at chambers for his costs under *Ord. LXV. r.* 1 (*post, Ch. LXVII.*). The costs do not follow the event under that rule, but are in the discretion of the judge (*y*).

The plaintiff is not entitled to the costs of preparing for trial (*z*). When, in an action against the lessee of a colliery, two breaches of covenant were assigned: first, non-payment of a sleeping rent; and secondly, not properly working the mine; the defendant allowed judgment to go by default, and a writ of inquiry was issued; the jury found that the plaintiffs had sustained damages to the amount of 50*l.*, but that they were entitled to no damages in respect of dilapidations through the mine not having been properly worked. It was held, notwithstanding, that the master was right in allowing to the plaintiffs, on taxation, the full costs of witnesses summoned by the plaintiffs to prove default in properly working the mine (*a*).

Where several defendants.

By *Ord. XXVII. r.* 5, "When in any such action as in *r.* 4 mentioned there are several defendants, if one or more of them make default as mentioned in *r.* 2, the plaintiff may enter an interlocutory judgment against the defendant or defendants so making default, and proceed with his action against the others. And in such case, the value and amount of damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a judge shall otherwise direct."

When defence goes to part of the cause of action only.

When Defence goes to part of the Cause of Action only.]—By *R. of S. C., Ord. XXVII. r.* 9, "If the plaintiff's claim be for a

(*x*) See these forms, Chit. F. 185.
(*y*) *Gath* v. *Howarth*, W. N. 1884, 99; Bitt. Ch. Cas. 29.
(*z*) *Freeman* v. *Springham*, 32 L. J., C. P. 249.
(*a*) *Dods and another* v. *Evans*, 33 L. J., C. P. 147.

debt or liquidated demand, the detention of goods and pecuniary damages, or for any of such matters, or for the recovery of land, and the defendant delivers a defence, which purports to offer an answer to *part only* of the plaintiff's alleged cause of action, the plaintiff may by *leave of the Court or a judge* enter judgment, final or interlocutory, as the case may be, for the part unanswered; provided that the unanswered part consists of a separate cause of action, or is severable from the rest, as in the case of part of a debt or liquidated demand: provided also that, where there is a counter-claim, execution on any such judgment as above mentioned in respect of the plaintiff's claim shall not issue without leave of the Court or a judge."

Where there is a counter-claim.

Execution on Judgment by Default.]—The execution on a judgment by default is, in general, the same as in ordinary cases (*b*). In actions of debt within the statute 8 & 9 *W.* 3, *c.* 11, *s.* 8, such as on a bond for the performance of covenants for the payment of money by instalments, or of an annuity, or the like (*c*), if the defendant suffer judgment to go by default, although in strictness this is a *final* judgment, and entered up for the entire penalty of the bond, yet the plaintiff cannot sue out execution for the sum recovered by the judgment, but only for the damages in respect of the breach sued for, and he may deliver a suggestion of breaches from time to time as they occur, and execute a *writ of inquiry*, in order to assess damages on them (*c*).

Execution.

Sect. 3. *Where Parties to Issue other than Plaintiff or Defendant make Default.*

By *Ord. XXVII. r.* 14, "In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court or judge may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties."

The application may be made to a master by summons at chambers.

Sect. 4. *Setting aside Judgment signed in default of Defence.*

By *Ord. XXVII. r.* 15, "Any judgment by default whether under this order or under any other of these rules, may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such Court or judge may think fit." The application should be made to a master at chambers by summons supported by an affidavit showing that the defendant has a defence on the merits (*d*), and accounting for the default. See the note and cases, *ante*, p. 266.

Setting aside judgment signed in default of defence.

Formerly a simple affidavit by the defendant that he had "a good defence to this action on the merits, as I am advised and believe," was considered sufficient; but the application should now be supported by an affidavit showing the nature of the defence and

Affidavit in support.

(*b*) Post, Ch. LXXIV.
(*c*) See post, Ch. CX.
(*d*) *Watt* v. *Barnett*, 3 Q. B. D. 183, affirmed Id. 363: *Smith* v. *Dobbin*, 3 Ex. D. 338; 37 L. T. 388, 777, per *Brett*, L. J.

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the facts by which it is supported. Under the former practice it was held that the affidavit must state in express terms that the defendant had "a good defence to this action upon the merits" (*e*). It might be made either by the defendant himself or his attorney or agent, or the clerk of the attorney who had the sole management of the cause, or some person who had had such a connexion with the cause as acquainted him with its merits, and this must appear on the face of the affidavit (*f*). Where it was made by the party himself, the words "as he is *advised* and believes" were added (*g*). Where it was made by the attorney or managing clerk to the attorney, the form was, "as he is *informed* and verily believes" (*h*), or, "as he is instructed and verily believes" (*i*). "Apprized and believes" would not do (*h*). An affidavit merely that the defendant was advised and believed he had "a good and meritorious defence" (*k*); or, that the defendant "hath merits and good cause of defence to this action" (*e*); or, that "he is informed and believes that he has a good, substantial and available defence to this action" (*l*); or, that he had "merits to defend," or "a good defence to the action" (*m*); or, that he had "a good and sufficient defence on the merits," not saying "to this action" (*g*), or the like, would not suffice. An affidavit by an agent, that, from the instructions he had received from the country, he believed that the defendant had a good defence to the action on the merits, was held sufficient (*n*). The plaintiff would not, in general, in answer to the affidavits of merits, be allowed to make an affidavit to show that the defendant had no merits; and if he did, and made a long statement of it, the Court would order the master not to allow the costs of that part of the affidavit (*o*).

Where the judgment has been regularly signed the terms usually imposed are payment of all the costs thrown away (*p*).

(*e*) *Lane* v. *Isaacs*, 3 Dowl. 652.

(*f*) *Rowbotham* v. *Dupree*, 5 Dowl. 557; *Morris* v. *Hunt*, 1 Chit. Rep. 93.

(*g*) *Crossby* v. *Innes*, 5 Dowl. 566.

(*h*) *Per Cur. Bromley* v. *Gerish*, 6 M. & G. 750; 1 D. & L. 763, and see note (*d*).

(*i*) *Schofield* v. *Huggins*, 3 Dowl. 427: *Worthington* v. ——, 2 C. M. & R. 315.

(*k*) *Bower* v. *Kemp*, 1 Dowl. 282; 1 C. & J. 287.

(*l*) *Page* v. *South*, 7 Dowl. 412.

(*m*) *Pringle* v. *Marsack*, 1 D. & R. 155.

(*n*) *Schofield* v. *Huggins*, 3 Dowl. 427.

(*o*) *Heane* v. *Battersby*, 3 Dowl. 213, per *Gurney*, B. And see per *Coleridge*, J., in *Blewitt* v. *Gordon*, 1 Dowl. N. S. 820.

(*p*) See *Williams* v. *Brisco*, 29 W. R. 713.

PART V.

INTERMEDIATE PROCEEDINGS.

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CHAPTER XXVII.

SUMMONS FOR DIRECTIONS.

Summons for directions.

UNDER the former system it was, until quite recently, necessary to take out a separate summons on every application in an action. This is no longer necessary. One summons, called a "summons for directions," may now be taken out by either party at any stage of the action prior to trial, embodying an application for all that is required at the time when it is taken out, and the summons may be adjourned from time to time, and brought on again by notice, whenever either party desires some further order.

By *R. of S. C., Ord. XXX. r.* 1, "In every cause or matter one general summons for directions may be taken out at any time by any party with respect to the following matters and proceedings:—particulars of claim defence or reply, statement of special case,

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discovery (including interrogatories), commissions and examinations of witnesses, mode of trial (including proceedings in lieu of demurrer, trial on motion for judgment, and reference), place of trial, and any other matter or proceeding in the cause or matter previous to trial."

By *r.* 2, "Such summons for directions shall be a summons returnable in *not less than four days*, in the Form No. 3 in Appendix K., with such variations as circumstances may require, and shall be addressed to and served upon all such parties to the cause or matter as may be affected thereby. The applicant shall, so far as practicable, include in the summons all or as many of the above-mentioned matters and proceedings as, having regard to the nature of the cause or matter, can conveniently be dealt with by the order and directions of the Court or judge. Upon the hearing of the summons, any party to whom the summons is addressed shall be at liberty to apply for any order or directions as to any of the above-mentioned matters or proceedings which he may desire, and thereupon, after giving notice to such parties (if any) as the Court or judge may direct, any order may be made, and all necessary directions given, as to all or any of such matters and proceedings as may be just, whether applied for or not: such order shall be in the Form No. 4 in Appendix K., with such variations as circumstances may require."

The summons is taken out and served in the same manner as an ordinary summons (*a*). It will be observed that the rule requires that at least three days should elapse between the dates of issue and return. On the hearing the party served with the summons may ask for any direction he requires.

When the order or orders required is or are made, the further hearing of the summons is adjourned, with liberty to either party to bring it on again, on giving the other two days' notice. It is useful to get a provision inserted in the adjournment clause that the notice to bring on the summons again shall specify the further order or orders required.

Costs of application not included in summons for directions.

Costs of Application that should have been included in Summons for Directions.]—By *Ord. XXX. r.* 3, "If, upon any other application as to any of the above-mentioned matters or proceedings, it shall appear to the Court or judge that the application is one that *could and ought* to have been included in or made upon the general summons for directions, such application shall be granted only at the costs of the party making the same."

(*a*) See post, Ch. CXXIII. See forms, Chit. F. p. 189.

CHAPTER XXVIII.

DISCONTINUANCE—WITHDRAWAL OF DEFENCE, COUNTERCLAIM, &c.

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1. *Discontinuance.*

CH. XXVIII.

1. Discontinuance or withdrawing part of claim, &c.

Discontinuance.]—By *R. of S. C., Ord. XXVI. r.* 1, "The plaintiff (*a*) may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing (*b*), wholly (*c*) discontinue his action *against all or any of the defendants*, or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs (*d*) of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record (*e*) or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after (*f*) the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave."

(*a*) *Long* v. *Buckeridge*, 1 Str. 112.

(*b*) Before the Jud. Acts, the obtaining of the rule to discontinue was deemed a step in the cause. *Murray* v. *Silver*, 1 C. B. 638.

(*c*) Formerly, part of an action could not be discontinued. 16 M. & W. 8.

(*d*) As to what costs had to be paid where the plaintiff discontinued after making the representative of the defendant a party to the suit, under the 138th section of the C. L. P. Act, 1852, see *Benge* v. *Swaine*, 23 L. J., C. P. 182.

(*e*) See r. 2, post, p. 340.

(*f*) *Price* v. *Parker*, 1 Salk. 178: *Boucher* v. *Lawson*, Hardw. 200, 201: *Roe* v. *Gray*, 2 W. Bl. 815: *Price* v. *Parker*, 1 Salk. 178: *Young* v. *Hitchens*, 1 D. & M. 559: *Goodenough* v. *Butler* (or *Beetles*), 2 C., M. & R. 240; 3 Dowl. 751: *Stevens* v. *Etherick*, Carth. 86; 1 Show. 63.

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Without leave.

Without Leave.]—Under the above rule the plaintiff may discontinue the whole of his action or withdraw any part or parts of it, or discontinue it as against one or more of several defendants. He may do so by notice in writing, without any leave being necessary, provided he does so before delivery of the defence, or if, after delivery of defence, before taking any steps in the action other than an interlocutory application. In all other cases, leave to discontinue or withdraw is necessary. The plaintiff cannot withdraw his action without leave after it has been entered for trial, even though no defence has been delivered (*g*).

Notice of.

Notice of.]—When the plaintiff discontinues or withdraws part of his cause of action without leave, he must serve a notice in writing, specifying the extent of the discontinuance or withdrawal, on his opponent. A form of notice is given in the *R. of S. C., Appendix B., No.* 19 (*h*). This form should be followed in all cases, but a written notice by the plaintiff's solicitors, stating that they were instructed to proceed no further with the action, has been held sufficient (*i*).

Leave to discontinue.

Leave to discontinue, &c.]—After the periods above referred to the plaintiff cannot discontinue or withdraw without leave. This leave is obtained by a summons before a master at chambers or a district registrar. If the leave is given the order should be in the terms that the action be discontinued, or that a specified part of it be withdrawn, and not that it be stayed (*k*).

The leave will generally be granted, but in some cases when the defendant would be prejudiced it may be refused. Thus, it was refused after an action had been referred to an arbitrator to state a special case, and he had in the case found the facts with regard to all but a very small portion of the claim in the defendant's favour (*l*).

Terms.

As a general rule, the leave will only be granted on payment of costs (*m*), but in some special cases leave will be granted without this (*n*). If the defendant become insolvent after the commencement of the action, and the plaintiff take no further steps in it after knowledge of the insolvency, the Court will, in general, allow him to discontinue without payment of costs (*o*).

Where plaintiff has leave to discontinue upon payment of costs, they should be paid forthwith; for, until paid, the action is not discontinued or stayed (*p*). And where the plaintiff, instead of

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(*g*) *Matthews* v. *Antrobus*, 49 L. J., Ch. 80. See Ord. XXVI. r. 2, post, p. 340.

(*h*) See Chitty's Forms, p. 192.

(*i*) *The Pommerania*, 4 P. D. 195; 48 L. J., P. 55; 39 L. T. 642.

(*k*) *Anon.*, W. N. 1876, 40.

(*l*) *Stahlschmidt* v. *Walford*, 4 Q. B. D. 217; 48 L. J., Q. B. 348.

(*m*) See 8 Eliz. c. 2, s. 2; Comb. 209. See *Ames* v. *Ragg*, 2 Dowl. 35: *Poensgen* v. *Chanter*, 6 Scott, 300.

(*n*) See Ord. LXV., post, Ch. LXVII., and Ord. XXVI., supra: *Broadhurst* v. *Willey*, W. N. 1876, 21.

(*o*) *Ford* v. *Stock*, 1 Dowl., N. S. 763.

(*p*) *Beeton* v. *Jupp*, 15 M. & W. 149: *Molling* v. *Buckholtz*, 3 M. & Sel. 153: *Whitmore* v. *Williams*, 6 T. R. 765. See *White* v. *Gompertz*, 5 B. & Ald. 905; 1 D. & R. 556: *Brandt* v. *Peacock*, 1 B. & C. 649; 6 D. & R. 2.

paying costs, went on and obtained a verdict, *Parke*, J., refused to set aside the verdict, and order a discontinuance to be entered (*q*).

Where, before the Judicature Acts, the plaintiff had obtained a rule to discontinue, the defendant might by motion, or summons and order, compel the plaintiff to enter the judgment of discontinuance, and carry in the judgment roll (*r*); but if the plaintiff had leave to discontinue upon payment of costs, they must first have been paid.

Taxing costs.

In taxing costs on discontinuance or withdrawal the masters act upon the principle that the costs of all work in preparing papers, briefing counsel, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of the notice, is allowable; and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper, and whether the time for doing it had arrived (*s*). No change of practice in this respect has been made since the Judicature Act (*t*).

As to taxation of costs, *see post, Ch. LXVII.* Before the Judicature Acts, if, after judgment for the plaintiff on demurrer to one of several pleas, he discontinued the action, and the defendant did not insist upon taking proceedings in error, the costs of the demurrer and the costs of the discontinuance might be ascertained by one taxation, and an allocatur made out for the balance (*u*). If the defendant insisted upon taking such proceedings, the costs of the discontinuance and demurrer must have been taxed separately (*v*). The defendant is not entitled to the costs of the draft or copies of the briefs (*x*), or instructions for same (*y*), where the plaintiff discontinues before notice of trial.

Effect of.

Effect of Discontinuance.]—The plaintiff cannot by discontinuing, after he has given the usual undertaking as to damages on the granting of an interlocutory injunction, avoid an inquiry as to such damages; and such inquiry will be ordered after the discontinuance (*z*).

A discontinuance puts an end to any appeal that may be pending (*a*).

We have seen (*ante*, p. 307) that by *Ord. XXI. r.* 16, discontinuance by the plaintiff of his claim does not prevent a defendant from proceeding with a counterclaim.

If the plaintiff in a test action discontinues or withdraws, another action may be substituted as the test action (*b*).

(*q*) *Edginton* v. *Proudman*, 1 Dowl. 152: *Baker* v. *Jupp*, 3 D. & L. 474; 15 M. & W. 149, nom. *Beeton* v. *Jupp*: *Stokes* v. *Woodeson*, 7 T. R. 6. And see *Rex* v. *Fern*, 2 Dowl. 182: *Turner* v. *Gill*, 3 Dowl. 31.

(*r*) See *Mayor of Macclesfield* v. *Gee*, 13 M. & W. 470; 2 D. & L. 418; Tidd's Prac. Forms, 234.

(*s*) *Harrison* v. *Leutner*, 16 Ch. D. 559; 50 L. J., Ch. 264; cp. *The St. Olaf*, 2 P. D. 113; 36 L. T. 30.

(*t*) Id.

(*u*) *Mayor of Macclesfield* v. *Gee*, supra: *Elwood* v. *Bullock*, 6 Q. B. 383.

(*v*) *Mayor of Macclesfield* v. *Gee*, supra.

(*x*) *Doe* d. *Postlethwaite* v. *Neale*, 2 M. & W. 732; 6 Dowl. 166.

(*y*) *Cooper* v. *Boles*, 29 L. J., Ex. 141: *Freeman* v. *Springham*, 32 L. J., C. P. 249.

(*z*) *Newcomen* v. *Coulson*, 7 Ch. D. 764: *Newby* v. *Harrison*, 3 De G., F. & Jo. 287.

(*a*) *Conybeare* v. *Lewis*, 13 Ch. D. 469.

(*b*) *Amos* v. *Chadwick*, 9 Ch. D. 459.

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Judgment by defendant for costs.

Judgment by Defendant for Costs.]—By *R. of S. C., Ord. XXVI. r.* 3, "Any defendant may enter judgment for the costs of the action, if it is wholly discontinued against him, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued, in case such respective costs are not paid within four days after taxation."

A form of judgment is given in the *R. of S. C., Appendix F., No.* 14. (*See Chitty's Forms*, p. 193.)

Rule 1 (*supra*) entitles the defendant to tax his costs, and this rule (*r.* 3) enables him to sign judgment for them, which he could not previously do (*d*). As to what costs the defendant is entitled to when the plaintiff withdraws, *see ante*, p. 339.

2. *Withdrawal of Defence or Counterclaim.*

2. Withdrawal of defence or counterclaim.

The defendant cannot withdraw his defence or counterclaim without leave; but the rule (*Ord. XXVI. r.* 1, *supra*) enables a master, on a summons for that purpose, to order the defence, or counterclaim, or any part of either, to be withdrawn or struck out on terms.

The summons should, it appears, state the terms which the defendant offers (*e*). In one case one of the defendants to an action for the recovery of land was allowed to withdraw his defence after the action had been in the paper for trial, but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving the plaintiffs all the relief to which they could be entitled at the trial, and paying the costs "so far as they were occasioned by the defence of the said defendant," and the costs of a summons for leave to withdraw (*f*). It was subsequently held that the only costs which such defendant was liable to pay under this order were the increased costs occasioned by such defendant having defended the action; and that he was not liable to pay an apportioned part of the plaintiff's general costs (*g*).

3. *Withdrawal of Cause after Entry for Trial.*

3. Withdrawal of cause after entry for trial.

By *Ord. XXVI. r.* 2, "When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties."

4. *New Action after Discontinuance.*

New action.

After a discontinuance (*h*), the plaintiff may commence a new action for the same cause. If the defendant before the 1 & 2 *V.*

(*d*) *Bolton* v. *Bolton*, 3 Ch. D. 276; 35 L. T. 358.

(*e*) *Real and Personal Advance Co.* v. *McCarthy*, 14 Ch. D. 188, per *Fry*, J., at p. 191; 42 L. T. 43. See *Swindell* v. *Birmingham Syndicate*, W. N. 1884, 98.

(*f*) *Real and Personal Advance Co.* v. *McCarthy*, 14 Ch. D. 188; 42 L. T. 48, *Fry*, J. But the correctness of the order was doubted by the judges of the Court of Appeal when the case came before them on another point. See note (*g*), infra.

(*g*) *Real and Personal Property Advance Co.* v. *McCarthy* (C. A.), 18 Ch. D. 362; 45 L. T. 166.

(*h*) The discontinuance is not complete until the costs are paid, if the plaintiff has leave to discontinue upon payment of costs. *Molling* v. *Buckholtz*, 3 M. & Sel. 153: *Whitmore* v. *Williams*, 6 T. R. 765.

c. 110, were held to bail in the first action, he could not have been held to bail a second time without a judge's order (*i*).

Staying proceedings in subsequent action until costs paid.

Staying Proceedings in subsequent Action until Costs of discontinued Action are paid.]—By *R. of S. C., Ord. XXVI. r.* 4, "If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same or substantially the same, cause of action, the Court or a judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid."

(*i*) R. H. 2 W. 4, r. 7. See *Bishop v. Powell*, 6 T. R. 616: *Anon.*, 1 Dowl. 59: *Prescott* v. *Stevens*, Id. 57.

CHAPTER XXIX.

PAYMENT OF MONEY INTO COURT AND PROCEEDINGS THEREON (a).

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Sect. 1. *Payment into Court in satisfaction of Claim or Counterclaim.*

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In what cases.

In what Cases.]—By *R. of S. C., Ord. XXII. r.* 1, "Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability, (except in actions or counterclaims for libel or slander) pay money into Court which shall be subject to the provisions of rule 6: provided that in an action on a bond under the statute 8 & 9 *Will.* 3, *c.* 11 (*b*), payment into Court

(*a*) As to the investment of money awarded to or recovered by an infant or person of unsound mind, not so found by inquisition, see Ord. XXII. rr. 15 et seq., post, Ch. XCIX., "*Actions by and against Infants.*" The rules as to investment of money do not apply to actions in the Queen's Bench Division. See post, p. 359.

(*b*) See post, Ch. CX., "*Actions on Bonds.*"

shall be admissible to particular breaches only, and not to the whole action."

This rule enables a defendant who either admits the plaintiff's claim or part of it, or who is willing to pay a sum in satisfaction of the claim for the sake of peace, or for some other reason, without admitting it, to pay money into Court. This can only be done in actions to recover a debt or damages (*c*); but this practically includes all actions brought in the Queen's Bench Division. It does not extend to actions for an account (*c*).

Lord Campbell's Act.

By sect. 2 of the 27 & 28 *V. c.* 95, an Act to amend the 9 & 10 *V. c.* 93, intituled "An Act for compensating the families of persons killed by accident;" it is enacted, "that it shall be sufficient if the defendant is advised to pay money into Court, that he pay it as a compensation in one sum to all persons entitled under the said Act for his wrongful act, neglect or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict on that issue." If money be paid into Court under this section without specifying the shares into which it is to be divided, and the sum paid in be accepted, the proper mode of obtaining an apportionment is by applying, under *Ord. XXXVI. r.* 8, for directions as to mode and place of trial, and obtaining an order for trial by jury at some assizes (*d*).

There are various statutory provisions expressly allowing the defendant to pay money into Court in particular cases, independently of the above provisions. Thus justices of the peace, and others, in actions against them for anything done in the execution of their respective duties, are empowered, by various statutes, to pay money into Court, *post, Ch. XCI.* As to bringing money into Court in ejectment for non-payment of rent, *see post, Ch. CVI.* As to paying money into Court in replevin, *see post, Ch. CVII.*

To counterclaim.

By *R. of S. C., Ord. XXII. r.* 9, "A plaintiff may, in answer to a *counterclaim*, pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant."

Amount.

Amount.]—Care must be taken to pay in enough to satisfy the debt or damages in respect of which the money is paid in up to the time of payment into Court. If interest be due, it should be calculated up to the time of the payment into Court, and not merely to the commencement of the action (*e*). If the defendant after delivering his defence find he has not paid in a sufficient sum, he will in general be allowed to amend his defence and pay in a further sum, upon payment of costs and other reasonable terms.

Mode of payment in.

Mode of Payment in.]—*See post*, p. 355.

Payment into Court before defence.

Payment into Court before Defence—Notice.]—The above rule (*Ord. XXII. r.* 1, *supra*, p. 342), it will be observed, empowers the

(*c*) *Nichols* v. *Evens*, 22 Ch. D. 611; 48 L. T. 66.

(*d*) *Kidd* v. *Midland R. Co.*, March 22nd, 1877, Bristol, per *Cockburn*, L. C. J., "Times," March 27th 1877. See *Condliffe* v. *Condliffe*, 29 L. T. 831: *Sanderson* v. *Sanderson*, 36 L. T. 847.

(*e*) *Kidd* v. *Walker*, 2 B. & Ad. 705; 1 Dowl. 331.

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defendant to pay money into Court at any time before delivering his defence. Before the writ is served payment to the plaintiff will be an effectual discharge, and the costs of the writ cannot be recovered (*f*). After the writ is served the defendant, if he intends to pay the whole amount claimed and the costs, may within four days after service pay the money to the plaintiff or his solicitor pursuant to the notice indorsed on the writ (*g*); and in that case all further proceedings will be stayed except so far as the taxation of the costs, if the defendant desires a taxation, is concerned (*g*). If the defendant intends to pay less than the amount claimed and costs he may pay it into Court. Formerly he could have taken out a summons to stay proceedings on the payment being made; but such summonses are no longer issued or used (*h*). It is submitted, however, that although the defendant cannot take out a summons to stay on payment of less than the whole claim, he may still take out a summons to stay on payment of the whole amount claimed and costs, as, for instance, when he admits the whole amount to be due but has omitted to pay it within the four days pursuant to the notice indorsed on the writ (*i*), or to stay on payment of the whole amount without the costs, as when the writ is vexatiously or unnecessarily issued (*k*).

Notice.

When money is paid into Court before defence the defendant must immediately after he has paid the money in serve upon the plaintiff a notice that he has done so.

By *Ord. XXII. r.* 4, "If the defendant pays money into Court before delivering his defence, he shall serve upon the plaintiff a notice specifying both the fact that he has paid in such money, and also the claim or cause of action in respect of which such payment has been made. Such notice shall be in the form No. 3 in Appendix B., with such variations as circumstances may require" (*l*).

Payment with defence.

Payment into Court with Defence.]—If the defendant intends to pay money into Court the sooner he does so the better, as the more costs he will save if he succeeds in showing that the amount paid in is sufficient. If, however, the money be not paid in before defence it may be paid in with it. (*Ord. XXII. r.* 1, *ante*, p. 342.) In this case, the defendant should pay the money into Court, and produce a copy of the defence, on which will be indorsed a receipt, and which should be delivered to the plaintiff.

If the defendant pay money into Court with his defence he may either admit the claim and state that the amount paid in is sufficient to satisfy it, or he may deny the claim and state that, even if the claim were valid, the sum paid in is sufficient to satisfy it.

(*f*) See post, p. 366.

(*g*) See ante, p. 225.

(*h*) By an order of the judge at chambers, dated Nov. 12th, 1875, it was provided that, "As money may now be paid into Court without leave after service of the writ and before defence, summonses to stay on payment of a smaller sum than the sum demanded will no longer be issued. Instead thereof the amount shall be paid into Court, and the copy of the receipt sent to the plaintiff's solicitor." "Times," Nov. 18th, 1875; W. N. 1875, Pt. 2, 201.

(*i*) See ante, p. 225.

(*k*) See post, p. 366.

(*l*) See form of notice, Chit. F., p. 195.

Pleading payment.

Pleading Payment into Court.]—In all cases where money is paid into Court with the defence, and also when it is paid in before, but has not been accepted by the plaintiff in satisfaction, the payment must be pleaded in the defence. By *Ord. XXII. r.* 2, "Payment into Court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein." The pleading must state clearly that the money is paid in, the amount of it, and also whether it is paid in in respect of the whole or of part only of the plaintiff's claim, and if in respect of part only that part should be clearly specified. (*Ord. XXII. r.* 2, *supra*.) Payment into Court may be pleaded either to the whole or to part only (*m*) of the plaintiff's claim, and either alone or together with other defences as to the same or other portions of the claim, either in the alternative or collaterally; but if the money be paid into Court, as to part only of the claim, that part must be clearly specified in the defence. Still if it be paid in generally to several claims the defence need not specify how much is paid in in respect of each (*n*). A payment into Court of a less sum than that admitted to be due by the defence would be bad (*o*). When one part of the plaintiff's statement of claim is on a bill or note, and part of such claim is paid into Court, and also other parts of the claim, the defence should specify how much of the money paid in is meant to apply to the bill or note, and show a defence, if any, specially for the residue (*p*). In replevin for goods taken in closes A. and B., defendant may pay money into Court as to the goods taken in A., and to some of those taken in B., and avow and make cognizance as to the residue taken in B. (*q*). Where one tenant in common brings an action against his co-tenant, and the statement of claim takes no notice of the plaintiff's limited interest, but alleges an expulsion in case of realty, or total destruction in case of personalty, the defendant may pay money into Court in respect of the damage to the plaintiff's share, and as to the residue plead *liberum tenementum*, or traverse the plaintiff's property (*r*). And where there are several claims, or several breaches of covenant, the defendant may plead payment into Court of one entire sum, in satisfaction of all the claims or breaches (*s*). Where there was a count

(*m*) Ord. XXII. r. 1, ante, p. 342. See *Baillie* v. *Cazalet*, 4 T. R. 579: *Fulwell* v. *Hall*, 2 W. Bl. 837: *Hallett* v. *East India Co.*, 2 Burr. 1120.

(*n*) *Paraire* v. *Loibl*, 49 L. J., Q. B. 481; 43 L. T. 427 (C. A.).

(*o*) *Tattersall* v. *Parkinson*, 16 M. & W. 752: *Grinsley* v. *Parker*, 3 Ex. 610. See as to form of plea of payment into Court before the Jud. Acts, where there were two counts for the same cause, *Tattersall* v. *Parkinson*, supra: *Early* v. *Bowman*, 1 B. & Ad. 89: *Churchill* v. *Day*, 3 M. & R. 81: *Stafford* v. *Clarke*, 2 Bing. 377: *Brune* v. *Thompson*, 4 Q. B. 543; 1 D. & M. 221: *Carr* v. *Royal Ex. Ass. Corporation*, 34 L. J., Q. B. 21.

(*p*) *Armfield* v. *Burgin*, 6 M. & W. 281; 8 Dowl. 247. See *Finlayson* v. *Mackenzie*, 3 Bing., N. S. 824: *Harris* v. *Bushell*, 2 Dowl., N. S. 514: *Hills* v. *Mesnard*, 10 Q. B. 266. And see *Jourdain* v. *Johnson*, 2 C., M. & R. 570; 1 Saund. 6th ed. 33, i: *Bailey* v. *Sweeting*, 12 M. & W. 616; 1 D. & L. 653.

(*q*) *Lambert* v. *Hepworth*, 2 Q. B. 729; 2 G. & D. 112.

(*r*) *Cresswell* v. *Hedges*, 31 L. J., Ex. 497.

(*s*) *Marshall* v. *Whiteside*, 4 Dowl. 766; 1 M. & W. 188: *Mitchell* v. *Townley*, 7 Ad. & E. 164; semble, overruling *Mee* v. *Tomlinson*, 5 N. & M. 624; 1 H. & W. 614: and *Lorymer* v. *Vizell*, 3 Bing. N. C. 222. And see *Jourdain* v. *Johnson*, 2 C.,

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to recover money due on a policy, and a common count for the recovery of the premium paid, and money was paid into Court on the latter count, and the plaintiff afterwards succeeded on the first count; the Court held that such payment into Court must be taken into consideration in assessing the damages on the first count (*t*). Justices and others paying money into Court under particular statutes need not state in the plea the character in which they make the payment (*u*).

—together with denial or other defences.

Except in actions for libel and slander, the defendant may, without any leave, plead in his defence, together with a defence of payment into Court, other inconsistent defences or a total denial of any liability (*x*). If the payment is pleaded alone, the claim is taken as admitted, and the only question to be tried, if issue be joined, is the sufficiency of the amount paid in (*x*). If payment is pleaded, together with a denial of liability, the payment does not in any way operate as an admission, but merely amounts to a statement that, even if the plaintiff has a cause of action which is denied, the amount paid in is sufficient to satisfy it (*x*).

Appropriation of money paid in under Order XIV.

Appropriation of Money paid in under Ord. XIV.]—By *Ord. XXII. r.* 11, "Money paid into Court under an order of the Court or a Judge or certificate of a master or associate shall not be paid out of Court except in pursuance of an order of the Court or a Judge: Provided that, where before the delivery of defence money has been paid into Court by the defendant pursuant to an order under the provisions of *Ord. XIV.*, he may (unless the Court or a Judge shall otherwise order) by his pleading appropriate the whole or any part of such money, and any additional payment if necessary, to the whole or any specified portion of the plaintiff's claim; and the money so appropriated shall thereupon be deemed to be money paid into Court pursuant to the preceding rules of this order relating to money paid into Court, and shall be subject in all respects thereto."

As to the mode of making the appropriation, *see post*, p. 356.

Defence of tender.

Defence of Tender.]—By *Ord. XXII. r.* 3, "With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court."

The money, together with a copy of the defence, must be taken to the Bank of England, Law Courts Branch, and on the money being paid in, an official receipt for it is given on the margin of

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M. & R. 564: *Noel* v. *Davies*, 4 M. & W. 136: *Beesley* v. *Dolley*, 8 Sc. 243. Where a declaration comprised several causes of action, and money was paid into Court generally, it was not the practice to order the defendant to give particulars stating in respect of what items of the plaintiff's claim the money was paid into Court. *The Thames Iron Works and Ship Building Co.* v. *The Royal Mail Steam Packet Co.*, 30 L. J., C. P. 265. See *Baxendale* v. *Great Western R. Co.*, 30 L. J., Ex. 63, where, under very peculiar circumstances, an order for such purpose was made.

(*t*) *Carr* v. *The Royal Ex. Ass. Corporation*, 34 L. J., Q. B. 21.

(*u*) *Aston* v. *Perkes*, 15 M. & W. 385; 15 L. J., Ex. 241: *Thompson* v. *Shephard*, 24 L. J., Q. B. 5.

(*x*) Ord. XXII. r. 1, ante. See *Hawkesley* v. *Bradshaw* (C. A.), 5 Q. B. D. 302; 49 L. J., Q. B. 333: *Berdan* v. *Greenwood*, 3 Ex. D. 251; 47 L. J., Ex. 628: *Spurr* v. *Hall*, 2 Q. B. D. 614, decided under the former rules. As to the costs, see post, p. 350, n. (*i*) and (*k*).

the defence. The defence, with the receipt, &c. marked, is then delivered to the plaintiff in the usual way.

How taken out, &c.

After paying money into Court on a plea of tender, the defendant cannot take it out, even although he has a verdict (*y*). But the plaintiff may take it out, whether he confesses or denies the tender in his reply (*z*). The plaintiff should confess the tender if it was a legal one.

Effect of not paying in the money.

If the defendant plead a tender without paying the money into Court, the defence, as far as it respects the tender, will be irregular (*a*).

Payment after defence.

Payment into Court after Defence.]—In order to pay money into Court after defence delivered, a Master's order, to be obtained on summons, is necessary (*b*). Money has been allowed to be paid into Court even after granting a new trial (*c*), and even after setting aside the execution of a writ of inquiry (*d*).

Taking money out of Court by plaintiff when liability not denied.

Taking money out of Court when Liability not denied.]—By *Ord. XXII. r. 5*, "In the following cases of payment into Court under this Order, viz.:—

(a.) When payment into Court is made before delivery of defence:

(b.) When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court is made, is not denied in the defence:

(c.) When payment into Court is made with a defence setting up a tender of the sum paid:

the money paid into Court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a Judge shall otherwise order."

In cases within this rule the plaintiff, whether he accepts the money paid into Court in full satisfaction or not, may immediately take the money out of Court (*e*). It belongs to the plaintiff, whatever may be the result of the action (*e*), and he is entitled to it, though he be nonsuit (*f*), or though the defendant dies (*g*) during the action; and, if the plaintiff dies, his executors will be entitled to it (*h*). It has been said, that the defendant can in no case recover it back (*i*). To this, however, there is an exception, in case it is paid in under a mistake; and if the defendant can clearly and satisfactorily establish that it was so, the Court or a Judge may order it, or part of it, to be repaid or refunded to him (*k*). The

(*y*) See r. 5, supra: *Cox* v. *Robinson*, 2 Str. 1027. But see *Elliott* v. *Callow*, 2 Salk. 597.

(*z*) *Le Grew* v. *Cooke*, 1 B. & P. 333.

(*a*) See r. 3, p. 246: *Chapman* v. *Hicks*, 2 C. & M. 633.

(*b*) Ord. XXII. r. 5 ante. See *Griffiths* v. *Williams*, 1 T. R. 710, 711: *Tarlton* v. *Wragg*, 2 Str. 1271.

(*c*) *Anon.*, 1 Tidd, 9th ed. 672.

(*d*) *Day* v. *Edwards*, 1 Taunt. 491.

(*e*) Under the former rules this was so even when the payment was pleaded, together with a denial of liability (*Emden* v. *Carte* (C. A.), 19 Ch. D. 311; 51 L. J., Ch. 371; 45 L. T. 328: *Coughlan* v. *Morris*, 6 L. R., Ir. 29, affirmed Id. 405.) But this is now altered by Ord. XXII. r. 1, ante, p. 342, and r. 6, post, p. 351.

(*f*) *Elliott* v. *Callow*, 2 Salk. 597.

(*g*) *Knapton* v. *Drew*, Pr. Reg. 251. See *Palmer* v. *Reippenstein*, 1 M. & Gr. 94.

(*h*) *Cockray* v. *Martin*, Barnes, 279.

(*i*) See per *Buller*, J., in *Malcolm* v. *Fullarton*, 2 T. R. 648. And see *Cox* v. *Robinson*, 2 Str. 1027: *Vaughan* v. *Barnes*, 2 B. & P. 392.

(*k*) *Colyer* v. *Selby*, 5 December, 1840, cor. *Parke*, B., at chambers.

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Court or a Judge may also, if the plaintiff fail in his action, and the money has not been taken out of Court by him, impound it to answer the defendant's costs (*l*). The taking the money out of Court waives any irregularity in paying it in (*m*). The defendant cannot avail himself of the act as evidence upon the trial of any issues joined in the cause (*n*).

Acceptance of sum paid in when claim not denied.

Acceptance by Plaintiff of Sum paid into Court when Claim not denied.]—By *Ord. XXII. r.* 7 (*o*), "The plaintiff, when payment into Court is made before delivery of defence, may within four days after the receipt of notice of such payment, or when such payment is first signified in a defence, may before reply, accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant in the Form No. 4 in Appendix B (*p*), and shall be at liberty, *in case the entire claim or cause of action is thereby satisfied*, to tax his costs after the expiration of four days from the service of such notice, *unless the Court or a Judge shall otherwise order*, and in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed."

This rule only applies when the action is one for debt or damages (*q*), and it is in all cases subject to *Ord. LXV.* (*post, Ch. LXVII.* "*Costs*"), which gives a Judge discretion over costs; and a Judge (*r*) may therefore on a summons for that purpose, if sufficient reason be shown him for so doing, deprive the plaintiff of the right to costs which *primâ facie* he has under this rule (*s*). This has been done, for instance, when the amount had been offered to and refused by the plaintiff before the writ was issued (*t*). On the same principle, when the plaintiff has taken the money out in satisfaction, after the four days referred to in the above rule, he may afterwards apply for an order for his costs; and a Judge may make the order (*u*).

If the defendant pays money into Court to the whole of the claim, and the plaintiff determines upon accepting the money in satisfaction of the whole cause of action, *he should before reply give the notice above mentioned and proceed as directed by r.* 7, *supra, and in that case he may at once proceed to a taxation of costs, and sign final judgment for them if not paid in forty-eight hours after*

The learned judge, after going fully into the point, said, that all the above cases were distinguishable, except the dictum of *Buller*, J., and that that was extra-judicial; and that he could not understand why a payment into Court should be more binding than a judgment by default, which, no doubt, the Court would set aside on the ground of mistake.

(*l*) See *Anon.*, Barnes, 280. And see *Green* v. *Coughlan*, 1 Jones, Rep. Ex. (Ir.) 283.

(*m*) *Griffiths* v. *Williams*, 1 T. R. 710. See *Verbist* v. *De Keyser*, 3 D. & L. 392.

(*n*) *Gould* v. *Oliver*, 2 Sc. N. R. 241.

(*o*) See former enactment, C. L. P. Act, 1852, s. 73.

(*p*) See the form, Chit. F.

(*q*) *Nichols* v. *Evens*, 22 Ch. D. 611; 52 L. J., Ch. 383.

(*r*) Not a master. See Ord. LIV. r. 12, post, Ch. LXVII.

(*s*) *Broadhurst* v. *Willey*, W. N. 1876, 21, *Lindley*, J. But see per *Cockburn*, L. C. J., *Greaves* v. *Fleming*, 4 Q. B. D. at p. 227.

(*t*) Id.: *Morris* v. *Bennett*, 65 L. T. Jour. 176, *Huddleston*, B.

(*u*) *Greaves* v. *Fleming*, 4 Q. B. D. 226; 48 L. J., Q. B. 335.

taxation (*x*). If payment into Court be to only part of the claim, and there are other defences to the residue, and the plaintiff determines upon accepting the money and proceeding no further in the action, *he should before reply give the notice above mentioned, and also give a notice in writing that he withdraws that part of his claim to which the payment into Court is not pleaded* (*Ord. XXVI., ante*, p. 337), *and proceed to a taxation, &c. as just pointed out* (*y*). In this case, the plaintiff will be liable to the defendant's costs of the matter so withdrawn, though the plaintiff will in general be entitled to the general costs of the action (*z*). Where, before the Judicature Acts, the defendant pleaded a special plea, and plaintiff new assigned, and defendant paid money into Court on the new assignment, and plaintiff took it out in satisfaction of the action, the plaintiff was entitled to the general costs of the cause (*a*). After a case stood for trial, and was made a *remanet*, the plaintiff obtained leave to amend his declaration and particulars; the defendant to be at liberty to plead *de novo* to the amended declaration; the plaintiff accordingly amended, and the defendant then paid money into Court, which the plaintiff took out: it was held, that the plaintiff was not entitled to the costs of preparing for the trial, but only to the costs incurred by him up to the joinder of issue (*b*).

The 5th section of the County Court Act, 1867, which is applied by sect. 67 of the *Judicature Act*, 1873, to all actions in which any relief is sought which could be given in a County Court, applies to the case, and, therefore, if the plaintiff recovers less than (*c*) 20*l.* in an action of contract or 10*l.* in an action of tort, he will not be entitled to his costs without an order (*d*). (*See also Ord. LXV. r.* 12 (*post, Ch. LXVII.*), where in an action of contract less than 50*l.* is recovered.)

Proceedings when money not accepted.

Proceedings when Money is not accepted.]—If the payment into Court be pleaded to the whole statement of claim, and the plaintiff determines upon not accepting the money in satisfaction of his claim, *he should reply accordingly, and proceed to trial, &c. as in ordinary cases.* If the payment into Court be pleaded only to part of the statement of claim, and there is any other defence to the rest of it, and the plaintiff determines upon proceeding to trial, *he should reply that he accepts the money in satisfaction of that part of the claim in respect of which it is paid in, or, that the sum paid into Court is not enough to satisfy the claim of the plaintiff in respect of*

(*x*) *Emery* v. *Webster*, 23 L. J., Ex. 9: *Webster* v. *Emery*, 24 L. J., Ex. 186, where plaintiff by mistake took out money paid into Court in full satisfaction.

(*y*) See *Topham* v. *Kidmore*, 5 Dowl. 676: *Emmott* v. *Standen*, 3 M. & W. 497; 6 Dowl. 591.

(*z*) *Goodee* v. *Goldsmith*, 2 M. & W. 202; 5 Dowl. 288: *Emmott* v. *Standen*, 3 M. & W. 497: *Baillie* v. *Cazelet*, 4 T. R. 579: *Skarratt* v. *Vaughan*, 2 Taunt. 266.

(*a*) See *Ben* v. *Bateman*, 8 M. & W. 666: *Griffiths* v. *Jones*, 1 M. & W. 731; 5 Dowl. 167. The marginal note to the latter case is incorrect.

(*b*) *Wilton* v. *Snook*, 1 D. & L. 964; 12 M. & W. 805; 13 L. J., Ex. 236. See *Jackson* v. *Nunn*, 3 G. & D. 543; 4 Q. B. 209.

(*c*) See 45 & 46 V. c. 57, s. 4.

(*d*) *Parr* v. *Lillicarp*, 1 H. & C. 615; 32 L. J., Ex. 160: *Hewitt* v. *Cory*, L. R., 5 Q. B. 415; 22 L. T. 666; 18 W. R. 954: *Boulsing* v. *Tyler*, 3 B. & S. 472; 32 L. J., Q. B. 85, overruling *Chambers* v. *Wills*, 24 L. J., Q. B. 267.

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which it is paid in (*e*), *and he should reply to the other defences, and proceed to trial as in ordinary cases.* Where the plaintiff thus accepts money paid into Court in part satisfaction, he cannot at once tax his costs as to that part of the cause of action to which the payment into Court is pleaded (*f*). *The plaintiff must reply within the time limited in ordinary cases* (*g*).

Costs.

If the plaintiff refuses to accept the sum paid into Court, and succeeds at the trial in recovering more than is paid in, he will be entitled to his costs as in ordinary cases (*h*) If the defendant succeeds in proving that the amount paid in is sufficient, and ought therefore to have been accepted, the plaintiff will get his costs up to the time of payment in, and the defendant will get his costs subsequent to that time (*i*); and this is so when the defendant pleads the payment into Court as an alternative defence without admitting any liability (*k*).

By *r.* 12, *H. T.* 1853 (repealed by *R. of S. C.* 1883), "When money is paid into Court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, *when the costs of the cause are taxed*, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at '*Instructions for Plea*,' but not before" (*l*). The masters still act upon this rule.

If the plaintiff proceed in the action after a plea of payment into Court, and then discontinue (*m*), under *Ord. XXVI.* he will, in general, be ordered to pay costs.

(*e*) See *Fallows* v. *Bird*, 2 C., M. & R. 457. According to the strict construction of the rule, where the plaintiff accepts the money in satisfaction of that part of the claim in respect of which it is paid in, he should, before replying, give the notice referred to in Ord. XXX. r. 7, ante, p. 348.

(*f*) Ord. XXII. r. 7, ante, p. 348: *Canty* v. *Gill*, 5 Sc. N. R. 819.

(*g*) Cp. *Emmott* v. *Standen*, 3 M. & W. 497: *Topham* v. *Kidmore*, 5 Dowl. 676.

(*h*) Subject to the County Court Act, 1867, s. 5, as applied by Jud. Act, 1867, s. 67 (ante, p. 349), and to Ord. LXV. r. 12. (See post, Ch. LXVII., "*Costs.*")

(*i*) *Buckton* v. *Higgs*, 4 Ex. D. 174; 40 L. T. 755; 27 W. R. 803: *Gretton* v. *Mees*, 7 Ch. D. 839; 38 L. T. 506: *Salmon* v. *The Coniston Mining Co.*, 28 Sol. Jour. 617. See R. 12, H. T. 1853, supra: *M'Lean* v. *Phillips*, 18 L. J., C. P. 248; 7 C. B. 817: *Horne* v. *Denham*, 17 L. J., Q. B. 29. In *Langridge* v. *Campbell*, 2 Ex. D. 281; 36 L. T. 64, where money was paid in generally (there being no pleadings), and the action being referred "costs to abide the event," the sum paid in was found sufficient, the plaintiff was held entitled to no costs at all. This, however, was a peculiar case; see per *Kelly*, C. B. and *Hawkins*, J., in *Buckton* v. *Higgs*, supra, and was, moreover, it is submitted, wrongly decided.

(*k*) *Wheeler* v. *United Kingdom Telephone Co.* (C. A.), 13 Q. B. D. 597; 53 L. J., Q. B. 466; 50 L. T. 749: *Goutard* v. *Carr*, 53 L. J., Q. B. 55; 32 W. R. 55; 13 Q. B. D. 598, n. (1); 53 L. J., Q. B. 467, n. (5).

(*l*) See *Harrison* v. *Watt*, 16 M. & W. 316: *Rumbelow* v. *Whalley*, 20 L. J., Q. B. 262; cases decided before this rule. See *Harold* v. *Smith*, 29 L. J., Ex. 141, where money was paid into Court after issue joined and the defendant obtained the verdict, and it was held that the plaintiff was not entitled to costs of preparation for trial, though incurred before the money was paid into Court.

(*m*) *Berwick* v. *Symonds*, Say. 196.

A defendant who pays money into Court in an action for an illegal distress, and succeeds upon the issue of damages *ultra*, is not entitled to double costs under the 11 *G.* 2, *c.* 19, *s.* 21 (*n*).

Proceedings when liability denied.

Proceedings when Payment into Court is pleaded, together with Denial of Liability—1. *When Amount accepted.*]—By *R. of S. C., Ord. XXII. r.* 6, "When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court has been made, is denied in the defence, the following rules shall apply:—

1. When plaintiff accepts amount.

(a) The plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided, notwithstanding the defendant's denial of liability, whereupon all further proceedings, in respect of such claim or cause of action, except as to costs shall be stayed; or the plaintiff may refuse to accept the money in satisfaction and reply accordingly, in which case the money shall remain in Court subject to the provisions hereinafter mentioned:

(b) If the plaintiff accepts the money so paid in, he shall, after service of such notice in the Form No. 4 in Appendix B. as is in rule 7 mentioned, or after delivery of a reply accepting the money, be entitled to have the money paid out to himself on request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order."

Under this rule, when the plaintiff accepts the sum paid in in satisfaction, he may give the notice provided for and take the money out of Court. It is submitted that in this case he may proceed to tax his costs under rule 7 (*ante*, p. 248), and proceed as pointed out *ante*, p. 248. But it has been held by *Field*, J. at chambers, that he cannot do this, and that in order to get his costs he must proceed to trial (*o*).

2. When amount not accepted.

—2. *When Amount not accepted.*]—If the plaintiff does not accept the amount paid into Court in satisfaction of his entire cause of action, he should deliver a reply denying that the sum paid into Court is sufficient, and pleading to the other defences in the ordinary way (*p*). In this case the money remains in Court until the trial (*p*). By *Ord. XXII. r.* 6 (c), "If the plaintiff does not accept, in

(*n*) *Hancock* v. *Foulkes*, 1 Dowl., N. S. 658; 9 M. & W. 431.

(*o*) *Crossland* v. *Routledge*, W. N. 1883, 228. It is very respectfully, but confidently, submitted that this decision is wrong. The sum cannot be paid in otherwise than in satisfaction of the claim or cause of action; and the fact that the liability is denied does not prevent the payment, if accepted, being a satisfaction of the entire claim or cause of action within the words of Rule 7. (See sub-Rule (c).) The form of acceptance of the money is the same under Rule 6 (c) and Rule 7; and the fact that Rule 7 follows, and does not precede, Rule 6, shows that it applies to Rule 6 as well as 5. The provision in Rule 6 (a), that all proceedings "except as to costs shall be stayed," means that the proceedings necessary to have the costs taxed shall not be stayed. Moreover, if the plaintiff proceeded to trial, he would have to pay the defendant's costs unless he recovered more than the sum paid in. See ante, n. (*k*).

(*p*) Ord. XXII. r. 6 (a), supra.

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satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in Court and be subject to the order of the Court or a Judge, and shall not be paid out of Court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into Court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him" (*q*).

If the plaintiff goes to trial the costs are subject to the discretion of the Judge under *Ord. LXV. r.* 1. If the action be tried with a jury and no special order be made, if the plaintiff recover more than the amount paid in he should get his costs, but if he does not recover any more, inasmuch as the defendant has succeeded on an issue going to the whole cause of action, the latter is entitled to the costs (*r*).

Effect of, as an admission of cause of action, &c.

Effect of, as an Admission of the Cause of Action, &c.]—When money is paid into Court, together with a denial of liability, this does not operate as an admission. But by pleading a plea of payment of money into Court, without any other defence, the defendant admits the claim or cause of action in respect of which the payment is made (*s*). Thus, if it be pleaded to a claim on a contract, the defendant impliedly (*t*) admits the contract, &c., as set out in the statement of claim, and that the plaintiff is entitled to recover on all the breaches in respect of which the money is paid in (*u*). So, if such plea be pleaded to a claim on a bill of exchange, the defendant's handwriting (*v*), and the sufficiency of the stamp is admitted (*w*); so, if pleaded to a claim on a covenant, the execution of the deed is admitted (*x*); so, if pleaded to a claim on a guaranty, it admits an agreement signed according to the Statute of Frauds (*y*). Where two breaches were assigned in one count on a contract, and the defendant pleaded payment of money into Court to one of them, it was held that he thereby admitted the whole contract as set forth in that count (*z*). But such a plea does not admit the correctness of immaterial averments (*a*). A plea of

(*q*) This renders *Emden* v. *Carte* and the cases cited ante, p. 347, n. (*e*), obsolete.

(*r*) See cases cited ante, p. 350, n. (*i*) and n. (*k*).

(*s*) Ord. XXII. r. 1, ante, p. 242.

(*t*) *Archer* v. *English*, 2 Sc. N. R. 156; 9 Dowl. 11: *Robinson* v. *Harman*, 18 L. J., Ex. 202: *Perren* v. *The Monmouthshire Railway and Canal Co.*, 22 L. J., C. P. 162.

(*u*) *Wright* v. *Goddard*, 8 Ad. & El. 144; 3 Nev. & P. 361: *Hingham* (or *Kingham*) v. *Robins*, 7 Dowl. 352; 5 M. & W. 94, per *Parke*, B.: *Reid* v. *Dickons*, 5 B. & Ad. 499; 1 Saund. 6th ed. 33 m: *Menger* v. *Smith*, 4 B. & Ald. 673; 1 N. & M. 449: *M'Cance* v. *The London and N. W. R. Co.*, 31 L. J., Ex. 65.

(*v*) *Gutteridge* v. *Smith*, 2 H. Bl. 374.

(*w*) *Israel* v. *Benjamin*, 3 Camp. 43.

(*x*) *Randel* v. *Lynch*, 2 Camp. 357.

(*y*) *Middleton* v. *Brewer*, Peake, 15.

(*z*) *Dyer* v. *Ashton*, 1 B. & C. 3; 2 D. & R. 19.

(*a*) *Cooper* v. *Blick*, 2 Q. B. 915; 2 G. & D. 295, where a sum was laid under a videlicet: *Storeld* v. *Brewin*, 2 B. & Ald. 116. And see *Everth* v. *Bell*, 7 Taunt. 450; 1 Moore, 158: *Lechmere* v. *Fletcher*, 1 C. & M. 623.

payment into Court to a declaration on a valued policy, in which the loss is averred to be total, was held not to admit a total loss (*b*). Where a defendant pleads such a plea to a claim on a special contract, he cannot prove, in mitigation of damages, any fact not pleaded as a defence which would be an answer to the action (*c*). By pleading such a plea to the common *indebitatus* counts, the defendant, in ordinary cases, admitted that the sum paid in was due to the plaintiff, by virtue of some contract of the nature declared on; but it did not admit his liability on any particular contract on which the plaintiff might choose to rely; and it lay upon the plaintiff to prove *aliunde* some contract by which he was entitled, under such a form of declaration, to recover a larger amount from the defendant (*d*). In such a case it was no admission of the plaintiff's right of action beyond the sum paid into Court (*e*), and, consequently, did not preclude the defendant from pleading any defence he might think fit to the residue of the plaintiff's demand (*f*); if the particulars contained various causes of action, it did not preclude the defendant from contesting his liability in respect of any items beyond the amount paid in, the particulars not being considered as part of the declaration (*g*). Where a declaration contained a special count against the defendants as partners, and also *indebitatus* counts, a plea of payment of money into Court to the latter counts was not an admission of the partnership alleged in the former count (*h*). Where the declaration in tort was general and unspecific, the above payment admitted a cause of action, but not the cause of action sued for; and the plaintiff must have given evidence of the cause of action sued for before he could have larger damages than the amount paid into Court (*i*).

In actions of tort.

(*b*) *Rucker* v. *Palsgrave*, 1 Camp. 557; 1 Taunt. 419. See *Muller* v. *Hartshorne*, 3 B. & P. 556. And see *Mellish* v. *Allnutt*, 2 M. & Scl. 106: *Andrews* v. *Palsgrave*, 9 East, 325. And see *Harrison* v. *Douglas*, 3 A. & E. 396, as to payment of money into Court in an action on a policy being a waiver of an objection that the action was prematurely brought.

(*c*) *Speck* v. *Phillips*, 5 M. & W. 279. See *Leggett* v. *Cooper*, 2 Stark. 103. And see *Attwood* v. *Taylor*, 1 Sc. N. R. 611; 1 M. & Gr. 280, as to setting up a proviso in a contract which the declaration omitted to notice in order to mitigate the amount of damages after payment into Court.

(*d*) *Hingham* (or *Kingham*) v. *Robins*, 7 Dowl. 352; 5 M. & W. 94: *Schreger* v. *Carden*, 21 L. J., C. P. 135. See also *Stapleton* v. *Nowell*, 6 M. & W. 9; 8 Dowl. 196: *Goff* v. *Harris*, 5 M. & G. 573: *Archer* v. *English*, 1 M. & Gr. 873; 2 Sc. N. R. 156: *Stevenson* v. *Berwick* (*Mayor*, *&c.*), 1 Q. B. 154; 4 P. & D. 546. See *Goldy* v. *Goldy*, 26 L. J., Ex. 29, an action by an administratrix for money had and received.

(*e*) 2 Esp. Rep. 482, n.: *Blackburne* v. *Schoales*, 2 Camp. 341: *Rucker* v. *Palsgrave*, 1 Taunt. 419: *Everth* v. *Bell*, 7 Id. 450: *Stoveld* v. *Brewin*, 2 B. & Ald. 116: *Stapleton* v. *Nowell*, 6 M. & W. 9; 8 Dowl. 196; where several defendants, *Archer* v. *English*, 2 Sc. N. R. 156.

(*f*) *Long* v. *Greville*, 4 D. & R. 632; 3 B. & C. 10: *Reid* v. *Dickons*, 5 B. & Ad. 499: *Stafford* v. *Clarke*, 2 Bing. 377; 9 Moore, 724; 1 Car. & P. 703: *Everth* v. *Bell*, 7 Taun. 450; 1 Moore, 158.

(*g*) *Booth* v. *Howard*, 5 Dowl. 438: see *Stevenson* v. *Berwick* (*Mayor*, *&c.*), 4 P. & D. 546; 1 Q. B. 154. And see *Elgar* v. *Watson*, 1 C. & M. 494: *Goff* v. *Harris*, 5 M. & G. 573.

(*h*) *Charles* v. *Brankes*, 1 D. & L. 989; 12 M. & W. 743.

(*i*) *Perren* v. *The Monmouthshire Railway and Canal Co.*, 22 L. J., C. P. 162: *Tancred* v. *Leyland*, 16 Q. B. 669, an action for distraining for more rent than was due: *Story* v. *Finnis*, 6 Ex. 123; 20 L. J., Ex. 144, an action for pound breach: *Cook* v.

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Debt on statute.

In an action upon the statute of *E.* 6, the above plea admitted the plaintiff's title (*j*). It is a conclusive admission, in an indivisible claim, of the plaintiff's right to sue in the Court in which the action is brought (*k*); and of his right to sue in the character in which he sues (*l*). Where a declaration contained inconsistent counts, and the defendant paid money into Court on the second count, which the plaintiff accepted, the defendant could not read the second count, and the proceedings thereon, to the jury as evidence to negative an allegation in the first count (*m*).

Admission of the character, &c. in which plaintiff sues.

Action for malicious arrest after.

If the plaintiff takes the money out of Court, and it amounts to less than the sum stated in an affidavit under which he arrested the defendant, he does not thereby subject himself to an action for a malicious arrest (*n*).

Plaintiff may be nonsuited after.

The plaintiff may be nonsuited after payment of money into Court (*o*).

Arrest of judgment.

It seems that, under the old practice, the defendant could not move in arrest of judgment for a defect in an allegation of a breach in respect of which he had paid money into Court (*p*).

Consolidated actions.

Effect of Payment on Consolidated Actions.]—By *Ord. XXII. r.* 8, "Where money is paid into Court in two or more actions which are consolidated, and the plaintiff proceeds to trial in one, and fails, the money paid in and the costs in all the actions shall be dealt with under this Order in the same manner as in the action tried" (*q*).

Sect. 2. *Payment into Court to abide Event or otherwise than in Satisfaction.*

Money may be, in several cases, ordered to be paid into Court. This may be ordered as a condition to leave to defend on an application for judgment under *Ord. XIV.* or as security for costs. In these cases the plaintiff has no right to take the money out of Court except in conformity with the terms on which it is ordered to be paid in. Thus, when it is ordered to be paid in on an application under *Ord. XIV.* the plaintiff will only be entitled to it in the event of his succeeding in the action, and the defendant will be entitled to have it repaid to him if he succeeds. Until the action is determined the money will remain in Court, and the plaintiff will be a creditor holding a security within the Bankruptcy Act, 1883,

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Hartle, 8 C. & P. 568, an action of trover. *Goldy* v. *Goldy*, 26 L. J., Ex. 29, an action by an administratrix for converting goods of the intestate.

(*j*) *Broadhurst* v. *Baldwin*, 4 Price, 58.

(*k*) *Miller* v. *Williams*, 5 Esp. 19.

(*l*) *Lipscombe* v. *Holmes*, 2 Camp. 441.

(*m*) *Gould* v. *Oliver*, 2 Sc. N. R. 242; 2 M. & Gr. 208: *Carr* v. *The Royal Exchange Ass. Corporation*, 34 L. J., Q. B. 21.

(*n*) *Jackson* v. *Burleigh*, 3 Esp. 34. See *Hildyard* v. *Blowers*, 5 Esp. 62: *Butler* v. *Brown*, 1 B. & B. 56; 3 Moore, 327. But see *Laidlaw* v. *Cockburn*, 2 N. R. 76.

(*o*) As to demurring to evidence after it, see *Jenkins* v. *Tucker*, 8 H. Bl. 93.

(*p*) *Wright* v. *Goddard*, 8 A. & E. 144; 3 N. & P. 361.

(*q*) Cp. the former rules, 13 H. T. 1853 (repealed by R. of S. C., 1883). As to the previous practice upon this subject, see *Burstall* v. *Horner*, 7 T. R. 372: *Powell* v. *Parkinson*, 6 M. & Sel. 107; Tidd's New Prac. 317: *Twemlow* v. *Brock*, 2 Taunt. 361: *Wilton* v. *Place*, 2 B. & P. 56: *Muller* v. *Hartshorne*, 3 B. & P. 558.

in respect of it (*r*). In all these cases the money is paid to the Law Courts' Branch of the Bank of England, as pointed out *infra*.

By *Ord. XXII. r.* 11 (*ante*, p. 346), money paid into Court under an order of the Court or a Judge or certificate of a Master or Associate, shall not be paid out of Court except in pursuance of an order of the Court or a Judge.

As to paying money into Court on an application for discovery or with interrogatories, *see post, Ch. XLVIII.*

Sect. 3. *Regulations as to the Mode of paying Money into, and taking Money out of, Court.*

Supreme Court Funds Rules, 1884.

Do not apply to district registries.

The mode of paying money into, and getting it out of, Court is regulated by the Supreme Court Funds Rules, 1884, which came into operation on the 1st March, 1884 (*s*). These rules do not, however, apply to the district registries. A new rule is substituted for one of these by the *R. of S. C. Funds Rules* (*October*), 1884.

Mode of payment into Court.

Mode of Payment into Court.]—All money paid or deposited in Court is paid or deposited at the Law Courts Branch of the Bank of England (*t*).

In order to pay money into Court a request, in the form provided by the rules, and which may be procured at a law stationer's, must be filled up and signed in accordance with Rule 32 (*infra*), and taken, together with the notice or pleading (if any), or the order, or any office copy of the order upon or in pursuance of which the payment is made, and the money to the bank. On the documents being produced and the money paid there a receipt will be given. If the money is paid in upon a notice or pleading, the receipt is written thereon.

By *r.* 32, "In the Queen's Bench Division a lodgment of funds to the account of the Paymaster shall be made on presentation at

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(*r*) *Ex p. Banner, In re Keyworth*, L. R., 9 Ch. 379; 43 L. J., Bk. 102: *Ex p. Bouchard, In re Moojen*, 12 Ch. D. 26; 48 L. J., Bk. 105: *Murray* v. *Arnold*, 3 B. & S. 287; 32 L. J., Q. B. 11.

(*s*) By r. 1, "These rules shall come into operation on the 1st day of March 1884, and may be cited as 'The Supreme Court Funds Rules, 1884.'"

By r. 2, "The Chancery Funds Consolidated Rules, 1874, are hereby revoked as from the day on which these rules come into operation; and all other rules or general orders prescribing the mode of dealing with funds in Court, and containing any provisions relating to funds in Court inconsistent with these rules, are hereby revoked and these rules substituted therefor, as from the same day: Provided that the rules hereby revoked shall continue to apply to orders made but not fully acted upon before these rules come into operation, so far as is indispensable for the purpose of duly giving effect to such orders: but a certificate of a registrar as an authority for a sale or transfer of securities shall not in such cases be required."

By r. 111, "These rules shall not apply in district registries to funds in Court or hereafter lodged in Court."

(*t*) By S. C. Funds Rules, r. 29, "All money and securities to be paid into or deposited in Court shall be paid or deposited at the Bank of England (Law Courts Branch) and placed in the books of the bank to the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature; and the bank shall cause a receipt to be given to the person making the payment or deposit.

All securities to be transferred into Court shall be transferred to the said account in the books of the bank, or other company in whose books such securities are registered."

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the Bank (Law Courts Branch) of a request signed by or on behalf of the person desiring to make such lodgment. Such request for lodgment shall be in the form No. 8 in the Appendix to these Rules, and shall specify the cause or matter and the ledger credit to which the lodgment is to be placed, and shall also contain a statement of the circumstances under which the money is lodged, in such of the following terms as may be applicable to the case, viz.:—

(A.) When the money is to be lodged under Rule 5 of Order XXII. (*ante*, p. 347) of the Rules of the Supreme Court, 1883, a statement in the following terms:—'Paid in in satisfaction of claim of above-named' [*name of party*].

(B.) When the money is to be lodged under Rule 6 of Order XXII. (*ante*, p. 351) of the Rules of the Supreme Court, 1883, a statement in the following terms:—'Paid in against claim of above-named' [*name of party*] 'with defence denying liability.'

(C.) When the money is to be lodged under Rule 26 of Order XXXI. (*post, Ch. XLVIII.*) of the Rules of the Supreme Court, 1883, a statement in the following terms:—'Paid in to Security for Costs Account.'

(D.) When the money is to be lodged in pursuance of an Order, or otherwise than as above specified, a statement of the nature and date of the authority under which the lodgment is made, as for instance:—'Paid in under Order dated the day of 18 ;' *or* 'Paid in on notice of appeal [in Bankruptcy], dated the day of 18 .'

If the lodgment is made upon a notice or pleading, such notice or pleading must be produced at the Bank, and the receipt for the lodgment shall be given thereon; and if the lodgment is made in pursuance of an Order, such Order, or an office copy thereof, must be produced at the Bank by the person making the lodgment."

Lodgments under Orders XXII. and XXXI. to be distinguished in Pay Office books.

By *r.* 33, "In every case of a lodgment in the Chancery and Queen's Bench Divisions under the provisions of the said Orders XXII. (*ante*, p. 342) and XXXI. (*post, Ch. XLVIII.*), as provided in the preceding Rules 30 and 32, the Paymaster shall cause an entry to be made in his books indicating the circumstances under which the money is stated to be lodged."

Certificate of payment and office copy to be evidence.

By *r.* 38, "In the Chancery and Queen's Bench Divisions, when any direction or other authority for the lodgment of funds in Court is returned to the Pay Office, with a certificate thereon that the funds therein mentioned have been lodged, the Paymaster shall file at the Central Office a certificate of such lodgment, and shall therein state the ledger credit to which such funds have been placed in the books at the Pay Office; and an office copy of such certificate of the Paymaster shall be received as evidence of the lodgment."

Appropriation of money paid in under Order XIV.

Appropriation of Money paid in under Ord. XIV.]—By *S. C. Funds Rules, r.* 43, "In the Queen's Bench Division, when a defendant has lodged money in Court under Order XIV. of the Rules of the Supreme Court, 1883, as a condition of liberty to defend, and desires to appropriate the whole or any part of such money to the whole or any specified portion of the plaintiff's claim

pursuant to Rule 11 of Order XXII. of the said Rules, he or his solicitor shall leave at the Pay Office a notice of such appropriation in the Form No. 10 in the Appendix to these Rules, specifying the title of the cause or matter, the ledger credit to which the money is standing, the date of the Order under which the money was lodged in Court, and the amount to be appropriated; and whether so appropriated, (A) in satisfaction of a claim, or (B) against a claim, with a defence denying liability; and thereupon, for the purposes of payment out of Court, the money mentioned in the notice shall be subject to the next following Rule. The person leaving such notice must produce therewith the original receipt of the Bank for the amount lodged." (*See ante*, p. 346.)

Payment of money out of Court to party entitled.

Payment of Money out of Court to Party entitled.]—In certain cases provided for by *r.* 44 (*infra*) money paid into Court may be paid out to the party entitled to it on a request, but in all other cases an order for payment out in the form provided by the rules is necessary (*u*).

Payment out of Court of money lodged in actions for debts and damages.

By *S. C. Funds Rules*, *r.* 44, "In the Chancery and Queen's Bench Divisions, when money has been lodged in actions for debts and damages under Orders XXII. and XXXI. of the Rules of the Supreme Court, 1883, (as described in Rules 30 and 32 of these Rules,) and when and so far as money lodged under Order XIV. of the said Rules of the Supreme Court has been appropriated in the manner provided in the last preceding Rule, payment of the money shall be made to the person in satisfaction of whose claim it has been lodged, or to the person otherwise entitled thereto, or, on the written authority of either such person respectively, to his solicitor, as under:—unless an Order restraining such payment has been lodged at the Pay Office prior to the issue of the Paymaster's direction for payment.

(A.) When the money has been lodged or appropriated in satisfaction of a claim, under Rules 30 (A.) and 32 (A.) of these Rules, or the last preceding Rule, a direction for payment shall be issued by the Paymaster upon a request in the Form No. 11 (A.) in the Appendix to these Rules.

(B.) When the money has been lodged or appropriated against a claim, with a defence denying liability, under Rules 30 (B.) and 32 (B.) of these Rules, or the last preceding Rule, a direction for payment shall be issued by the Paymaster upon receipt of a notification that the plaintiff accepts the sum lodged in satisfaction, and that due notice has been given of such acceptance, and upon a request for payment of the same; such notification and request to be in the form No. 11 (B.) in the Appendix to these Rules.

(*u*) By S. C. Funds Rules, r. 45, "Except as provided in the last preceding rule, and subject to the provisions contained in Rules 55, 56, 57, 70, 73 and 74, funds in Court shall not be paid, delivered, or transferred out of Court, nor invested, sold, or carried over unless in pursuance of an order, or in the case of an investment of money or application of dividends unless in pursuance of an authority contained in a certificate of a master in lunacy."

By r. 28, "In the Queen's Bench and Probate Divorce and Admiralty Divisions an order for the payment of money by the paymaster shall be in the Form No. 4 in the Appendix to these rules."

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(C.) When the money has been lodged to a security for costs account under Rule 30 (*c.*) and 32 (*c.*) (*ante*, p. 356) of these Rules, a direction for payment shall be issued by the paymaster upon receipt of a certificate of a taxing officer, master, or chief clerk (as the case may be) as to the person who is entitled to have paid out to him the money so lodged (*x*).

When a request is made for payment of money lodged on a notice or pleading, the original receipted notice or pleading must be produced at the pay office.

Except as in this rule is provided, the money so lodged or appropriated as mentioned herein, shall only be paid out in pursuance of an order."

Copy of order for payment out to be left at Pay Office.

A duly authenticated copy of the order (if any) directing the money to be paid out, must be left at the pay office (*y*), and the necessary direction for payment is prepared on the receipt of such copy (*z*).

Authorities for payments to others than named persons to be witnessed.

By *r.* 51, "When money is by an order in the Queen's Bench Division directed to be paid to a person therein named, or, on his authority, to a solicitor or other person, the signature to the authority must be attested by a witness, whose residence and description must be added to his attestation."

Women who marry before payment.

Payment out to particular Persons.]—By *S. C. Funds Rules*, *r.* 61, "When funds in Court are by an order directed to be paid, transferred, or delivered to a woman who is not married at the date of the order, or who, being married at that date, shall become a widow, and such woman shall marry before payment, transfer, or delivery of such funds, upon an affidavit of such woman and her husband that no settlement or agreement for a settlement whatsoever has

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(*x*) The original sub-division (c) was annulled as from the 24th October, 1884, by the S. C. Funds Rules, October, 1884, and the sub-division printed in the text substituted.

(*y*) By r. 46, "A duly authenticated copy of every payment schedule in the Chancery Division and in lunacy, and of every order in the Queen's Bench and Probate Divorce and Admiralty Divisions which directs funds to be dealt with, shall be left at the pay office, and shall be the paymaster's authority for the issue of directions giving effect to such orders.

"In the Chancery Division it shall be the duty of the solicitor having the carriage of the order forthwith to leave such copy (as provided in Rule 24). In the Queen's Bench and Probate Divorce and Admiralty Divisions such copy shall be left by or on behalf of the person entitled to payment or interested in any other dealings with such funds directed or authorized by the order."

(*z*) By r. 47, "The directions of the paymaster for the payment of money under these rules, and for the delivery of securities out of Court in pursuance of an order shall be prepared by the paymaster forthwith, or from time to time, upon receipt of a copy of the order and any further necessary authority or information; and except as provided in the next following rule such directions shall be delivered upon the personal application of the persons entitled thereto.

"Investments of money, transfers of securities out of Court, and carrying over of funds, in pursuance of an order, shall be made by the paymaster upon receipt of the necessary authority and information.

"Sales of securities in pursuance of an order, of which a copy has been left at the pay office, shall be made by the paymaster upon application by or on behalf of the persons interested therein, and such application may be sent by post."

been made or entered into, before, upon, or since their marriage, or in case any such settlement or agreement for a settlement has been made or entered into, then upon an affidavit of such woman and her husband identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband that such solicitor has carefully perused such settlement or agreement for a settlement, and that, according to the best of his judgment, such funds are not, nor is any part thereof, subject to the trusts of such settlement or agreement for a settlement, or in any manner comprised therein or affected thereby, such funds shall be paid, transferred, or delivered to such woman without the intervention or concurrence of her husband in the same manner as if she had remained unmarried."

Representatives of deceased persons.

By *r.* 62, "When funds in Court are by an order directed to be paid, transferred, or delivered to any person named or described in an order, or a certificate of a chief clerk, or of a taxing officer, or of a master in lunacy (except to a person therein expressed to be entitled to such funds as real estate, or to be entitled thereto as a trustee, executor, or administrator, or otherwise than in his own right, or for his own use), such funds, or any portion thereof for the time being remaining unpaid or untransferred or undelivered, may, unless the order otherwise directs, on proof of the death of such person, whether on or after, or, in the case of payment directed to be made to creditors as such, before the date of such order, be paid or transferred or delivered to the legal personal representatives of such deceased person, or to the survivors or survivor of them."

Partners.

By *r.* 33, "When money in Court is by an order directed to be paid to any persons described in the order, or in a certificate of a chief clerk, or of a taxing officer, or of a master in lunacy, as co-partners, such money may be paid to any one or more of such co-partners, or to the survivor of them."

Surviving representatives.

By *r.* 64, "When funds in Court are by an order directed to be paid, transferred, or delivered to any persons as legal personal representatives, such funds, or any portion thereof for the time being remaining unpaid, untransferred, or undelivered, may, upon proof of the death of any of such representatives, whether on or after the date of the order directing such payment, transfer or delivery, be paid, transferred, or delivered to the survivors or survivor of them."

Within what time probate or letters of administration must have been granted.

By *r.* 65, "No funds shall, under Rules 62 and 64, be paid, transferred, or delivered out of Court to the legal personal representatives of any person under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the date of the order directing such payment, transfer, or delivery, or in case such funds consist of interest or dividends from the date of the last receipt of such interest or dividends under such order."

Money cannot be placed on deposit in Queen's Bench Division.

Money cannot be placed on Deposit.]—By *S. C. Funds Rules*, *r.* 77, "Money shall not be placed on deposit in the following cases:

(*a.*) In any cause or matter in the Queen's Bench or Probate Divorce and Admiralty Divisions."

CHAPTER XXX.

STAYING PROCEEDINGS (*a*).

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PART V.

Generally.

Jud. Act, 1873, s. 24, sub-s. 5.

Generally.]—In many instances, more particularly mentioned in this chapter, the proceedings in an action may be stayed altogether, or suspended by the order of the Court or a Judge or Master.

By the *Judicature Act*, 1873, *s.* 24, *sub-s.* 5, it is enacted that "No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this act had not passed, either unconditionally or on any terms or conditions, *may be relied on by way of defence thereto* (*b*): Provided always, that nothing in this Act con-

(*a*) As to staying proceedings on bankruptcy, see the Bankruptcy Act, 1883, s. 10, sub-s. 2, post, Ch. CII.

(*b*) See cases cited post, p. 361, n. (*d*), and especially per *Mellish*, L. J., 1 Ch. D. at p. 157. From the judgment of Sir *J. Hannen* in *Marshall* v. *Marshall*, 5 P. D. 19, at p. 20, it would appear that it is only in cases where a temporary stay is

tained shall disable either of the said Courts from directing a *stay of proceedings* in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by *motion in a summary way*, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just."

This section puts an end to the power the Court of Chancery formerly possessed, of staying proceedings in other Courts by injunction (*c*). It further enables the defendant to raise by way of defence every matter of equity which, under the old system, would have constituted ground for an injunction staying proceedings either conditionally or on any term or condition (*d*). At the same time the section expressly reserves the power of any division to stay any proceedings pending before itself.

To what Division application to be made.

Since the above enactment all applications to stay proceedings must (except in the two exceptional cases below referred to) be made to the Division in which the proceedings which it is sought to stay are pending (*d*). Except in those two cases no Division has now any power to restrain or interfere with the proceedings pending in any other Division (*e*). The two exceptional cases are the power of the Judge to whom bankruptcy proceedings are assigned to restrain proceedings which is not affected by the above section (*f*); and the power conferred by *Ord. XLIX. r. 5* (*g*), on the Judge of the

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asked that an action should not be stayed on equitable grounds, and that when a permanent stay is asked, the matter should be relied on by way of defence.

(*c*) The power to plead equitable defences conferred by the 83rd section of the C. L. P. 1854, was (as construed by the Courts) confined to cases where the defence was one in which an absolute perpetual unconditional injunction would have been granted by the Court of Chancery. Day's C. L. P. Acts, 4th ed. 328. See *Allen* v. *Walker*, L. R., 5 Ex. 187.

(*d*) *Garbutt* v. *Faweus*, 1 Ch. D. 155; 45 L. J., Ch. 133; 33 L. T. 617; 24 W. R. 91, C. A.: *In re Morrison Patent Fuel Co.*, W. N. 1877, 20: *In re South of France Pottery Works Syndicate*, 37 L. T. 260; 25 W. R. 870, C. A.: *In re People's Garden Co.*, 1 Ch. D. 44; 45 L. J., Ch. 129; 24 W. R. 40: *Walker* v. *Banaghar Distillery Co.*, 1 Q. B. D. 129; 45 L. J., Q. B. 134; 33 L. T. 502: *Rose* v. *Gardden Lodge, &c. Co.*, 3 Q. B. D. 235; 47 L. J., Q. B. 338; 38 L. T. 101; 26 W. R. 353: *In re Artistic Colour Printing Co.*, 14 Ch. D. 502; 49 L. J., Ch. 526, M. R.; Jud. Act, 1875, s. 11, s. 1, ante, p. 11. The decisions contra, viz., *Kingchurch* v. *People's Garden Co.*, 1 C. P. D. 45; 45 L. J., C. P. 131; 33 L. T. 381; 24 W. R. 41: *Needham* v. *Rivers Protection Co.*, 1 Ch. D. 253; 45 L. J., Ch. 132; 33 L. T. 403; 24 W. R. 317, are wrong.

(*e*) *Wright* v. *Redgrave*, 11 Ch. D. 24; 40 L. T. 204; 27 W. R. 562, C. A.: *Searle* v. *Choat*, W. N. 1884, 36, and cases cited supra, n. (*d*).

(*f*) Bankruptcy Act, 1883, s. 10, sub-s. 2: *Ex p. Ditton, In re Woods*, 1 Ch. D. 557; 45 L. J., Bk. 87, C. A.: *Ex p. Day, In re Potter*, 48 L. T. 912, action against receiver in liquidation proceedings stayed.

(*g*) See post, Ch. XXXVII., "*Transfer of Actions.*" And see further as to staying proceedings against companies, or executors or administrators after winding-up or administration order, post, p. 414,

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Chancery Division, by whom a winding-up or administration order has been made, to transfer to himself any action pending in any other Division by or against the company, or executors or administrators (*g*). A County Court has no power to stay proceedings in an action pending in the High Court (*h*). The High Court may restrain proceedings in an inferior Court by prohibition or injunction (*i*).

How made.

The statute, it will be observed, says that the application may be made "on motion in a summary way," and there does not appear to have been any reported decision as to the effect of these words, except, indeed, that they do not mean *ex parte* (*j*). In practice the application to stay proceedings should be made, in the first instance, at chambers on a summons (*k*) supported, if necessary, by an affidavit of the facts upon which the application is based (*k*). Notwithstanding that the section says the "Court" may order the stay, it has been held at chambers that by the combined effect of the 39th section of the *Judicature Act*, 1873, and *Ord. LIV. r.* 12, a master has jurisdiction in all cases (*l*). In some cases application has been made to the Court and a rule absolute granted in the first instance (*m*); but this, it is submitted, is incorrect, because the plaintiff ought to have an opportunity of being heard as to the terms and conditions on which the stay should be granted. It would seem that if there are several actions in the same Division, and it is sought to stay them all on the same grounds, this may be done on one application (*n*).

On payment of debt and costs within four days.

On Payment of Debt and Costs within Four Days.]—When the claim is for a debt or liquidated demand only the writ is indorsed with a notice that on payment of the debt and costs within four days after service, in the case of a writ for service within the jurisdiction, or within the time limited for appearance in the case of a writ for service out of the jurisdiction, further proceedings will be stayed (*o*), and defendant is entitled to have them stayed on such payment. As to the proceedings, see the rule and observations *ante*, p. 223.

Upon payment of debt, &c. and costs, where amount not disputed.

Upon Payment, &c. of Debt or Damages in Action for a Debt and Costs where the Amount is not disputed.]—As a general rule,

and Chs. XCII. and XCVII. As to the power of transfer generally, see post, Ch. XXXVII., "*Transfer of Actions.*"

(*g*) See n. (*g*), ante.

(*h*) *Cobbold* v. *Pryke*, 4 Ex. D. 315; 49 L. J., Ex. 9.

(*i*) *Hedley* v. *Bates*, 13 Ch. D. 498. See post, Vol. 2, Ch. CXXXII., "*Prohibition.*"

(*j*) Per *Lush*, J., *Blewitt* v. *Dowling*, W. N. 1875, 202.

(*k*) Id.: *Moore* v. *City and County Bank*, W. N. 1875, 240, *Quain*, J. See Ord. LIV. r. 1.

(*l*) Per *Lush*, L. J., at Chambers, in *Taylor* v. *Danby*, January 21st, 1881, in which case the master held that he had no jurisdiction to stay an action on a summons after a winding-up order had been made; and the learned Lord Justice held, reversing this, that he had. (*Ex rel. edit.*) This appears to destroy the force of the word "respectively" in sect. 39. As to the use of the expressions "the Court," and the "Court or a judge," see per *Brett*, L. J., *Baker* v. *Oakes*, 2 Q. B. D. at p. 173.

(*m*) *Masbach* v. *Anderson & Co.*, 37 L. T. 440: *Everingham* v. *Co-operative, &c. Co.*, W. N. 1880, 99, C. A.: cp. *In re Parry*, 33 L. J., Ch. 245.

(*n*) Per *Jessel*, M.R., *In re People's Garden Co.*, 1 Ch. D. at p. 46.

(*o*) R. of S. C., Ord. III. r. 7, ante, p. 223.

the defendant will be allowed to stay proceedings upon payment of debt and costs. This is, however, except where the payment is made pursuant to the notice indorsed on the writ (*supra*, p. 362), a matter of favour to the defendant, and not of right; and, therefore, the Court or a Judge, in allowing it, may impose terms on the defendant. It seems that without the plaintiff's consent, an order will not be made for a stay of the proceedings on payment of the debt and costs on a future day (*p*). If the order be, that *upon payment* of debt and costs within a certain time, the proceedings be stayed, and the debt and (*q*) costs be not paid within the time so limited, the plaintiff may proceed in the action; but the order being *conditional*, he cannot enforce it (*r*). But, generally, the order is drawn up so as to make it absolutely binding on the defendant to pay the debt and costs, in which case the plaintiff may proceed by execution for the recovery of them (*s*), or may sign judgment in the action if the order warrant it (*t*). The costs are frequently agreed on; if not, they must be taxed in the usual manner (*u*).

Effect of order, and proceedings on.

We will proceed to point out in what cases orders of this description for a stay of proceedings may be obtained.

In an action for a money demand, the defendant may have the proceedings stayed upon payment of the sum demanded and costs (*x*), but not so where the action is for unliquidated damages (*y*). Where several actions are brought against the acceptor and indorsers of a bill of exchange, any of the parties may obtain an order for a stay of the proceedings in the action against him, on payment of the debt and costs in such action (*z*). If the bill has been paid by one of the other parties, the acceptor, if he contests his liability, may proceed in the action against him. Also, if several actions be brought on a bill, and one of the parties pays the debt and costs in the action against him, the plaintiff may

Actions for debts.

Where several actions on same bill, &c.

(*p*) *Norton* v. *Fraser*, 2 M. & Gr. 916; 3 Sc. N. R. 293. See *Filmer* v. *Burnby*, 2 M. & Gr. 529; 9 Dowl. 466: *Michael* v. *Myers*, 6 M. & Gr. 702; 13 L. J., C. P. 15.

(*q*) See *Smith* v. *Smith*, 2 N. R. 473.

(*r*) *Fricker* v. *Eastman*, 11 East, 319: *Hand* v. *Lady Dinely*, 2 Str. 1219.

(*s*) *Fricker* v. *Eastman*, 11 East, 319: *Scurrall* v. *Horton*, Barnes, 283.

(*t*) As to the mode of obtaining such an order, and as to signing judgment on the same, see post, Ch. LXX. See form of order and of the judgment, Chit. Forms, p. 204.

(*u*) *Cook* v. *Hunt*, 7 Dowl. 397; 5 M. & W. 161.

(*x*) *Gibbon* v. *Copeman*, 5 Taunt. 849: *Lee* v. *Irish*, Hardw. 173.

(*y*) *Fisher* v. *Pyne*, 1 M. & Gr. 265.

(*z*) *Smith* v. *Woodcock*, 4 T. R. 691: per Lord *Tenterden*, in *Dawson* v. *Morgan*, 9 B. & C. 620. And see per *Parke*, B., in *Jones* v. *Shepherd*, 3 Dowl. 421. By r. 24, H. T. 1853 (repealed), "In any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action."

Before the R. of T. T. 1 V., the former rule on this subject, the acceptor of a bill of exchange, or the maker of a promissory note, could not obtain a stay of proceedings before judgment, except upon the terms of paying, not only the debt and costs in the action against him, but also the costs in all the other actions against the indorsers, &c., unless it appeared clearly that the other actions were brought for the purpose of creating costs, or the like: *Rex* v. *Sheriffs of London*, 2 B. & Ald. 192: *Bull* v. *Blackwood*, 6 Dowl. 589: *Hodson* v. *Gunn*, 2 D. & R. 57.

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In actions on bonds, &c.

proceed in the other actions for the purpose of recovering the costs in them (*b*).

By 4 & 5 *Anne*, *c.* 3, *s.* 13 (*c*), "If, at any time pending an action upon any such bond (*d*) with a penalty, the defendant shall bring into the Court where the action shall be depending, all the principal money and interest (*e*) due (*f*) on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the Court shall and may give judgment to discharge every such defendant of and from the same accordingly" (*g*). In these cases the application is *to a Master for an order that it be referred to one of the Masters to compute the principal and interest due on the bond (as the case may be); and that upon payment of such sum, with costs to be taxed, &c., the proceedings in the action be stayed.* So, in debt on a bond conditioned for the payment of an annuity, or of money by instalments, or other bond within the 8 & 9 *W.* 3, *c.* 11, the defendant may obtain a stay of proceedings, upon payment of the arrears and costs, provided he gives the plaintiff judgment in the action as a security for the future payments (*h*), but not otherwise (*i*). But where the bond was conditioned for the payment of a sum in gross, and by a subsequent agreement that sum was to be paid by instalments, the Court refused to stay proceedings on the bond on payment of the instalment, but required the defendant to pay in the whole sum mentioned in the condition of the bond, with costs (*k*); and the same where it was expressly stated in the bond that the whole sum should become due upon default made in the payment of any one instalment (*l*). In an action against a surety upon a bond conditioned for the due payment to the receiver-general of all sums received by a collector of assessed taxes, the Court has no authority to order the proceedings to be stayed as to certain items in the plaintiff's particulars of demand, upon payment of their amount into Court (*m*). In debt on bond conditioned to perform covenants, or for the performance of any specific act, the defendant may obtain a stay of proceedings upon payment of the penalty of the bond and costs (*n*). So, by the

(*b*) See *Randall* v. *Moon*, 21 L. J., C. P. 226: *Goodwin* v. *Cremer*, 25 L. J., Ex. 30.

(*c*) Ruff. c. 16. Revised version, c. 3 (not repealed).

(*d*) Any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain (s. 12).

(*e*) See *England* v. *Watson*, 9 M. & W. 333; 1 Dowl., N. S. 398: *Farquhar* v. *Morris*, 7 T. R. 124: *Hogan* v. *Page*, 1 B. & P. 337. See *Vansandau* v. ——, 1 B. & Ald. 214: *Wheelhouse* v. *Ladbroke*, 27 L. J., Ex. 307.

(*f*) See *Robinson* v. *Brown*, 3 C. B. 54.

(*g*) See *Bonafous* v. *Rybot*, 3 Burr. 1373: *Lord Lonsdale* v. *Church*, 2 T. R. 388: *Wilde* v. *Clarkson*, 6 T. R. 303: *Locke* v. *Shermer*, Ca. t. Hard. 116. As to paying money into Court, see ante, p. 342.

(*h*) *Darby* v. *Wilkins*, 2 Str. 957: *Bridges* v. *Williamson*, Id. 814: *Bonafous* v. *Rybot*, 3 Burr. 1370.

(*i*) *Vansandau* v. ——, 1 B. & Ald. 214: *Tighe* v. *Crafter*, 2 Taunt. 387. See *Steele* v. *Bradfield*, 4 Taunt. 227: *Macdonald* v. *Pasely*, 1 B. & P. 161.

(*k*) *Bonafous* v. *Rybot*, 3 Burr. 1374.

(*l*) *Gowlett* v. *Hanforth*, 2 W. Bl. 958.

(*m*) *Kepp* v. *Wiggett*, 4 C. B. 678.

(*n*) See supra.

7 *G.* 2, *c.* 20, *s.* 1, in debt on bond conditioned for the payment of mortgage money, or for the performance of covenants in a mortgage deed, where no suit for foreclosure or redemption is depending, a payment to the mortgagee, or, in case of his refusal, a payment into Court of principal and interest due on the mortgage, and costs, shall be deemed to be in full satisfaction of the mortgage, and the Court shall discharge the mortgagor of and from the same accordingly (*o*). An action of covenant on a mortgage deed is within this enactment, and under it a master has power to make an order for the delivery up of the deed (*p*). As to staying proceedings in an action on a replevin-bond, *see post, Ch. CVII.*

On judgment.

In an action to recover money due on a judgment, the Court will stay proceedings, upon payment of the sum recovered by the judgment and costs (*q*); and, perhaps, in some cases, without costs.

On statute.

So, in an action on a statute for a penalty (unless, perhaps, a *qui tam* action) the proceedings may be stayed upon payment of the penalty and costs (*r*); or, if the action be for several penalties, the defendant may have the proceedings as to one or more of them stayed upon paying into Court the amount of the same, and allowing the plaintiff to proceed as to the others, if he wish it (*s*).

In trespass or for unliquidated damages.

In actions for trespass or where the damages cannot be ascertained without the intervention of a jury, an order cannot in general be obtained for a stay of proceedings upon payment of a sum of money and costs (*t*). And where a sheriff sold goods under a *fi. fa.* without paying the rent due to the landlord, the Court refused to stay proceedings in an action against him by the landlord on payment into Court of the sum for which the goods were sold, or to bind the plaintiff to pay costs, in case of his not recovering more than the sum paid into Court (*u*). Yet, in one case, under particular circumstances, the Court ordered the proceedings to be stayed in an action of trespass, where no special damage was laid, upon the defendant's restoring the goods seized, or paying the full value of them, with costs (*x*). But the Court refused to do so upon payment of the sum for which the goods were sold, or even upon restoring the goods, where the parties could not be thereby placed in as good a situation as before the goods were taken (*y*).

In replevin.

As to staying proceedings in replevin, *see post, Vol.* 2, *Ch. CVII.*

In ejectment.

As to staying proceedings in an action for recovery of land for non-payment of rent, or by a mortgagee, &c., *see post, Vol.* 2, *Ch. CVI.*

(*o*) See *Berthen* v. *Street*, 8 T. R. 326: *Skinner* v. *Stacey*, 1 Wils. 80. And see *Sutton* v. *Rawlings*, 3 Ex. 407: as to a mortgagor obtaining a reconveyance of his property, and delivery up of his deeds, see C. L. P. Act, 1852, s. 219, post, Ch. CVI.

(*p*) *Smeeton* v. *Collier*, 1 Ex. 457.

(*q*) See *Simpson* v. *Stone*, 2 W. Bl. 785: *Thomas* v. *Edwards*, 2 Anst. 558.

(*r*) *Webb* v. *Punter*, 2 Str. 1217: *Stock* v. *Eagle*, 2 W. Bl. 1052. And see *Rex* v. *Strong*, 1 Burr. 431. As to compounding penal actions, see post, Ch. XLI.

(*s*) Tidd, 9th ed. 541.

(*t*) See *Calvert* v. *Jolliffe*, 2 B. & Ad. 418, per *Littledale*, J.: *Squire* v. *Archer*, 2 Str. 906: *Bowles* v. *Fuller*, 7 T. R. 335: *Holdfast* v. *Morris*, 2 Wils. 115: *Bernasconi* v. *Fairbrother*, 7 B. & C. 379.

(*u*) *Calvert* v. *Jolliffe*, 2 B. & Ad. 418.

(*x*) *Pickering* v. *Truste*, 7 T. R. 53. And see per *Bayley*, B., 2 Dowl. 69.

(*y*) *Gibson* v. *Humphrey*, 1 C. & M. 544; 2 Dowl. 68. And see *Kust* v. *Barker*, 3 Anst. 896: *Woodgate* v. *Baldock*, Id. 256.

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On one of several claims.

Where there are two or more claims in a statement of claim, and any one of them is for a demand of a sum certain, such as is above described, the defendant may obtain a stay of proceedings as to such one, upon payment of that part of the plaintiff's demand, and the costs relating thereto; and the plaintiff may proceed on the other claims if he wish it.

After verdict.

Where a plaintiff had obtained a verdict in an action for unliquidated damages, it was held that he had a right to sign final judgment in the usual way, and that the Court would not deprive him of his right, and stay further proceedings upon payment by the defendant of the sum recovered and the costs (*z*).

Costs.

As to the principle on which the taxing master should act in these cases, see *In re Wormsley*, 47 L. J., Ch. 844; 39 L. T. 85.

Where the amount is disputed.

Upon Payment, &c. of Debt, or Damages and Costs, where the Amount is disputed.]—It may be premised that the Court will not, in general, interfere to stay proceedings merely on affidavit that there is no debt due, or no cause of action (*a*). And, where the defendant *disputes the amount* of the sum claimed, he should pay the sum which he admits to be due into Court, and defend for the rest of the claim; or, if he cannot pay it, then his course is to plead to that part of the claim which he disputes, and leave the residue unanswered. As to payment into Court, *see ante*, p. 342 *et seq.*

Upon payment of debt, &c. without costs.

Upon Payment, &c. without Costs.]—If the plaintiff or his solicitor has been guilty of oppressive or vexatious conduct, or gross misconduct, the Master or a Judge will sometimes stay the proceeding on payment of the debt without costs (*b*). This will be done when the defendant before action offered to comply with plaintiff's demand (*c*). Where a sheriff levied under a *fi. fa.*, and the plaintiff brought an action for money had and received against him for the amount of the money levied, without having previously made a demand of it, the Court stayed the proceedings upon payment of the money levied, without costs (*d*). And where the defendant, after an application by the plaintiff's solicitor, paid the plaintiff the debt demanded, without knowing that a writ had been sued out, the plaintiff having said nothing to him about it, and the solicitor afterwards proceeded in the action for his costs, the Court ordered the proceedings to be stayed without costs (*e*). But where the defendant having, on application by letter from the plaintiff's solicitor, promised to remit the amount to him, and induced the solicitor to suppose he would pay his charge for the letter, afterwards, and before writ issued, remitted the debt to the

(*z*) *Peat* v. *Magnall*, 18 L. J., Q. B. 5.

(*a*) *Smith* v. *Curtis*, 2 Dowl. 223: *Sherwood* v. *Benson*, 4 Taunt. 631. See Tidd, 9th ed. 530.

(*b*) *Adams* v. *Staton*, 1 Bing. 769; 7 Moore, 365.

(*c*) *Rudd* v. *Roe*, L. R., 10 Eq. 610; 39 L. J., Ch. 846.

(*d*) *Jefferies* v. *Sheppard*, 3 B. & A. 696. See *Mackintosh* v. *Paydon*, R. & M. 363, per *Abbott*, C. J.: *Siggers* v. *Lewis*, 2 Dowl. 681.

(*e*) *Rooke* v. *Wasp*, 5 Bing. 190; 2 M. & P. 304. And see *Wylie* v. *Phillips*, 3 Bing. N. S. 776: *Meeking* v. *Whalley*, 2 Dowl. 823; 1 Bing. N. C. 59.

plaintiff without the costs, and the solicitor, not knowing of the payment, to secure his costs, issued out the writ, and the money was not received by the plaintiff until after the writ issued, the Court refused to stay the proceedings unless defendant paid the costs of the writ, and 6*s.* 8*d.* for the instructions, together with the costs of the application (*f*).

Where action for a trifling amount.

As to staying proceedings where the action is brought for a sum under 40*s.*, &c., *see post*, p. 371.

On payment of less than amount claimed.

On Payment of less than Amount claimed.]—Formerly if the amount claimed by the plaintiff was in excess of the sum due the defendant could take out a summons to have the proceedings stayed on payment of the amount admitted to be due, but now by a Judge's order dated at Chambers, November 25, 1875, it is ordered that, "As money may now be paid into Court without leave at any time after service of the writ and before defence (*Ord. XXII. r.* 1), summonses to stay on payment of a smaller sum than the sum demanded will no longer be issued. Instead thereof, the amount should be paid into Court, and the receipt sent to the plaintiff's solicitor, with the notice (*App.* (*B.*), *No.* 3)" (*g*).

On delivery up of goods, &c. claimed and payment of nominal damages.

On Delivery up of Goods, &c. claimed and Payment of Nominal Damages.]—In actions for the detention or conversion of goods, if no special damage be alleged, or be but colorably alleged, the defendant may in general obtain an order for a stay of proceedings on delivery up of the deeds or goods in question, and paying nominal damages (1*s.*) and costs; or, if the plaintiff insists on proceeding for damages, the order will be for the delivery up of the deeds or goods, and that the plaintiff shall be subject to the costs of the action, unless he recover damages beyond nominal damages for the detention of the deeds, &c. (*h*). Also, in those actions for deeds, &c., where the defendant admits the plaintiff's right to part of the deeds, &c. in dispute, but disputes it as to the rest, the defendant may, on delivering up the deed, &c. which he admits to be the plaintiff's, and payment of costs, obtain a stay of proceedings; or, if plaintiff still insists on proceeding for damages, or for the other deeds, &c., then he may obtain an order, that the plaintiff shall be subject to the costs of the action, unless he obtain a verdict for some of the other deeds, &c., or damages beyond nominal damages for the detention of the deeds, &c. in question (*i*). Where trover was brought for title-deeds, and a writ of inquiry executed, the Court permitted satisfaction to be entered up on the roll upon the terms of the defendant's delivering up the deeds, &c.,

(*f*) *Morrison* v. *Summers*, 1 B. & Ad. 559; 1 Dowl. 325.

(*g*) See the form, Chit. F. 195.

(*h*) See Tidd, 9th ed. 545: *Phillips* v. *Hayward*, 3 Dowl. 362: *Rex* v. *Clarke*, 3 Burr. 1364; Ca. Pr. C. B. 59, 130: *Pickering* v. *Truste*, 7 T. R. 53: *Bowington* v. *Parry*, 2 Str. 822: *Olivant* v. *Perineau*, Id. 1191: *Olivant* v. *Berino*, 1 Wils. 23: *Earl* v. *Holdernesse*, 4 Bing. 462: 1 M. & P. 254: *West* v. *Taunton*, 4 M. & P. 79; 6 Bing. 408: *Lucas* v. *London Dock Co.*, 4 B. & Ad. 378. And see form of rule there, Id. 380. See per *Bramwell*, L. J., *Hirst* v. *L. and N. Western R. Co.*, 4 Ex. D. at p. 195: cp. *Ellis* v. *Munson*, 35 L. T. 585 (C. A.).

(*i*) *Phillips* v. *Hayward*, 3 Dowl. 362, where see the form of order: *Peacock* v. *Nicholls*, 8 Dowl. 367.

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paying costs as between solicitor and client, and putting the plaintiff in the same situation as before action brought, &c. (*k*). But where the goods have been sold by the defendant, and there is an uncertainty whether they were sold for the real value, the Court or a judge will not, in general, interfere to stay the proceedings (*l*).

In second actions for the same cause.

After discontinuance.

In second Actions for the same Cause (*m*).]—We have seen (*ante*, p. 341) that by *Ord. XXVI. r.* 4, if a subsequent action be brought before payment of the costs of a discontinued action, for the same or substantially the same cause of action, the Court or Judge may, if they or he think fit, order a stay of such subsequent action until such costs shall have been paid.

In other cases.

In other cases, if a second action appear to have been brought *oppressively* or *vexatiously*, the Court or a Judge will stay proceedings until the costs of the former action be paid (*n*), provided both actions are by and against the same parties, and for the same cause, or substantially so (*o*). And an action in which relief is claimed which has already been claimed in another action may be stayed, except so far as it claims relief not included in the former action (*p*). An action by husband and wife has been stayed until the costs of a former action by the husband for the same cause were paid (*q*). But a stay of proceedings in a second action until the costs of the former action were paid was refused where the plaintiff was in prison under a *ca. sa.* for those costs (*r*). As to consolidating actions where several actions are pending for the same cause, *see post*, p. 407.

(*k*) *Coombe* v. *Sanson*, 1 D. & R. 201. See a case after verdict, &c., *Yates* v. *Dublin Steam Packet Co.*, 6 M. & W. 77.

(*l*) *Gibson* v. *Humphrey*, 2 Dowl. 68; 1 C. & M. 544.

(*m*) *Cobbett* v. *Warner*, L. R., 2 Q. B. 108; 36 L. J., Q. B. 94: *Cannot* v. *Morgan*, 1 Ch. D. 1; 45 L. J., Ch. 50. As to staying proceedings where a second ejectment is brought for the same premises, until security for costs given, see C. L. P. Act, 1854, s. 93, post, Vol. 2, Ch. CVI.

(*n*) *Martin* v. *Beauchamp*, 25 Ch. D. 12; 49 L. T. 334, C. A.; *McHenry* v. *Lewis* (C. A.), 22 Ch. D. 397; 52 L. J., Ch. 325: per *Jessel*, M. R., *Peruvian Guano Co.* (*Limited*) v. *Bockwoldt*, 48 L. T. at p. 10: *Re Payne, Randle* v. *Payne* (C. A.), 23 Ch. D. 288; 48 L. T. 194, where proceedings in a second action brought by a next friend on behalf of a married woman were stayed. *Baldwin* v. *Richards*, 2 T. R. 511, n.: *Melchart* v. *Halsey*, 2 W. Bl. 741; 3 Wils. 149: *Crawley* v. *Impey*, 8 Taunt. 407; 2 Moore, 460: *Weston* v. *Withers*, 2 T. R. 571: *Pashley* v. *Poole*, 3 D. & R. 53: *Danvers* v. *Morgan*, 25 L. J., C. P. 144: *Winter* v. *Slow*, 2 Str. 878: *Yates* v. *Dublin Steam Packet Co.*, 6 M. & W. 77: *Williams* v. *Thacker*, 1 B. & B. 514: *Liversedge* v. *Goode*, 2 Dowl. 141: per *Jessel*, M. R., *Gathercole* v. *Smith*, 17 Ch. D. at p. 4, counterclaim. See *Dawson* v. *Sampson*, 2 Chit. 146, where the proceedings in the first action were set aside for irregularity, and the Court refused to stay the proceedings in a second action.

(*o*) *English* v. *Cox*, Cowp. 322. See *Dicas* v. *Jay*, 6 Bing. 519: *Wade* v. *Simeon*, 1 C. B. 610: *Hoare* v. *Dickson*, 7 C. B. 164; 18 L. J. 58: *Prowse* v. *Loxdale*, 3 B. & S. 896; 32 L. J., Q. B. 227: *Cobbett* v. *Warner*, supra: *Tichborne* v. *Mostyn*, L. R., 8 C. P. 29.

(*p*) *Morton* v. *Quick*, *In re Aird*, 26 W. R. 441 (C. A.).

(*q*) *Lampley* v. *Sands*, 1 T. R. 584.

(*r*) *Bevan* v. *Robins*, 8 D. & R. 42. And see *Benn* v. *Benn*, Barnes, 180: *Stilwell* v. *Clarke*, 3 Ex. 264; 18 L. J. 165.

The Court have refused to stay proceedings against a defendant until the debt and costs recovered by him in a former action against the plaintiff should be paid (*s*). The Court will not stay proceedings in an action of libel on the ground that the libel complained of has previously been made the subject of an unsuccessful application to the Queen's Bench Division for a criminal information (*t*). And, in an action for penalties, the Court will not stay the proceedings upon an affidavit that the defendant has been sued by another person, and compounded for the same offence; at least, this is so unless the affidavit show specifically what was the offence compounded for, that the Court may see that both offences are the same (*u*).

Where action pending in another Court.

If, during the pendency of an action in one Court, another action for the same cause is commenced in another Court, the proceedings in the latter will generally be stayed (*x*).

Where action pending out of jurisdiction.

The pendency of an action in Scotland or Ireland, or any other part of the Queen's dominions, may be sufficient reason for staying a second action brought in this country for the same cause (*y*). But the pendency of an action for the same cause in a foreign country is not a sufficient ground for staying proceedings in the action here (*y*), unless it can be shown that the plaintiff's proceedings are vexatious (*y*).

In actions against several defendants.

Where a person, who has a right of action against several for one specific damage, recovers and receives a satisfaction from any one of them, the Court or Judge may, in a clear case, stay proceedings in any action he may bring, for the same cause, against the others (*z*). In a case where separate actions were brought against several persons for the same debt, who (if at all) were *jointly* liable, the defendant in one action having paid the debt and costs in that action, the Court stayed the proceedings in the others without costs (*a*).

After recovery in former action.

The Court have also, in some instances, under peculiar circumstances, and where the proceedings were evidently vexatious, stayed the proceedings in a second action, after a recovery for the same cause in a former one (*b*); the Court, however, usually refuse to interfere in this summary way, but put the defendant to plead the former recovery (*c*). The Court would not interfere, under the 7 &

(*s*) *Cooke* v. *Dobree*, 1 H. Bl. 10. See *Smith* v. *Holt*, 2 Dowl. 62.

(*t*) *Wakley* v. *Cook*, 16 L. J., Ex. 225.

(*u*) *Harrington* v. *Johnson*, Cowp. 744. See *Pechell* v. *Layton*, 2 T. R. 512, 712: *English* v. *Cox*, Cowp. 322.

(*x*) *Frith* v. *Guppy*, L. R., 2 C. P. 32; 36 L. J., C. P. 45: *Re Swire, Mellor* v. *Swire*, 21 Ch. D. 647; 46 L. T. 437: *Townsend* v. *Townsend*, 23 Ch. D. 100. See ante, p. 361.

(*y*) *McHenry* v. *Lewis* (C. A.), 22 Ch. D. 397; 52 L. J., Ch. 325: *Peruvian Guano Co.* (*Limited*) v. *Bockwoldt*, 23 Ch. D. 225; 48 L. T. 7: *The Peshawur*, 8 P. D. 32: *Hyman* v. *Helm* (C. A.), 24 Ch. D. 531; 49 L. T. 376: cp. *Dawkins* v. *Simonetti*, 29 W. R. 228, C. A.: *Cox* v. *Mitchell*, 7 C. B., N. S. 55; 29 L. J., C. P. 33. See *Wilson* v. *Ferrand*, L. R., 13 Eq. 362; 26 L. T. 387.

(*z*) Semb. *Bird* v. *Randall*, 3 Burr. 1354; 1 W. Bl. 389.

(*a*) *Carne* v. *Legh*, 6 B. & C. 124; 9 D. & R. 126: *Bailey* v. *Haines*, 15 Q. B. 533: *Newton* v. *Blunt*, 3 C. B. 675; 4 D. & L. 674.

(*b*) See per *Cotton*, L. J., *McHenry* v. *Lewis*, 22 Ch. D. at p. 409.

(*c*) *Ross* v. *Jacques*, 8 M. & W. 135: *Harrington* v. *Johnson*, Cowp. 744: *Pechell* v. *Layton*, 2 T. R. 512; Id. 712: *Liversedge* v. *Goode*, 2 Dowl.

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8 *V. c.* 96, *s.* 57, to stay the proceedings in an action upon a judgment for debt and costs in a former action, although it appeared that the sum recovered in the original action did not exceed 20*l.* (*d*).

After agreement to refer.

As to staying proceedings after a reference to arbitration, *see post, Vol.* 2, *Ch. CXXXVII.*

After juror withdrawn.

As to staying proceedings where a fresh action is brought after a withdrawal of a juror in a former action for the same cause, *see post*, p. 374 (*e*).

After a foreign attachment.

Where a foreign attachment had been sued by plaintiff out of the Mayor's Court, to seize money in the hands of bankers belonging to a railway company only provisionally registered, but no further steps had been there taken against the garnishee, the Court refused to stay proceedings in an action subsequently brought in the Queen's Bench, against three of the provisional committee of the railway company, in which the same debt was sought to be recovered as for work done for the company (*f*).

Effect of stay till payment of costs of former action.

When the proceedings in a second action are stayed until payment of the costs of the former action, the Court or a Judge will set aside any proceedings in the second action taken before the costs of the first are paid (*g*).

Application, when to be made.

The application to stay the proceedings on any of these grounds should be made as soon as possible (*h*). In one case, of an ejectment, it was granted after notice of trial in the second action of ejectment had been given, and the plaintiff had been at the expense of preparing for trial, and bringing the witnesses to town (*i*).

In cross-actions between the same parties.

In Cross Actions between the same Parties.]—Where cross-actions are brought between the same parties, and in respect of the same subject-matter, they may be ordered to be consolidated, or the proceedings in one may be stayed, and the plaintiff in that one be ordered to assert his claim by way of counterclaim in the other (*k*). In the latter case, the action brought against the party on whom the onus of proof lies ought to be stayed, and the action brought by him allowed to proceed, the other party being at liberty

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141, where the plaintiff in replevin, after being nonprossed, brought an action of trespass, and the Court refused to interfere. But had the plaintiff recovered in replevin, the Court might have stayed proceedings in an action of trespass for the same cause. *Lamb* v. *Nutt*, 1 Tidd, 572.

(*d*) *Joseph* v. *Buxton*, 2 D. & L. 835; 1 C. B. 221.

(*e*) *Gibbs* v. *Ralph*, 15 L. J., Ex. 7: *Moscati* v. *Lawson*, 1 H. & W. 474.

(*f*) *Denton* v. *Maitland*, 15 L. J., Q. B. 332: *Frith and others* v. *Guppy*, L. R., 2 C. P. 32; 36 L. J., C. P. 45, where, whilst an action was pending in the C. P., the plaintiffs sued the defendants for the same cause of action in the Mayor's Court, London, and the former Court considered that the proceeding in the latter Court was vexatious, and put the plaintiffs to their election of abandoning the action in the Mayor's Court, or having the proceedings in the C. P. stayed.

(*g*) *Doe* d. *Sutton* v. *Ridgway*, 5 B. & Ald. 523.

(*h*) See *Prowse* v. *Loxdale*, 32 L. J., Q. B. 22.

(*i*) *Doe* d. *Chadwick* v. *Law*, 2 W. Bl. 1157: *Doe* d. *Green* v. *Packer*, 2 Dowl. 373; 2 C. & M. 457, nom. *Doe* d. *Martin* v. *Packer*, *S. C.*

(*k*) *Thomson* v. *South Eastern R. Co.*, 9 Q. B. D. 320; 51 L. J., Q. B. 322: *Re Swire*, 46 L. T. 437: *Adamson* v. *Tuff and others*, 44 L. T. 420, application refused, as questions in issue not same in both actions. Cp. *Hyman* v. *Helm*, 24 Ch. D. 531; 49 L. T. 376, foreign action.

to raise by way of counterclaim all questions which he intended to raise in the action which is stayed (*l*).

In several actions pending trial of one as a test action.

In several Actions pending Trial of one as a Test Action.]—Where several actions are brought by different persons against the same defendants to try the same question, the Court may, on the application of the plaintiffs (*m*), stay the proceedings, or enlarge the time for proceeding in all the actions except one, and order the trial of that one as a test action (*m*). In this case, in the event of the action selected as a test action not being prosecuted or not satisfactorily disposing of the matter, the trial of another may be ordered (*n*). When several actions are brought upon the same policy of insurance, a master, upon application of the defendants, will order a stay of the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs if the plaintiff should recover, and submitting to such other terms as the Court or Judge may think proper to impose upon them (*o*). The order may be obtained, notwithstanding the plaintiff refuses his consent to it (*p*); and if the action which is tried be determined in favour of the plaintiff, the other defendants may (if necessary) obtain a stay of proceedings in their several actions, upon payment of the amount of their subscriptions and costs (*q*).

As to the consolidation of several actions, *see post*, p. 407.

In trifling actions.

In trifling Actions.]—It has always been deemed beneath the dignity of the Superior Courts to take conusance of pleas under 40*s.*; and in trespass for goods, it was expressly prohibited by stat. 6 *E.* 1, c. 8, which, however, is repealed by 42 & 43 *V.* c. 59. If it appear, upon the face of the writ or statement of claim (*r*) or by the plaintiff's acknowledgment (*s*), or even upon affidavit (*t*), that the sum for which the action is brought is really less than 40*s.*, the Court or a Judge will stay the proceedings, unless it appear that the debt is not recoverable in any inferior Court (*u*). The plaintiff cannot

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(*l*) *Thomson* v. *South East. R. Co.*, supra.

(*m*) *Bennett* v. *Lord Bury*, 5 C. P. D. 339; 49 L. J., C. P. 411; 42 L. T. 480, where see form of order. *Amos* v. *Chadwick*, 4 Ch. D. 869.

(*n*) Id.: *Amos* v. *Chadwick*, 9 Ch. D. 459; 47 L. J., Ch. 871: *Robinson* v. *Chadwick*, 7 Ch. D. 878; 47 L. J., Ch. 607.

(*o*) *Doyle* v. *Anderson*, 1 A. & E. 635; 4 N. & M. 873. See *Sharpe* v. *Lethbridge*, 4 Sc. N. R. 722: *Syers* v. *Pickersgill*, 27 L. J., Ex. 5.

(*p*) *Hollingsworth* v. *Brodrick*, 4 A. & E. 646; 6 N. & M. 240. And see *Ohrly* v. *Dunbar*, 1 N. & P. 244. See the form of the order, 6 N. & M. 243, n., Chit. Forms, 228; from the terms of which the practice in these cases may be collected.

(*q*) *Lewis* v. *Banks*, 27 L. J., C. P. 247.

(*r*) Cp. *Oulton* v. *Perry*, 3 Burr. 1592.

(*s*) *Kennard* v. *Jones*, 4 T. R. 595. And see *Melton* v. *Garment*, 2 N. R. 84: *Stean* v. *Holmes*, 2 W. Bl. 754: *Sandall* v. *Bennett*, 3 Dowl. 294.

(*t*) *Wellington* v. *Arters*, 5 T. R. 64: *Stuart* v. *Cawse*, 5 C. B., N. S. 737; 28 L. J., C. P. 193: *Fletcher* v. *Tanner*, 3 C. B. 963. But see *Oulton* v. *Perry*, 3 Burr. 1592: *Anon.*, 2 Ld. Raym. 1304: *Welsh* v. *Troyte*, 2 H. Bl. 29: *Tubb* v. *Woodward*, 6 T. R. 175.

(*u*) *Eames* v. *Williams*, 1 D. & R. 359: *Welsh* v. *Troyte*, 2 H. Bl. 29: *Tubb* v. *Woodward*, supra: *Sutton* v. *Bament*, 3 Ex. 831; 18 L. J., Ex. 318.

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evade this by colourably suing for a larger cause of action (*x*). But the proceedings will not be stayed where the plaintiff has recovered less than 40*s.*, by reason of the defendant having set up as a defence and succeeded on a tender (*y*). Nor will the proceedings be stayed in an action for conversion of goods (*z*), or, perhaps, in any other action for unliquidated damages, on an affidavit by the defendant that the cause of action does not amount to 40*s.*

Before the County Court Acts, in an action for a debt of any amount recoverable in a Court of Requests, where the plaintiff might, after verdict, be deprived of the costs, the Court or a Judge would, if the case were clear, stay the proceedings on payment of the debt without costs (*a*).

The application should be made as soon as possible. It may, however, it seems, be made at any time before trial (*b*).

In vexatious actions.

In Vexatious Actions.]—If an action is shown to be vexatious and to be an abuse of the process of the Court, or groundless and without pretence (*c*), as where it is against a public officer for a breach of an alleged public duty, when it is clear that no such duty existed (*d*); or where there is a decision of the Court directly in point deciding that the action will not lie (*e*), the Court will, on the application of the defendant, stay all further proceedings in it. The application must be supported by a strong affidavit showing the circumstances under which it is made (*f*).

Until costs of interlocutory proceedings paid. Stay refused.

Until Costs of Interlocutory Proceedings paid—Stay refused.]—The Court will not generally stay the proceedings in an action on the ground that the plaintiff has not paid the costs of interlocutory proceedings (*g*) unless the order ordering the payment of the costs provides for a stay unless they are paid (*g*).

In actions brought without authority.

In Actions brought without Authority.]—As to when the Court or a Judge will set aside or stay proceedings, where an action is brought or defended by a solicitor, without any authority for so doing, *see ante*, p. 105.

By wife.

Where a solicitor brought an action for a wife, in her husband's name, for a trespass in entering her house and taking her goods (the wife living apart from her husband) without authority from the latter, the Court refused to stay the proceedings, although the husband joined the defendant in the application (*h*). It has been

(*x*) *Thompson* v. *Gill*, 6 Dowl. 155.

(*y*) *Nurdin* v. *Fairbanks*, 5 Ex. 738.

(*z*) *Lowe* v. *Lowe*, 8 Moore, 220; 1 Bing. 270.

(*a*) *Cornforth* v. *Lowcock*, 1 M. & R. 321. See *Sandall* v. *Bennett*, 3 Dowl. 294: *Bartholomew* v. *Carter*, 5 Sc. N. R. 498: *Dunster* v. *Day*, 8 East, 239. *Meredith* v. *Drew*, 1 Dowl. 252: *King* v. *Myers*, 5 Dowl. 687.

(*b*) See *Kennard* v. *Jones*, 4 T. R. 495.

(*c*) *Edmunds* v. *Att.-Gen.*, 47 L. J., Ch. 345; 38 L. T. 213; 26 W. R. 550: *Jacobs* v. *Raven*, 30 L. T. 366: *Burstall* v. *Beyfus* (C. A.), 26 Ch. D. 35; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418. See Ord. XXV. r. 4, ante, p. 325: *Ackers* v. *Ackers*, W. N. 1884, 82.

(*d*) *Castro* v. *Murray*, L. R., 10 Exch. 213.

(*e*) *Dawkins* v. *Prince Edward of Saxe-Weimar*, 1 Q. B. D. 499; 45 L. J., Q. B. 567.

(*f*) See *In re Aird*, W. N. 1878, 24.

(*g*) *Morton* v. *Palmer*, 9 Q. B. D. 89; 51 L. J., Q. B. 307.

(*h*) *Chambers* v. *Donaldson*, 9 East, 471. And see —— v. *Smith*, 2 Chit.

held that the wife of a lunatic, who had no committee, had a sufficient implied authority to sue in the name of the lunatic for debts due to him (*i*).

By cestui que trust, or one of several plaintiffs.

Where a *cestui que trust* brings an action in the name of his trustee (*k*), or in the case of joint-tenants or joint-contractors (*l*), or in other cases where a person is obliged to use another's name in an action, the proceedings will not be stayed upon the application of the trustee, &c., excepting temporarily, until he be indemnified against costs (*m*). In these cases, a demand of indemnity ought to be made before making the application; otherwise, the costs of it will not, in general, be given (*n*). The name of a person having been inserted in a deed, as trustee, without his authority, and it having been decided, in an action on the deed, that it was necessary to join him in suing, and his name having been accordingly inserted as co-plaintiff in a new writ, without his authority, the Court upheld an order of a judge to strike it out (*o*).

By assignee of debt.

An assignee of a debt may in general bring an action for it in the assignor's name (*p*). A. assigned to B. by way of security for a loan of 10,000*l.*, two sums of 5,000*l.* each, due from C. to A. under two several indentures, and afterwards brought an action against C. upon those indentures; the Court, refused to stay the proceedings in the action at the instance of B. and C., and suggested that the proper course was to apply after judgment to stay execution (*q*).

By indorser of a note.

The indorser of a promissory note paid the indorsees in default of the maker, and then sued the maker in the name of the indorsees, without their authority, and obtained a verdict; the amount of the verdict having been paid, and an execution issued for costs, the Court, on motion, made a rule absolute to stay all proceedings, without costs on either side (*r*).

By public company which has ceased to exist.

Where, in an action for calls, defendant applied to set aside the proceedings on the ground that the action had been brought without authority, as the company had ceased to exist; it was held, that, as the cause had been set down for trial and the defen-

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Rep. 392: *Auster* v. *Holland*, 1 B. C. 104; 15 L. J., Q. B. 229; *Morgan and Wife* v. *Thomas*, 2 Dowl. 332; 2 C. & M. 388: *Harrison* v. *Almond*, 4 Dowl. 321; 1 H. & W. 519: *Proctor* v. *Brotherton*, 9 Ex. 486; 23 L. J., Ex. 116, where the wife sued as executrix. As to a wife suing alone, see post, Ch. CI.

(*i*) *Rock* v. *Slade*, 7 Dowl. 22.

(*k*) *Spicer* v. *Todd*, 2 C. & J. 165; 2 Tyr. 172; 1 Dowl. 306: *Orchard* v. *Coulsting*, 6 Sc. N. R. 843: and see *Auster* v. *Holland*, 3 D. & L. 740; 15 L. J., Q. B. 229. See as to striking out, in an action for the recovery of land, the name of a trustee, post, Ch. CVI.

(*l*) *Whitehead* v. *Hughes*, 2 Dowl. 258; 2 C. & M. 318: *Saville* v. *Roberts*, 1 Ld. Raym. 380.

(*m*) *Laws* v. *Bott*, 16 M. & W. 300, 362: *Emery* v. *Mucklow*, 10 Bing. 23; 3 M. & Sc. 384; 2 Dowl. 735. See *Turquand* v. *Fearon*, 4 Q. B. D. 280; 48 L. J., Q. B. 341.

(*n*) *Morgan* v. *Thomas*, 2 Dowl. 332.

(*o*) *Langston* v. *Wetherell*, 27 L. J., Ex. 400. All the cases referred to in this paragraph were decided before the Jud. Acts.

(*p*) *Pickford* v. *Ewington*, 4 Dowl. 453. And see *Britton* v. *Perrott*, 2 C. & M. 597: *Tubb* v. *Dodd*, 2 Pr. Rep. 97, C. P. Under the Jud. Act, 1873, s. 25, sub-s. 6, when the assignment is in writing and absolute and notice in writing has been given to the action the assignee may sue in his own name. See post, Ch. CXXI.

(*q*) *Sepping* v. *Nokes*, 2 C. B. 292.

(*r*) *Coleman* v. *Beadman*, 18 L. J., C. P. 263.

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dant had known the facts for a long time, the application was, at all events, too late; and that, as the persons authorizing the action had for some time acted as directors, the validity of their appointment could not be questioned on such an application (*s*).

By lunatic, &c.

Where a plaintiff had been delirious, and, on apparently recovering, he brought an action against his bankers to recover money belonging to him in their hands, the Court would not oblige him to give an indemnity to the bankers on payment by them to him of the sum for which the action was brought (*t*).

Amount, &c. of indemnity.

As to the amount, and time, and manner of giving security for costs, *see post*, p. 401 (*u*).

In action against good faith.

Where Action, &c. against Good Faith.]—The Court has an unlimited power over its own process, and will not allow it to be abused for the purpose of injustice (*x*). Therefore, if an action be brought pending a reference which it has been agreed shall operate as a stay of proceedings, or otherwise contrary to good faith (*y*), though the agreement in fraud of which the action is brought was made while the parties were not under the authority of the Court (*z*), the Court will stay the proceedings. But the Court will not interfere unless the facts of the case are clear (*a*); and, except in very clear cases, the Court would leave the defendant to set up the matter which he relies on as a defence (*b*). Where a juror has been withdrawn by the plaintiff, at the suggestion of the Judge, on the understanding that the cause was to be put an end to, the Court will not allow the plaintiff afterwards to proceed in that (*c*) or in a second action (*d*). The application to stay the proceedings should, in general, be made at chambers (*e*).

Where there is an agreement to refer to arbitration.

Where there is an Agreement to refer to Arbitration.]—In certain cases, where there is an agreement to refer to arbitration, the proceedings in an action brought in contravention of this agreement may, under sect. 11 of the *Com. Law Proc. Act*, 1852 (*f*), be stayed. See fully, *post*, *Vol.* 2, *Ch. CXXXVII.*, "*Arbitration.*"

On compromise.

On Compromise.]—Where, after the commencement of an action, the parties have entered into a valid compromise of the matters in

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(*s*) *Thames Haven Dock and Railway Co.* v. *Hall*, 3 Railw. Ca. 441.

(*t*) *Williams* v. *Smith*, 1 Dowl. 631.

(*u*) See *Orchard* v. *Coulsting*, 7 Sc. N. R. 414.

(*x*) See *Cocker* v. *Tempest*, 7 M. & W. 502; 9 Dowl. 306; *Carr* v. *The Royal Ex. Ass. Corporation*, 34 L. J., Q. B. 23.

(*y*) Tidd, 9th ed. 529; 2 Ld. Raym. 789. See *Moscati* v. *Lawson*, 1 H. & W. 321: *Cleworth* v. *Pickford*, 7 M. & W. 531, per *Abinger*, C. B.: *Philpot* v. *Thompson*, 2 D. & L. 18: *Harris* v. *Reynolds*, 7 Q. B. 71: see Ch. CXXXVII.

(*z*) *Cocker* v. *Tempest*, ubi supra.

(*a*) Ib.

(*b*) *Marshall* v. *Marshall*, 5 P. D. 19, 20, where the respondent to a divorce petition sought to stay the proceedings on the ground that the petitioner was bound by deed not to present the petition, and the Court refused the stay on the ground that the objection should be raised by way of defence. The Court subsequently held the defence a good one.

(*c*) *Harries* v. *Thomas*, 2 M. & W. 32: *Moscati* v. *Lawson*, 1 H. & W. 572.

(*d*) *Gibbs* v. *Ralph*, 14 M. & W. 394; 15 L. J., Ex. 7.

(*e*) Cf. *Cocker* v. *Tempest*, ubi supra.

(*f*) This section is not repealed.

question in the action, the Court may, on an application for that purpose, stay any further proceedings (*g*). The application should be made by summons returnable before a master. A compromise may be entered into either by agreement between the parties, or by an order of Court founded on such agreement. In the latter case, if the order was obtained by mistake or fraud, the Court will refuse to enforce it (*h*) if the mistake or fraud is clearly shown (*i*); but in the case of an agreement, the question should not be determined on the hearing of the application, but the party seeking to set it aside should be left to bring an action for that purpose, proceedings in the original action being stayed meanwhile (*k*). The Court has power to enforce a compromise on motion (*l*), but only as against the parties to the action (*m*). A compromise may be enforced by action (*n*). A trustee in bankruptcy has power to compromise an action (*o*). As to compromise where infants are parties, *see In re Birchall*, 16 Ch. D. 41; 44 L. T. 193: *Gray* v. *Paul*, 46 L. J., Ch. 818; 25 W. R. 874: *Norman* v. *Strains*, 6 P. D. 219. When married women are parties, *see Wall* v. *Rogers*, L. R., 9 Eq. 58; 39 L. J., Ch. 204, *post*, *Vol.* 2, *Ch. CI.* As to the right of a solicitor to object to a compromise effected with a view to deprive him of his costs, *see The Hope*, 8 P. D. 144, *ante*, p. 165.

After injunction, &c.

After Injunction, &c.]—By the *Com. Law Proc. Act*, 1852, s. 226 (*p*), "In case any action, suit or proceeding in any Court of law or equity shall be commenced, sued, or prosecuted in disobedience of and contrary to any writ of injunction, rule, or order of either of the superior Courts of law or equity at Westminster, or of any Judge thereof, in any other Court than that by or in which such injunction may have been issued, or rule or order made, upon the production to any such other Court or Judge thereof of such writ of injunction, rule, or order, the said other Court (in which such action, suit, or proceeding may be commenced, prosecuted, or taken), or any Judge thereof, shall stay all further proceedings contrary to any such injunction, rule, or order (*q*); and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes: Provided always, that nothing herein contained shall be held to diminish, alter, abridge, or vary the liability of any person or persons commencing, suing, or prosecuting any such action, suit,

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(*g*) *Eden* v. *Naish*, 7 Ch. D. 781, 786; 47 L. J., Ch. 325: *Hakes* v. *Hodgkins*, cited 7 Ch. D. 784: *Scully* v. *Lord Dundonald*, 8 Ch. D. 659: *Pryer* v. *Gribble*, L. R., 10 Ch. 534, 542. See *Dixon* v. *Evans*, L. R., 5 H. L. 606; 42 L. J., Ch. 139.

(*h*) *Att.-Gen.* v. *Tomlin*, 7 Ch. D. 389: *Mullins* v. *Howell*, 11 Ch. D. 763.

(*i*) *Davis* v. *Davis*, 13 Ch. D. 861; 49 L. J., Ch. 241.

(*k*) *Gilbert* v. *Emdean*, 9 Ch. D. 259.

(*l*) *Scully* v. *Lord Dundonald*, supra: *In re Gaudet Frères and Co.*, 12 Ch. D. 882.

(*m*) *Heasman* v. *Pearse*, 29 L. T. 171.

(*n*) *Smith* v. *Shirley*, 44 L. J., Ex. 29; 32 L. T. 234.

(*o*) *Leeming* v. *Lady Murray*, 13 Ch. D. 123.

(*p*) Not repealed.

(*q*) See *Pearce* v. *Robins*, 26 L. J., Ex. 183: *Mortimore* v. *Soares*, 5 Jur., N. S. 574; 1 El. & El. 399; 28 L. J., Q. B. 133. A Court of common law would not stay proceedings in accordance with an injunction before this Act. See *Foreman* v. *Jeyes*, 5 B. & Ad. 835.

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or proceeding contrary to any injunction, rule, or order of either of the Courts aforesaid, to any attachment, punishment, or other proceeding to which any such person or persons are, may, or shall be liable in cases of contempt of either of the Courts aforesaid, in regard to the commencing, suing, or prosecuting such action, suit, or proceeding."

Where the Court of Chancery had issued an order for an injunction restraining a party from bringing an action, a Court of common law would enforce such order by staying proceedings under this sect., although no writ of injunction had been actually issued (*q*).

In action in respect of a claim for goods taken in execution under process of County Courts.

In Action in respect of a Claim to Goods taken in Execution under Process from County Courts.]—By 30 & 31 *V. c.* 142 (The County Courts Act, 1867), *s.* 31, "If any claim shall be made to or in respect of any goods or chattels taken in execution (*r*) under the process of a County Court, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar of the Court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the said Court as well the party issuing such process (*s*) as the party making such claim (*s*), and the Judge of the Court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and shall also adjudicate between such parties, or either of them, and the high bailiff, with respect to any damage (*t*) or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and such orders shall be enforced in like manner as any order in any suit brought in such Court, and shall be final and conclusive as between the parties, and as between them, or either of them, and the high bailiff, unless the decision of the Court shall be in either case appealed from, and upon the issue of the summons any action which shall have been brought in any Court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed" (*u*). The application to stay under this section should be made promptly (*v*), and, at all events, before issue joined (*v*). On the hearing of the interpleader the County Court Judge has power to adjudicate upon any claim for damages made by the claimant, and any action in respect of such damage whether so adjudicated upon or not will be stayed (*t*). The fact that the goods have been sold and are no longer under the control of the County Court makes no difference (*r*). An action against the purchaser of the goods will not be stayed under this

(*q*) *Cobbett* v. *Ludlam*, 25 L. J., Ex. 25.

(*r*) *Hills* v. *Renny*, infra.

(*s*) Ibid.

(*t*) *Death* v. *Harrison*, L. R., 6 Exch. 15; 40 L. J., Ch. 26: *Hills* v. *Renny*, 5 Ex. D. 313; 49 L. J., Ex. 710; 31 W. R. 328.

(*u*) This Act repeals the former enactment on this subject, 9 & 10 V. c. 95, s. 118. See the following cases decided on this enactment: *Mann* v. *Buckerfield*, 2 L. M. & P. 60, per *Erle*, J.: *Tinkler* v. *Hilder*, 4 Ex. 187; 18 L. J. 429: *Jessop* v. *Crawley*, 15 Q. B. 212; 19 L. J., Q. B. 319: *Mercer* v. *Stanbury*, 25 L. J., Ex. 316: *Chater* v. *Chignell*, 15 Q B. 217; 19 L. J., Q. B. 520: *Jones* v. *Williams*, 28 L. J., Ex. 324.

(*v*) *Ward* v. *Jackson*, L. R., 6 Exch. 18, n. (1).

section (*x*). The high bailiff may set up the interpleader proceedings by way of defence instead of applying to stay the action (*y*). *See* 19 & 20 *V. c.* 108, *s.* 72. As to the claimant depositing the value of the goods, &c. with the bailiff in order to prevent a sale of them, *see* 19 & 20 *V. c.* 108, *s.* 72: *C. C. R.* 1875, *Ord. XXI. r.* 1: and *Davies* v. *Wise*, 7 Q. B. D. 425; 40 L. J., Q. B. 651; 45 L. T. 26; 29 W. R. 804. As to the right of appeal, *see sect.* 68.

See the London Small Debts Act, 15 & 16 *V. c.* lxxvii, and County Courts Act, 1867, *s.* 35.

In penal actions by common informers.

In Penal Actions by Common Informers.]—In all suits by a common informer, within stat. 21 *J.* 1, *c.* 4, commenced in the High Court of Justice, the proceedings may be stayed (*z*). So, if an action on a penal statute be brought when the proper mode of proceeding is by information and conviction before a justice of peace, the Court will stay the proceedings (*a*). In a *qui tam* action for penalties, the Court refused to stay proceedings, upon a suggestion by affidavit that an Act of Parliament was likely to be passed, the effect of which would be to relieve the defendant from the penalties (*b*). In some cases actions for penalties may be stayed if the plaintiff is guilty of wilful delay in proceeding (*c*). As to staying proceedings in debt *qui tam*, where the consent of the Attorney-General has not been obtained, *see Hollis* v. *Marshall*, 2 H. & N. 755; 27 L. J., Ex. 235. As to compounding penal actions, *see post*, p. 440.

Pending criminal proceedings.

Pending Criminal Proceedings.]—The Court will not compel a plaintiff to elect between an action and an indictment for the same cause (*d*). In an action commenced before the 1 & 2 *V. c.* 110, by bailable process, the Court refused to stay proceedings until after the trial of an indictment for perjury founded on the plaintiff's affidavit of debt (*e*). So, in an action for money won at play, the Court refused to stay the proceedings until after the trial of an indictment against the parties for a cheat (*f*). So, after verdict for the plaintiff and judgment, the Court refused to stay proceedings until after a trial of an indictment for perjury then pending against the plaintiff's witnesses (*g*). But where the plaintiff, who was indicted for felony, brought an action to recover money he had deposited with a banker, which was surmised to be the produce

(*x*) *Hills* v. *Renny*, supra.

(*y*) *Death* v. *Harrison*, supra: cp. *Davies* v. *West*, 7 Q. B. D. 425.

(*z*) See *Shipman* v. *Henbest*, 4 T. R. 109: *Jeffrey* v. *Coles*, Willes, 634: *Curlewis* v. *Dudley*, 2 Ld. Raym. 872: *Smith* v. *Potter*, 1 Str. 415: *White* v. *Boot*, 2 T. R. 274: *Leigh* v. *Kent*, 3 T. R. 363; 1 Saund. 312 *a*.

(*a*) See the clauses in the Excise and Customs Acts. See *Petrie* v. *White*, 3 T. R. 5: *Sutton* v. *Bishop*, 4 Burr. 2287: *Taylor* v. *Vergette*, 7 H. & N. 142; 30 L. J., Ex. 400.

(*b*) *Grant* v. *Ridley*, 5 M. & G. 201; 6 Sc. N. R. 176.

(*c*) *Taylor* v. *Vergette*, 7 H. & N. 142; 30 L. J., Ex. 400: *Petrie* v. *White*, 3 T. R. 5: *Guest* v. *Caldicott*, 45 L. T. 609.

(*d*) *Jones* v. *Clay*, 1 B. & P. 191: cp. *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561, 565; 50 L. J., Q. B. 329: *Ex p. Ball, In re Shepherd*, 10 Ch. D. 667; 48 L. J., Bk. 57.

(*e*) *Johnson* v. *Wardle*, 3 Dowl. 550. And see *Rex* v. *Boston*, 4 East, 572.

(*f*) *Anon.*, 2 Salk. 649.

(*g*) *Warwick* v. *Bruce*, 4 M. & Sel. 140. See also Lofft, 436: *Rex* v. *Tremearn*, 5 B. & C. 761; 8 D. & R. 590.

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of the felony, the Court of Common Pleas stayed the proceedings in the action until after the trial of the indictment (*h*). In an action for slander, imputing felony, where the plaintiff obtained a verdict, the Court refused to stay judgment or execution, although it appeared that the plaintiff had since been convicted of the felony imputed to him; it appearing, also, that the defendant was examined as a witness against him (*i*).

Pending appeal, &c.

Pending Appeal, &c.]—As to staying proceedings on a judgment or order pending an appeal, *see post, Vol.* 2, *Ch. LXXXVI.*, "*Appeal.*"

Where judgment was obtained in the Court of Exchequer in an action on a foreign judgment, the Court refused to prevent the plaintiff from charging the defendant in execution, though it was sworn that an appeal was pending in the foreign Court: and *Parke*, B., said, that it would be time enough to apply when the judgment of the foreign Court was reversed (*k*).

Staying proceedings pending rule nisi, &c.

Pending a Rule Nisi, &c.]—As to this, *see post, Vol.* 2, *Ch. CXXII.* As to proceedings being stayed after an order for particulars, *see post*, p. 384.

In actions by outlaws and alien enemies.

In Actions by Outlaws and Alien Enemies.]—Before the Judicature Acts the Court stayed the proceedings after judgment recovered and affirmed on error, on the defendant bringing the debt and costs into Court, the plaintiff having been outlawed in another action, as the defendant, if he paid the money to the plaintiff, might have to pay it over again to the Crown (*l*). But the Court refused to stay proceedings upon the ground that the plaintiffs after verdict had become alien enemies (*m*).

In other cases.

In other Cases, &c.]—The Court may in clear cases stay proceedings in an action on the ground that the action does not lie (*n*). Where an ejectment was brought to recover property in the possession of the Crown, the Court, at the instance of the Crown, stayed the proceedings (*o*).

The Court will not, in general, stay the trial of the issues of fact until an appeal on a question of law is decided (*p*).

On transfer of bill of exchange pending the action.

Where the plaintiff, in an action on a bill of exchange, deposited the bill as a security with another person after action brought, giving him at the same time notice of the action, the Court held, that this was no ground for staying proceedings; but intimated that, if the person with whom the bill was deposited had brought

(*h*) *Deakin* v. *Praed*, 4 Taunt. 825.

(*i*) *Symons* v. *Blake*, 2 C. M. & R. 416.

(*k*) *Alison* v. *Furnival*, 3 Dowl. 202; 1 C. M. & R. 277.

(*l*) *Grant* v. *Bryant*, 6 M. & Sel. 347.

(*m*) *Vanbrynen* v. *Wilson*, 9 East, 321. But see *De Lunville* v. *Phillips*, 2 W. R. 97.

(*n*) See Ord. XXV. r. 4, ante, p. 325. This was otherwise formerly. *Sherwood* v. *Benson*, 4 Taunt. 631; *Smith* v. *Curtis*, 2 Dowl. 223: *Smith* v. *Rolt*, 2 Dowl. 62.

(*o*) *Doe* d. *Legh* v. *Roe*, 8 M. & W. 579. It would seem that no affidavit is necessary in support of such an application, but that it is sufficient if it is made by the Attorney-General appearing on behalf of the Crown.

(*p*) *In re J. B. Palmer's Application*, 22 Ch. D. 88; 52 L. J., Ch. 224.

a second action upon it, they would interfere to stay that action (*q*).

Where adverse claims, &c.

As to staying proceedings in the case of adverse claims, *see post, Vol.* 2, *Ch. CXXI.*, "*Interpleader*" (*r*).

Publication by order of Parliament.

As to staying proceedings against persons for publication of papers printed by order of Parliament, *see* 3 & 4 *V. c.* 9; and *Stockdale* v. *Hansard*, 11 Ad. & E. 297.

Auditâ querelâ.

The Court or Judge will stay proceedings where formerly a party was entitled to relief upon an *auditâ querelâ* (*s*), *see post, Ch. LXXIV.*

Solicitor uncertificated.

As to staying the proceedings where the plaintiff's solicitor is uncertificated, *see ante*, p. 85.

Actions against companies.

As to staying proceedings against companies pending winding-up proceedings, *see post, Vol.* 2, *Ch. XCII.*, "*Actions by and against Companies.*"

Executors and administrators.

As to staying proceedings in actions against executors or administrators after an administration order has been made, *see post, Vol.* 2, *Ch. XCVII.*, "*Actions by and against Executor and Administrator.*"

As to staying proceedings in an action by a foreign republic until an officer is named to give discovery, *see Republic of Costa Rica* v. *Erlanger*, 1 Ch. D. 171; 45 L. J., Ch. 145.

On bankruptcy.

As to staying proceedings on bankruptcy under sect. 10, sub-sect. 2, of the *Bankruptcy Act*, 1883, *see post, Vol.* 2, *Ch. CII.*, "*Actions by and against Bankrupts*," *&c.*

Action against an ambassador.

As to staying proceedings in an action against an ambassador, *see Taylor* v. *Best*, 14 C. B. 487; 23 L. J., C. P. 89: *Magdalena Steam Co.* v. *Martin*, 2 El. & El. 94; 28 L. J., Q. B. 310.

What a breach of a rule staying proceedings.

What is a Breach of an Order staying Proceedings.]—A motion to enlarge another rule in the cause is a breach of a rule staying proceedings (*t*). So is giving a notice to discontinue (*u*); or, it seems, obtaining an order to arrest the defendant (*x*). But not so countermanding a notice of trial (*y*).

Waiving order.

An order staying all further proceedings in the cause "until the further order of the Court," cannot be waived by a notice of abandonment of such order from the defendant (*z*).

An order staying proceedings does not prevent a defendant from moving to dismiss the action for want of prosecution (*a*).

(*q*) *Marsh* v. *Newell*, 1 Taunt. 109. And see *Colombies* v. *Slim*, 2 Chit. Rep. 637.

(*r*) See *Hogkinson* v. *Travers*, 2 D. & R. 409; 1 B. & C. 257, where a commission of bankruptcy issued against A., and afterwards a joint commission against A. and B., and the assignees under the first commission brought an action against C., pending which there was a petition to supersede the first commission.

(*s*) And see *Ouchterlony* v. *Gibson*, 6 Sc. N. R. 577; 5 M. & W. 579; 1 D. & L. 1.

(*t*) *Wyatt* v. *Prebble*, 5 Dowl. 268.

(*u*) *Murray* v. *Silver*, 3 D. & L. 26; 1 C. B. 638; 14 L. J., C. P. 236.

(*x*) *Ball* v. *Stanley*, 6 M. & W. 396; 8 Dowl. 344.

(*y*) *Mullins* v. *Ford*, 2 B. C. 19.

(*z*) *Wilson* v. *Uphill*, 5 C. B. 245.

(*a*) *La Grange* v. *McAndrew*, 4 Q. B. D. 210; 48 L. J., Q. B. 315: *Gould* v. *Twine*, 43 L. J., Ch. 381; 30 L. T. 243; 22 W. R. 398: *Jackson* v. *Ivimey*, L. R., 1 Eq. 693.

CHAPTER XXXI.

PARTICULARS.

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Sect. 1. *In ordinary Cases.*

PART V.

Indorsement of, on writ.

Particulars of Claim—Indorsement.]—The plaintiff is required to indorse on his writ of summons "a statement of the nature of the claim made or of the relief or remedy required in the action" (*a*). Forms of indorsement for this purpose are provided by the Rules of the Supreme Court (*b*), and the subject is treated of *ante*, p. 221.

Further particulars of claim indorsed on writ.

Further particulars of the claim indorsed on the writ will, in some cases, be ordered at the defendant's instance after appearance (*c*); but as a general rule where the indorsement on the writ is not sufficient, a statement of claim, and not further particulars, should be applied for and ordered (*d*).

In pleadings or referred to therein.

Particulars in or referred to in the Pleadings.]—By *R. of S. C., Ord. XIX. r.* 6, "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading; provided that, if the particulars be of debt, expenses or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading."

If the particulars required by the rule are not given in the pleading an order may be obtained compelling the party to amend his pleading (*e*). In some cases the plaintiff will not be com-

(*a*) R. of S. C., Ord. II. r. 1, ante, p. 221.

(*b*) App. A. See Chit. F., pp. 66 *et seq.*

(*c*) *Cotton* v. *Housman*, W. N. 1876, 22: *Barker* v. *Wood*, Id. 56: *Godden* v. *Corsten*, 5 C. P. D. 17; 49 L. J., C. P. 112, particulars of credits.

(*d*) *Schomberg* v. *Zoebelli*, W. N. 1876, 106. See Ord. XIX. r. 7, post, p. 386.

(*e*) *Seligmann* v. *Young*, W. N. 1884, 93; Bitt. Ch. Cas. 154.

pelled to give the particulars required by the rule until after he has obtained discovery of documents (*f*).

Of claim, &c. stated in pleadings.

Particulars of Statements in Pleadings.]—Particulars of statements contained in the pleadings, whether claim, defence, or set-off or counterclaim, are now frequently ordered when such statements are not sufficiently definite or explicit, or the pleading does not contain such details as it is proper that the other party should know in order that he may not be taken by surprise at the trial (*g*). This course is very convenient, and much more so than ordering the amendment of the pleading itself in all cases where all that is really required is the details of facts which, for the sake of conciseness and convenience, are stated generally and collectively in the pleading (*g*). When, however, the pleading is itself vague or indefinite, an amendment should, it is submitted, be ordered, and not merely particulars (*h*).

Of slander.

In an action for slander particulars as to when, where and to whom the words were spoken have been refused (*i*); but they have been ordered when the claim was that the defendant had caused and procured the words to be spoken by a third party (*k*).

Of credits.

The plaintiff may be ordered to give particulars of items with which he credits the defendant in his claim (*l*).

Of defence.

A defendant may be ordered to give particulars under his defence, set-off or counterclaim (*m*). Where, in an action for libel, the defendant pleads a general defence of justification, he will be ordered to give particulars of the facts on which he relies (*n*). There is a distinction, with regard to ordering particulars, between cases which are properly common law actions, where a sum of money is claimed, and chancery actions, where an account is asked, and in which full particulars are not necessary in order to enable the defendant to frame his defence, and in which they will not be ordered (*o*).

Under former practice.

The cases as to particulars under the old system of practice and pleading are no longer binding (*p*), but as they are still occasionally referred to it may be useful to refer briefly to some of them. Thus, in covenant for not repairing, &c., an order was made for a particular of the non-repairs, &c. (*q*). So, in an action by vendee against vendor, where it was stated in the declaration that the abstract of title delivered was "insufficient,

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(*f*) *Whyte* v. *Ahrens* (C. A.), 26 Ch. D. 717; 32 W. R. 649.

(*g*) See *The Rory*, 7 P. D. 117, per *Lord Coleridge*, C. J., at p. 120, per *Brett*, L. J., at p. 121: *S. C.*, 51 L. J., P. 73.

(*h*) See per *Bramwell*, L. J., *Phillips* v. *Phillips*, 4 Q. B. D. at p. 130; 39 L. T. at p. 557.

(*i*) Per *Quain*, J., *Restell* v. *Steward*, W. N. 1881, 231; per *Denman*, J., *Winyard* v. *Cox*, W. N. 1876, 106.

(*k*) *Bradbury* v. *Cooper*, 12 Q. B. D. 94; 32 W. R. 11.

(*l*) *Godden* v. *Corsten*, 5 C. P. D. 17; 49 L. J., C. P. 112.

(*m*) Per *Lush*, J., W. N. 1875, 220.

(*n*) *Stainbank* v. *Beckett*, W. N. 1879, 203, C. A. See post, p. 384, n. (*g*).

(*o*) *Augustinus* v. *Nerinckx*, 16 Ch. D. 13; 43 L. T. 458; 29 W. R. 225, C. A. In the Probate Division particulars of acts of undue influence (*Lord Salisbury* v. *Nugent*, 9 P. D. 23; 53 L. J., P. 23), and of unsound mind (*Hawkinson* v. *Barningham*, 9 P. D. 62; 53 L. J., P. 32), have been refused.

(*p*) See per *Lord Coleridge*, C. J., *Godden* v. *Corsten*, 5 C. P. D. at p. 18.

(*q*) *Sowter* v. *Hitchcock*, 5 Dowl. 724. See *Jones* v. *Lee*, 1 H. & N. 189; 25 L. J., Ex. 241.

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defective, and objectionable," the Court obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact, but not of objections in point of law (*r*). So, in an action by vendee against the auctioneer to recover back his deposit, because the conditions of the sale had not been complied with, the defendant might, if necessary, have a particular of the matters of fact on which the plaintiff sought to rely (*s*), though not of objections on points of law (*t*). So, in an action against a clerk by his former master for enticing away plaintiff's customers, contrary to an agreement, the declaration naming two of those customers, but also stating that there were divers others, without naming them, *Patteson*, J., on an affidavit that the defendant would be prejudiced in his defence, and might be taken by surprise at the trial, unless the names of the other customers were given, made an order on plaintiff to give their names, and gave defendant time to plead after the delivery of the particulars (*u*). In an action for the breach of a warranty of a horse, the Court refused an order for particulars of the unsoundness complained of (*x*). But wherever the particulars of the cause of action were fully specified in the declaration, any further particulars would not be granted (*y*). In actions of trespass, trover, or case, the defendant could not as a matter of course obtain an order for particulars of demand. But, under circumstances, a Judge would even in these actions compel a delivery of particulars, if an affidavit were produced, clearly showing that the defendant did not know for what the plaintiff was proceeding (*z*), and other special grounds and circumstances showing that it was necessary the defendant should have some more specific information than was disclosed by the declaration (*a*). Thus, in an action against the sheriff for an escape, the plaintiff might be compelled to give a particular of the time and place of the escape (*b*). In an indictment for a nuisance against members of a gas company, for throwing poisonous matter into the Thames, and sinking barges, and making erections in the river, the Court ordered the prosecutor to give particulars of the nuisance intended to be proved (*c*).

(*r*) *Collett* v. *Thompson*, 3 B. & P. 246.

(*s*) *Squire* v. *Todd*, 1 Camp. 293.

(*t*) *Roberts* v. *Rowlands*, 3 M. & W. 543; 6 Dowl. 553.

(*u*) *Stapleton* v. *Devoy*, Q. B. 8th Dec. 1838, coram *Patteson*, J., at chambers. See 11 Price, 19. But see *Gale* v. *Reed*, 8 East, 80: *Retallick* v. *Hawkes*, 1 M. & W. 573: *Stannard* v. *Ullithorne*, 3 Bing. N. C. 326; 3 Scott, 771.

(*x*) *Pylie* v. *Stephen*, 6 M. & W. 813; 8 Dowl. 771.

(*y*) *Brooke* v. *Farlar*, 3 Bing. N. C. 291; 5 Dowl. 361: *Dawes* v. *Anstruther*, 5 Dowl. 736; 2 M. & W. 817.

(*z*) *Snelling* v. *Channell*, 5 Dowl. 80: cp. *Thompson* v. *Birkley*, 47 L. T. 700; 31 W. R. 230.

(*a*) *Holrock* v. *Lediard*, 10 M. & W. 677; 2 Dowl., N. S. 277: *Luck* v. *Handley*, 4 Ex. 486. See *Early* v. *Smith*, 12 Ir. Com. Law Rep. App. xxxv. Q. B., where in an action of slander it was ordered that the plaintiff should furnish a statement of the occasions on which the words were spoken.

(*b*) *Webster* v. *Jones*, 7 D. & R. 774: *Davis* v. *Chapman*, 1 N. & P. 699; 6 A. & E. 767.

(*c*) *Rex* v. *Curwood*, 5 N. & M. 369. In an action for malicious prosecution, alleging, as special damage, that divers persons, named in the declaration, had left off dealing with the plaintiff, *Coltman*, J., on summons, ordered the plaintiff to give the addresses of the persons named within a week, or that, in default thereof, the names of those whose addresses were not given should be struck out of the declaration. *Fell* v. *Rosling*, 6 April, 1839, at chambers.

In an action for tort for an injury to the person by careless driving particulars were ordered as to the nature and extent of the injuries or of the claim for compensation, on an affidavit showing reasonable ground for the application (*d*).

To an action for calls commenced by a joint-stock insurance company, and continued by the official manager under the Winding-up Acts, the defendant pleaded that he was induced to become the holder of the shares by the fraud of the company, and that on notice of the fraud he had repudiated and disclaimed the shares. Upon affidavits of the official manager and secretary of the company that they had no knowledge of any fraud, or of any act or circumstance to justify the plea or the allegation of repudiation, the Court ordered the defendant to give particulars in writing of the acts of fraud relied upon, and of the acts constituting the repudiation and disclaimer (*e*). In an action on a life-policy, a condition of which was that the person whose life was insured had not been afflicted with certain specified disorders or any other complaint, the defendants pleaded that the assured, at the time of the policy, had symptoms of disease of the stomach: it was held that the defendants must deliver particulars under this plea (*f*).

So, in an action for libel where the defendant pleaded generally that the words were true, particulars of the facts and matters on which he relied in justification were ordered (*g*). So, also, in an action for slander of title (*h*). So particulars were ordered of a plea of exoneration and discharge (*i*).

At what time, and how obtained.

At what Time, and how obtained—On what Terms, &c. (*k*).]—It is discretionary with the master to make an order at any time before the trial (*k*). But in general an application for particulars of the plaintiff's claim will be refused after defence delivered, unless under special circumstances. The mode of obtaining the particulars is, *by taking out a summons* (*l*) *for that purpose, and obtaining an order thereon.* The application should in general be included in the summons for directions (*see ante*, p. 335).

In some cases an affidavit may be required in support of the application (*k*). Thus in an action for seduction of the plaintiff's daughter, particulars of times and places were refused unless the defendant would make an affidavit denying the seduction (*k*). *If*

See note (*u*), supra. It may be useful to observe, that the fact that the party may obtain, or even has obtained, by interrogatories the same information as he seeks to obtain by particulars, is no answer to the application for the latter, since the answer to the interrogatories does not bind the party at the trial as the particulars do.

(*d*) *Wicks* v. *Macnamara*, 27 L. J., Ex. 419: *R.* v. *Flower*, 7 Dowl. 665. See *Brown* v. *Great Western R. Co.*, 26 L. T. 398; 20 W. R. 385, Ex.

(*e*) *M'Creight* v. *Stevens*, 1 H. & C. 454; 31 L. J., Ex. 455.

(*f*) *Marshall* v. *The Emperor Life Assurance Society*, L. R., 1 Q. B. 35; 35 L. J., Q. B. 89.

(*g*) *Jones* v. *Bewicke*, L. R., 5 C. P. 32. See *Stainbank* v. *Beckett*, W. N. 1879, 203, C. A.: *Colonial Assurance Corp.* (*Limited*) v. *Prosser*, W. N. 1876, 55; Bitt. No. cclxxii: *Gourley* v. *Plimsoll*, L. R., 8 C. P. 362: *Restell* v. *Steward*, W. N. 1875, 219.

(*h*) *Wren* v. *Weild*, L. R., 4 Q. B. 213.

(*i*) *Coombe* v. *Stephenson*, 31 L. T. 585; 23 W. R. 137, Q. B.

(*k*) *Thompson* v. *Birkley*, 47 L. T. 700; 31 W. R. 230.

(*l*) See form of summons, Chit. Forms, p. 217.

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either party be dissatisfied with the master's decision, he may of course appeal. The order against the plaintiff generally is, that the plaintiff's solicitor or agent shall deliver to the defendant's solicitor or agent the particulars required, and that in the meantime all further proceedings in the action be stayed (*m*).

Time for pleading after delivery.

By *R. of S. C., Ord. XIX. r.* 8, "The party at whose instance particulars have been delivered under a Judge's order shall, unless the order otherwise provides, have the same length of *time for pleading after the delivery of the particulars* that he had at the return of the summons. Save as in this rule provided, an order for particulars shall not, unless the order otherwise provides, operate as a *stay of proceedings*, or give any extension of time."

Terms imposed.

The terms taking short notice of trial if necessary, will sometimes be imposed on the defendant by the order, unless the justice of the case requires that such term be dispensed with. Sometimes the master will impose other terms on the defendant. Even though the defendant may have had particulars delivered to him before action, still the master may make plaintiff re-deliver it as particulars of demand in the action (*n*).

As to order for staying proceedings.

The order for delivery of particulars by the plaintiff in general directs that all proceedings shall be stayed until they are delivered. In such a case the plaintiff cannot take any proceedings after the service (*o*) of the order until he has delivered the particulars (*p*). Before the Judicature Acts, under the usual order the defendant could not sign judgment of nonpros, though the plaintiff neglected or refused the delivery of the particulars; neither would the Court or Judge give him liberty to sign such a judgment (*q*); and this, although the order directed the particulars to be delivered in a specified time (*r*); but under the present practice it has been held that an order staying proceedings does not preclude the defendant from applying to have the action dismissed for want of prosecution (*s*). It seems that a defendant who has obtained an order for particulars of the plaintiff's demand, with a stay of proceedings until they are delivered, may waive the delivery of such particulars, and plead or demur to the statement of claim (*t*).

As against defendant.

As against the defendant the usual form of order is that, unless the particulars be delivered within a stated time, he be precluded from giving evidence of the defence or statement under which they are ordered (*u*).

(*m*) See form, Chit. Forms, p. 218.

(*n*) See *James* v. *Child*, 2 C. & J. 252; 2 Tyr. 312; 1 Dowl. 310.

(*o*) *Wilson* v. *Hunt*, 1 Chit. Rep. 647: *Jeddhell* v. ——, 4 Taunt. 253.

(*p*) *St. Hanlaire* v. *Byam*, 4 B. & C. 970: *Glover* v. *Watmore*, 5 B. & C. 769; 8 D. & R. 607: *Wilson* v. *Hunt*, 1 Chit. Rep. 647: *Cane* v. *Spinks*, 7 Dowl. 27. And see *Kirby* v. *Snowden*, 4 Dowl. 191: *Doe* d. *Roberts* v. *Roe*, 13 M. & W. 691.

(*q*) *Burgess* v. *Swayne*, 7 B. & C. 485: *Somers* v. *King*, 7 D. & R. 125. See *Johns* v. *Saunders*, 5 D. & L. 49, B. C.

(*r*) *Sutton* v. *Clarke*, 8 Bing. 165; 1 M. & Sc. 271; 1 Dowl. 259. See *Dumsday* v. *Hughes*, 2 Sc. 377.

(*s*) *La Grange* v. *McAndrew*, 4 Q. B. D. 210; 48 L. J., Q. B. 315.

(*t*) *Maunder* v. *Collett*, 3 C. B. 554. See *Johns* v. *Saunders*, 2 C. B. 79: *Wickens* v. *Cox*, 6 Dowl. 693; 4 M. & W. 67. See *Harden* v. *Harbourn*, 7 Dowl. 546.

(*u*) *Young* v. *Geiger*, 18 L. J., C. P. 43: *Ibbett* v. *Leaver*, 16 M. & W. 770.

Form of particulars.

Form of (*v*).]—The particulars must be explicit, and should in general specify items, dates and amounts, otherwise the party may be ordered to give further and better particulars. Each party is entitled to such particulars as will give him that information which a reasonable man should require respecting the matters which he is called upon to answer (*x*). What is such information must depend upon circumstances (*y*). Where the action is brought against a person only constructively liable, as a managing committeeman of a railway company, the particulars should be more explicit than in ordinary cases (*z*). Particulars as general as the statement of claim would probably be deemed a contempt of the order, and might subject the solicitor to costs (*a*). There is no objection, when an account has been already delivered, to refer to it generally in the particulars, without re-stating the items of it; but this may impose on the plaintiff the proof at the trial of such delivery (*b*). Where the action is for a balance of account, the particulars should state what the balance is (*c*). Where, in an action for an escape, the plaintiff, being ordered to give particulars as to time, &c., alleged in the particulars the escape as having taken place between the 13th of May and the 1st of November, the Court ordered a better particular (*d*). In covenant by the assignee of lessor against the lessee for not repairing, where the particulars merely stated the covenants alleged to have been broken, the Court, distinguishing between an ejectment for a forfeiture and an action of covenant, considered that, as the defendant had been in possession from a period anterior to the assignment, he must know better than the plaintiff what the breaches were, and therefore refused better particulars (*e*). As to the plaintiff being confined in his proof at the trial by the particulars delivered, *see post*, p. 386.

They must be explicit.

Need not state credit side of account.

The plaintiff will not, in general, be compelled to give any part of the credit side of the account (*f*). But it will be advisable for him in most cases to do so in the case of payments on account, in order to save expense (*g*). If the plaintiff do give the credit side of the account, or credit for payments, the Court will compel him to give the items of the credit side, or payments for which such credit has been given (*h*).

Should be intituled in the cause.

The particulars should be intituled in the Court and action, and signed in the name of the solicitor delivering them, and it should appear that they are delivered under the order directing their delivery.

(*v*) See Chit. Forms, p. 219.

(*x*) Cp. per cur., in *Rennie* v. *Beresford*, 15 M. & W. 78; 3 D. & L. 464; 15 L. J., Ex. 78: *Birkeley* v. *De Vere*, 4 D. & L. 97.

(*y*) Cp. *Archbutt* v. *Pennell*, 1 D. & L. 318: *Burnett* v. *Bouch*, 9 Car. & P. 620: *Higgins* v. *Ede*, 3 D. & L. 470; 15 L. J., Ex. 77: *Bayntun* v. *Satchell*, 17 C. B. 383.

(*z*) Cp. *Prichard* v. *Nelson*, 16 M. & W. 772.

(*a*) See *Brown* v. *Watts*, 1 Taunt. 353.

(*b*) *Hatchett* v. *Marshall*, Peake, 172; 1 Wightw. 71. See *James* v. *Child*, 2 C. & J. 252; 2 Tyr. 312; 1 Dowl. 310.

(*c*) *Mitchell* v. *Wright*, 1 Esp. 279.

(*d*) *Webster* v. *Jones*, 7 D. & R. 774. And see *Davies* v. *Chapman*, 6 A. & E. 767.

(*e*) *Sowter* v. *Hitchcock*, 5 Dowl. 724.

(*f*) *Penprase* v. *Crease*, 1 M. & W. 36: *Randall* v. *Ikey*, 4 Dowl. 682: per *Patteson*, J., in *Smith* v. *Eldridge*, 4 A. & E. 64; 5 N. & P. 408: *Beechey* v. *Hamner*, 9 Jur. 640, B. C.: *Fussey* v. *Gordon*, 13 C. B. 847.

(*g*) Cf. R. 13, T. T. 1853.

(*h*) *Godden* v. *Corsten*, 5 C. P. D. 17; 49 L. J., C. P. 112.

PART V.

Amendment of.

Amendment of.]—If the particulars be incorrect, the plaintiff cannot cure the defect by delivering fresh particulars, or otherwise, without an order, or by consent (*i*). But he may generally obtain such order to amend them on payment of costs, and such other terms as the justice of the case may require (*k*). Where the plaintiff, by mistake, gave credit to the defendant in the particulars for a sum of money, he was allowed to amend them by striking out the credit so given (*l*). An amendment has been allowed after the reference by consent of a cause (*m*), and after the return of a commission issued to examine witnesses abroad (*n*). The Courts have also allowed an amendment after verdict, and granted a new trial on payment of costs, where the particulars were defective (*o*). In one case an amendment was allowed upon terms after judgment, and after the same had been satisfied by payment (*p*).

Further and better particulars.

Further and better Particulars.]—By *R. of S. C., Ord. XIX. r. 7.* "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

If the particulars be not sufficiently explicit, the party who obtained the first order may obtain an order for further and *better particulars* (*q*). The application for such an order should be made within a reasonable time (*r*). If the particulars delivered in the action refer to a bill containing full particulars delivered before the action was brought, the master will sometimes dismiss the summons upon the plaintiff consenting to admit that a bill produced is the bill referred to in the particulars. The plaintiff's solicitor in such a case usually puts his initials to or otherwise marks the bill, in order that it may be identified at the trial.

Effect of particulars on the pleadings and evidence.

Effect of Particulars on the Pleadings and Evidence (*s*).]—The particulars are not to be considered as incorporated in the pleadings. Nor do they form any part of, nor can they have the effect of a

(*i*) *Brown* v. *Watts*, 1 Taunt. 553: *Jones* v. *Fowler*, 4 Dowl. 332: *Fromant* v. *Ashley*, 22 L. J., Q. B. 237.

(*k*) See Ord. XXVIII. r. 12, post, Ch. XLII. Cp. *Staples* v. *Holdsworth*, 6 Dowl. 714; 6 Sc. 605; 4 Bing. N. C. 717: *Collins* v. *Aaron*, 4 Bing. N. C. 233.

(*l*) *Preston* v. *Whitehart*, 5 Dowl. 720.

(*m*) *Blunt* v. *Cook*, 5 Sc. N. R. 233; 2 Dowl., N. S. 89: *Jones* v. *Correy*, 8 Sc. 515; 6 Bing. N. S. 247. But see *Morgan* v. *Tarte*, 11 Ex. 82.

(*n*) *Claparede & Co.* v. *Commercial Union Association* (C. A.), 32 W. R. 362.

(*o*) *Holland* v. *Hopkins*, 2 B. & P. 243: *Breckon* v. *Smith*, 1 A. & E. 488: *Law* v. *Thompson*, 15 M. & W. 541. See *Hodgson* v. *Steers*, 1 F. & F. 484.

(*p*) *Cannan* v. *Reynolds*, 25 L. T., Q. B. 177, *Erle*, J., dub.

(*q*) Tidd, 589, 599. See *Hurst* v. *Watkis*, 1 Camp. 69, n.: *Millwood* v. *Walter*, 2 Taunt. 224: *Brown* v. *Hodgson*, 4 Taunt. 189: *Hunter* v. *Welsh*, 1 Stark. 224: *Daces* v. *Anstruther*, 5 Dowl. 738.

(*r*) See *Irving* v. *Baker*, 15 L. J., Q. B. 322.

(*s*) Cf. *Booth* v. *Howard*, 5 Dowl. 438: *Ferguson* v. *Mahon*, 9 A. & E. 245; 1 P. & D. 194. And see *Kingham* (or *Hingham*) v. *Robins*, 5 M. & W. 94; 7 Dowl. 352.

pleading (*t*). Nor can they be looked at with a view to construe the pleadings (*u*). The plaintiff may apply them to any part of the statement of claim to which they are applicable (*x*).

Proof confined by the particulars.

At the trial, or execution of a writ of inquiry, the plaintiff will be confined in his proof by the particulars delivered (*y*), though in some cases an amendment will be allowed. Thus, in an action for goods sold and delivered, the plaintiff will not be allowed to prove a sale of other goods than those mentioned in the particulars, unless the judge at the trial allows them to be amended, which he will do if the justice of the case requires it, though sometimes he will impose terms on the plaintiff on so doing (*z*). Where the particulars stated the demand to be for goods sold and delivered to the defendant, the plaintiff was not allowed to give evidence of goods sold *by* the defendant as agent for the plaintiff, so as to recover the proceeds (*a*). But where the defendant, as plaintiff's agent, had goods from the plaintiff for sale, a particular, containing merely the item, "—— tierces of porter, £——," was held applicable to a count for money had and received (*b*). So, in an action for goods sold and delivered, where the particular was for goods bargained and sold, it was held the plaintiff might recover (*c*). Under a claim "for work and labour under an agreement," the plaintiff may recover for extras (*d*). Disbursements have been held recoverable under an item in the particulars for "cash advanced" (*e*). Where the particular was of a promissory note only, and when the note was produced at the trial it was found to be written on an improper stamp, it was ruled that the plaintiff could not recover upon a count for the consideration of it (*f*); but, under such a particular, after proving the note at the trial, the plaintiff might recover interest on it (*g*). So, it seems, the plaintiff might recover on an account stated upon the items set forth in the particulars, though the particulars do not expressly refer to the account stated (*h*). Where the particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands by the plaintiff and R., and won by the plaintiff of R., the Court held, that he could not recover the amount of his own stake, on proof that he had redemanded it from the

(*t*) See *Staples* v. *Holdsworth*, 4 Bing. N. C. 717.

(*u*) *Kilner* v. *Bailey*, 5 M. & W. 382, per *Abinger*, C. B.: *Dempster* v. *Purnell*, 4 Sc. N. R. 30; 3 M. & G. 375.

(*x*) *Russell* v. *Bell*, 10 M. & W. 340.

(*y*) As to an arbitrator being confined by the particulars, see post, Ch. XXXVI.

(*z*) As to amendments at the trial, see ante, p. 317, and post, Ch. LXV.

(*a*) *Holland* v. *Hopkins*, 2 B. & B. 243; 3 Esp. 168: *Macarthy* v. *Smith*, 8 Bing. 145.

(*b*) *Hunter* v. *Welsh*, 1 Stark. 224. And see *Brown* v. *Hodgson*, 4 Taunt. 189.

(*c*) *Best* v. *Robinson*, Ex. 30 May, 1846: *Breckon* v. *Smith*, 1 A. & E. 488.

(*d*) *Lines* v. *Rees*, 1 Jur. 593. See *Harris* v. *Montgomery*, 20 L. J., C. P. 221: *Law* v. *Thompson*, 15 M. & W. 541: *Mayor* v. *Ward*, 10 Jur. 796, Q. B.

(*e*) *Harrison* v. *Wood*, 1 M. & Sc. 536; 8 Bing. 371.

(*f*) *Wade* v. *Beasley*, 4 Esp. 7: *Brown* v. *Watts*, 1 Taunt. 353.

(*g*) *Blake* v. *Lawrence*, 4 Esp. 147.

(*h*) See *Fisher* v. *Wainwright*, 1 M. & W. 487: *Roberts* v. *Elsworth*, 10 M. & W. 653; 2 Dowl., N. S. 456; 12 L. J., Ex. 15: *Hedley* v. *Bainbridge*, 2 Q. & D. 483; 3 Q. B. 316. See Ord. XX. r. 8, ante, p. 293.

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defendant before it was paid over (*i*). In an action for damaging some goods, and not redelivering others, the particulars contained articles under each head, and mentioned one as "not redelivered," which was, in fact, redelivered, but damaged; it was held that the plaintiff could not recover in respect of it (*k*). So, under a particular for non-cultivation, the plaintiff was not allowed to go into evidence of mis-cultivation (*l*).

As the object, however, of this strictness is, that the opposite party may know what will be attempted to be proved against him at the trial, and may prepare his evidence accordingly, a mistake in the particulars, either as to the dates or other matter not calculated to deceive or mislead him, will not be deemed material (*m*); and, in general, a liberal construction should be put upon the particulars (*n*). Thus, an error in the date when a certain work was performed, not calculated to mislead, was held to be immaterial (*o*). So, where a payment made on account of the defendant to A. was stated in the particulars to have been made to B., Lord *Ellenborough* said, he should hold it to be immaterial, unless the defendant would make affidavit that he was misled by them (*p*). So, where the action was for money had and received to the use of a bankrupt, and the particulars for money had and received "to the use of the plaintiffs as assignees" (*q*). So a particular in which the plaintiffs claim for goods sold as brewers, will not prevent their recovering for goods sold as spirit-dealers (*r*). So, in an action for goods sold, where the particulars were for "chalk," and the proof was for "caulk," the variance was held immaterial (*s*). So, where in debt for rent, the plaintiff in his particulars described the premises as being in a different parish from that in which they were really situate, the mistake was held immaterial (*t*). So, where in an action for use and occupation, the particulars stated a special contract to pay 40*l.* for six months for certain premises, *Coleridge*, J., held, that the plaintiff might recover on an implied contract to pay rent for the same premises (*u*). So, in ejectment to recover premises forfeited by non-payment of rent, a variance between the amount of rent proved to be due, and the amount demanded in the particulars, was held not to be material (*x*). Where the particulars were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for want of

(*i*) *Davenport* v. *Davis*, 1 M. & W. 560. And see *Mearing* v. *Hollings*, 14 M. & W. 711; 15 L. J., Ex. 168: *Harris* v. *Montgomery*, 20 L. J., C. P. 221.

(*k*) *Moss* v. *Smith*, 1 Sc. N. R. 25; 8 Dowl. 537; 1 M. & G. 228.

(*l*) *Doe* v. *Broad*, 2 Sc. N. R. 685.

(*m*) *Lambirth* v. *Roff*, 1 M. & Sc. 597; 8 Bing. 411: *Young* v. *Fisher*, 2 Dowl., N. S. 637; 4 M. & G. 815: *Campbell* v. *Hewlett*, 16 Q. B. 258: *Gaskell* v. *Skene*, 19 L. J., Q. B. 275.

(*n*) *Hurcum* v. *Steriker*, 2 Dowl., N. S. 524: 10 M. & W. 553.

(*o*) *Millwood* v. *Walter*, 2 Taunt. 224: *Fleming* v. *Crisp*, 5 Dowl. 454. See *Parsons* v. *Wilson*, 4 Sc. N. R. 1; 3 M. & G. 445.

(*p*) *Day* v. *Bower*, 1 Camp. 69, n. See *Lambirth* v. *Roff*, 1 M. & Sc. 597; 8 Bing. 411.

(*q*) *Tucker* v. *Borrow*, 1 M. & M. 137.

(*r*) *Lambirth* v. *Roff*, 8 Bing. 411; 1 M. & Sc. 597: *Law* v. *Thompson*, 15 M. & W. 542, per *Alderson*, B.

(*s*) *Spencer* v. *Bates*, 1 Gale, 102.

(*t*) *Davies* v. *Edwards*, 3 M. & S. 380.

(*u*) *Kirkman* v. *Jervis*, 6 Dowl. 678.

(*x*) *Tenny* v. *Moody*, 10 Moore, 252; 3 Bing. 3.

a promissory note stamp, it was held, that the account stated might be proved by other evidence than the memorandum (*y*).

Omission, when cured by evidence of opposite party.

Also, although the plaintiff is confined in his proof to the items contained in his particulars, yet if it appear from the defendant's evidence that the plaintiff is entitled to recover for items not included in the particulars, he may in some cases recover for such items (*z*).

Where, the plaintiff declared upon three bills of exchange; but sought by his particulars to recover on the bill set out in the first count only, it was holden that he might give the other two bills in evidence to prove a collateral matter, namely the partnership of the defendants (*a*); but it was considered that he could not give them in evidence as a substantive cause of action (*b*). Though, according to a more recent case, he might have done so had the particulars stated that the plaintiff would rely on the whole or any part of the declaration (*b*).

Amending particulars.

As to amending the particulars, *see ante*, p. 386.

When evidence for defendant

The plaintiff's particulars of demand are evidence for the defendant of the payments credited in them (*c*).

How proved, &c.

No proof by the defendant of the order for, or delivery of, the particulars of demand is requisite at the trial, when they have been delivered by the plaintiff (*d*).

As to the effect of the plaintiff putting in the particulars of set-off as his evidence, see *Burkitt* v. *Blanshard*, 3 Ex. 89: and see further as to such particulars being evidence, *Miller* v. *Johnson*, 2 Esp. 602: *Harrington* v. *M'Morris*, 5 Taunt. 229: *Buckmaster* v. *Micklejohn*, 22 L. J., Ex. 242.

Sect. 2. *In particular Cases.*

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(a) *Under Lord Campbell's Act in Action for Death caused by Negligence, &c.*

By Lord Campbell's Act (9 & 10 *V. c.* 93, amended by stat. 27 & 28 *V. c.* 95), *s.* 4, the plaintiff is required "together with the declaration, to deliver to the defendant, or his attorney, a full

(*y*) *Singleton* v. *Barrett*, 2 C. & J. 368.

(*z*) *Hurst* v. *Watkis*, 1 Camp. 68; accord, per *Parke*, B., in *Fisher* v. *Wainwright*, 1 M. & W. 486. See *Holland* v. *Hopkins*, 2 B. & P. 243.

(*a*) *Duncan* v. *Hill*, 2 B. & B. 682.

(*b*) *Hay* v. *Fisher*, 2 M. & W. 722. See *Cooper* v. *Amos*, 2 C. & P. 267. See per *Taunton*, J., in *Breckon* v. *Smith*, 1 A. & E. 490.

(*c*) *Kenyon* v. *Wages*, 2 M. & W. 764: *Hart* v. *Middleton*, 2 C. & K. 9.

(*d*) See *Boulton* v. *Pritchard*, 4 D. & L. 117, where the further particulars only were annexed to the record. As to the effect of the defendant putting in the particulars of demand as his evidence, see *Townson* v. *Jackson*, 2 D. & L. 369; 13 M. & W. 374: *Burkitt* v. *Blanshard*, 3 Ex. 89.

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particular of the person or persons for and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered." *See Ord. XIX. rr.* 1, 4, &c. The particulars should always be given either in the statement of claim itself or separately, in which latter case they should be referred to in the pleading. In the form of claim given in the Appendix to the *R. of S. C.* 1883, they are referred to as delivered therewith (*e*). It would be no *defence* to the action that the particulars had not been delivered (*f*).

See further as to actions brought under this Act, *post, Ch. XCVII.*, "*Actions by and against Executors and Administrators.*"

(*b*) *In Actions for Infringement of Patent.*

In actions for infringement of patent.

Particulars are required in this case by "The Patents, Designs, and Trade Marks Act, 1883" (46 & 47 *V. c.* 57), which came into force on the 1st January, 1884. By sect. 29 (*g*) of that statute, it is enacted as follows:—

"(1) In an action for infringement of a patent, the plaintiff must deliver with his statement of claim, or by order of the Court or the Judge, at any subsequent time, particulars of the breaches complained of;

"(2) The defendant must deliver with his statement of defence or by order of the Court or a Judge, at any subsequent time, particulars of any objections on which he relies in support thereof;

"(3) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him (*h*);

"(4) At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered;

"(5) Particulars delivered may be from time to time amended, by leave of the Court or a Judge;

"(6) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a Judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case."

The particulars of objections delivered by the defendant cannot go beyond the defence (*i*). The objections are not part of the record so as to be incorporated with the issue raised (*k*). The defendant's

(*e*) App. C. s. 6, No. 4, Chit. F. p. 134; Form of Particulars, Id. p. 213.

(*f*) *Murphy* v. *Logan*, 10 Ir. C. L. R. 87.

(*g*) Cp. the repealed statute, 15 & 16 V. c. 83, s. 41.

(*h*) See the following cases decided on the repealed Act, 5 & 6 W. 4, c. 83, s. 5: *Russell* v. *Ledsam*, 11 M. & W. 647; 1 D. & L. 347: *Bulnois* v. *Mackenzie*, 4 Bing. N. C. 127; 6 Dowl. 215; 5 Sc. 419: *Heath* v. *Unwin*, 10 M. & W. 684: *R.* v. *Walton*, 2 Bing. 969: *Bentley* v. *Keighley*, 1 D. & L. 944; 8 Sc. N. R. 372: *Jones* v. *Berger*, Webst. Pat. Cas. 544; 5 M. & G. 208; 6 Sc. N. R. 208.

(*i*) *Macnamara* v. *Hulse*, 1 C. & M. 471.

(*k*) *R.* v. *Mill*, 10 C. B. 379; 1 L. M. & P. 695; 20 L. J., C. P. 16.

particulars of objections in support of his pleas in an action for the infringement of a patent for the manufacture of candles, after alleging that the invention was not new, stated that it had been used by the plaintiff and certain other persons who were named, "and by candle-makers generally in London and the vicinity thereof:" it was held, that this was a sufficient compliance with the former section (*l*). It seems, that if the defendant objects that the patent is not new, he should specify whether he objects to the patent generally on that ground, or to part only, and, if so, to what part (*m*). An objection that the specification does not sufficiently describe the nature of the invention, and the manner in which the process is to be performed, it seems, is sufficient (*n*). But an objection, that the patentee had not caused any specification sufficiently describing the nature of the invention to be enrolled, is not sufficiently precise (*o*). An objection, that the patent was obtained by fraud, should state the species of fraud upon which the defendant intends to rely (*p*). Where prior user is relied on, the plaintiff is entitled to particulars of the names and addresses of the persons by whom and of the places where such prior user took place (*q*). If the particulars of objections be not sufficiently specific, the plaintiff's course is to apply to a master for an order for the delivery of more specific particulars (*r*): but, if he omit to do so, he cannot object to their generality at the trial: the only question then is, whether the particulars are sufficiently large to include the objections relied on (*s*).

On the hearing before the Court, without a jury, of a suit to establish the validity of a patent, when the patent was impeached on the ground of want of novelty and prior use of the invention, *Page-Wood*, V.-C., refused to allow the defendant to introduce evidence of prior use not disclosed in the particulars, although such evidence had only come to his knowledge since they were delivered (*t*). The defendant might, however, in such a case obtain leave to amend his particulars (*t*). Where the defendant was ordered to give the names and dates of previous specifications of the plaintiff, and he gave particulars generally of all plaintiff's specifications between 1840 and 1850, it was held that this was not a compliance with the order, and that evidence of a particular specification of the plaintiff's of 1840 was properly excluded, the order

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(*l*) *Palmer* v. *Wagstaffe*, 9 Ex. 494; 22 L. J., Ex. 295. See *Palmer* v. *Cooper*, 9 Ex. 231; 23 L. J., Ex. 32, where per *Parke*, B., "it would be better that particulars of this kind should in future state that Messrs. A. & B. *at* London, instead of *of* London, used the subject of the invention."

(*m*) *Russell* v. *Ledsam*, supra: *Heath* v. *Unwin*, supra: *Fisher* v. *Dewick*, 4 Bing. N. C. 127; 5 Sc. 419. See *Cropper* v. *Smith*, 26 Ch. D. 700.

(*n*) See *Heath* v. *Unwin*, 10 M. & W. 681: *Leaf* v. *Topham*, 2 D. & L. 863. See *Jones* v. *Berger*, supra.

(*o*) *Leaf* v. *Topham*, 2 D. & L. 863.

(*p*) *Russell* v. *Ledsam*, supra.

(*q*) *Birch* v. *Mather*, 22 Ch. D. 629. See also *Morgan* v. *Fuller*, L. R., 2 Eq. 297: *Crossley* v. *Tomey*, 2 Ch. D. 533; 34 L. T. 476.

(*r*) *Bulnois* v. *M'Kenzie*, 4 Bing. N. C. 127; 6 Dowl. 215. See *Betts* v. *Walker*, 14 Q. B. 363.

(*s*) *Neilson* v. *Harford*, 8 M. & W. 806: *Hull* v. *Bollard*, 1 H. & N. 34; 25 L. J., Ex. 304: *Sykes* v. *Howarth*, 12 Ch. D. 826, where the particulars stated several sales, and particularly two to named persons, and evidence of a sale to a person not named was admitted.

(*t*) *Daw* v. *Eley*, L. R., 1 Eq. 38.

precluding the defendant from giving evidence unless its terms were complied with (*u*). Where the defendant was ordered to amend his particulars as regarded the objections to prior user, he was allowed to preface his statement of specific instances of alleged prior use with the words "amongst other instances," so as to give him an opportunity of re-amending (*x*). The form of order requiring the defendant to deliver further and better particulars should follow the words of the act (*y*).

As to the costs of an application to re-amend, *see Penn* v. *Bibby* (*x*).

The defendant may be given leave to amend his particulars; but if the application be made after issue joined, terms as to allowing the plaintiff to discontinue it may be imposed (*z*). As to the costs in case of failure of any of these objections, *see sub-s.* 6, *ante*, p. 390.

Where the plaintiff in an action for the infringement of a patent, after having given notice of trial, abandoned the action, the defendant having delivered with the pleas particulars of objections pursuant to the former section: it was held, that the defendant was entitled on taxation to his costs of preparing the particulars and of the evidence in support of them (*a*). The defendant may object to the validity of an assignment of the patent though no notice of such objection has been given (*b*).

(c) *In Action for Infringement of Copyright.*

Particulars of objections to copyright.

By the 5 & 6 *V. c.* 45 (the Act to amend the Law of Copyright), *s.* 16, "After the passing of this Act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, *the defendant, on pleading thereto*, shall give to the plaintiff a *notice in writing* of any *objections on which he means to rely* on the trial of such action; and if the nature of his defence be, that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objec-

(*u*) *Lister* v. *Leather*, 8 El. & Bl. 1004, 1030.

(*x*) *Penn* v. *Bibby*, L. R., 1 Eq. 548.

(*y*) *Flower* v. *Lloyd*, 45 L. J., Ch. 746; 35 L. T. 454.

(*z*) *Edison Telephone Co.* v. *India Rubber Co.*, 17 Ch. D. 137. See *Cropper* v. *Smith*, 26 Ch. D. 700.

(*a*) *Greaves* v. *The Eastern Counties R. Co.*, 28 L. J., Q. B. 290.

(*b*) *Chollet* v. *Hoffman*, 7 El. & B. 686; 26 L. J., Q. B. 249.

tion shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice" (*c*). The notice referred to in this section should, or at least may be, incorporated in the defence (*d*).

(d) *Of Matters in Mitigation of Damages in Actions for Libel or Slander.*

Of matters in mitigation of damages in actions for libel or slander.

By *R. of S. C., Ord. XXXVI. r.* 37, "In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence" (*e*).

See form of particulars, Chitty's Forms, p. 217.

(e) *Notice of intention to give Evidence of Apology in Action for Defamation.*

Notice of intention to give evidence of apology in action for defamation.

By stat. 6 & 7 *V. c.* 96, *s.* 1, "In any action for defamation, it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology."

The notice may still be delivered with the defence, but it is better to incorporate it in the pleading itself. See a form of plea of an apology and payment into Court under 6 & 7 *V. c.* 96, *s.* 2, to an action for a libel in a newspaper, Bull. & L., 3rd ed. 726: *O'Brien* v. *Clement*, 16 M. & W. 164: *Chadwick* v. *Herapath*, 3 C. B. 855: *Lafone* v. *Smith*, 4 H. & N. 158: *Jones* v. *Mackie*, L. R., 3 Ex. 1.

(*c*) See *Leader* v. *Purday*, 7 C. B. 4: *Boosey* v. *Davidson*, 4 D. & L. 147: *Boosey* v. *Purday*, 10 Jur. 1038, Ex.

(*d*) See per *Jessel*, M. R., *Dicks* v. *Yates*, 50 L. J., Ch. at p. 813.

(*e*) Cp. *Scott* v. *Sampson*, 8 Q. B. D. 491.

CHAPTER XXXII.

PRELIMINARY ACT IN ACTIONS FOR COLLISION.

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Preliminary act.

By *R. of S. C., Ord. XIX. r.* 28, "In actions *in any Division* for damage by collision between vessels, unless the Court or a Judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act, which shall be sealed up and shall not be opened until ordered by the Court or a Judge, and which shall contain a statement of the following particulars:

(a) The names of the vessels which came into collision and the names of their masters;
(b) The time of the collision;
(c) The place of the collision;
(d) The direction and force of the wind;
(e) The state of the weather;
(f) The state and force of the tide;
(g) The course and speed of the vessel when the other was first seen;
(h) The lights, if any, carried by her;
(i) The distance and bearing of the other vessel when first seen;
(k) The lights, if any, of the other vessel which were first seen;
(l) Whether any lights of the other vessel, other than those first seen, came into view before the collision;
(m) What measures were taken, and when, to avoid the collision;
(n) The parts of each vessel which first came into contact.

The Court or a Judge may order the preliminary act to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings; but in such case, if either party intends to rely on the defence of compulsory pilotage, he may do so, and shall give notice thereof in writing to the other party, within two days from the opening of the preliminary act."

There was under the former rules some doubt as to whether it was necessary to file a "preliminary act" in actions in the Queen's Bench Division, but this doubt is cleared up by the above rule, which expressly states that it shall be necessary.

Form of.

The form of the preliminary act should be the same as that of an ordinary pleading or particular. It should be intituled in the Court and cause, and should set forth the particulars required by the above rule.

Filing.

The preliminary act should be securely sealed up in an envelope, indorsed with the title of the Court or cause and the name and address of the solicitor of the party, and filed at the Central Office.

Amendment.

The Court will not allow the preliminary act to be amended after it has once been filed (*a*).

(*a*) *The Miranda*, 7 P. D. 185; *The Frankland*, L. R., 3 Ad. & Ecc. 511.

CHAPTER XXXIII.

SECURITY FOR COSTS (a).

In what cases (a).

In what Cases (a).]—It is in the discretion of the Court, Judge or Master to compel the plaintiff to give security for costs, and stay the proceedings in the meantime until security be given (b).

Where plaintiff resides abroad.

If the plaintiff, whether suing in an individual or in a representative (c) capacity, and whether for his own benefit or that of another (d), permanently reside abroad (e), or elsewhere, not being Ireland (f) or Scotland (f), out of the jurisdiction of the Court, a master will stay the proceedings in the action until he give security for costs (g). Where there are several plaintiffs, however, if any one of them reside in this country, security will not be ordered to be given (h), and this although that one be a bankrupt (i). The absence abroad must be of a permanent kind; and where the absence is of a merely temporary kind, as in the case of an English seaman, serving on board an English vessel (k), or on board a foreign vessel constantly sailing to and from this

Temporary absence not enough.

(a) As to security for costs in actions by limited companies, see post, Vol. 2, Ch. XCII., "*Actions by and against Companies.*" As to security for costs of appeal, see post, Vol. 2, Ch. LXXXV., "*Appeal.*" As to removal of actions of tort to County Court under sect. 10 of the County Court Act, 1867, unless security for costs be given, see post, Vol. 2, Ch. CXXXIII., "*Remission of Actions to County Courts.*"

(b) *Fletcher* v. *Law*, 5 N. & M. 351; 1 A. & E. 651; 1 H. & W. 430: *M'Cullock* v. *Robinson*, 2 N. R. 353, where the plaintiff, a bankrupt, brought an action against the defendant, an assignee, for the purpose of trying the validity of the bankruptcy. *Roper* v. *Phillips*, 3 M. & R. 84: *Bristowe* v. *Needham*, 2 Dowl. 658.

(c) *Chevalier* v. *Finnis*, 1 B. & B. 277; 3 Moore, 602: *Chamberlain* v. *Chamberlain*, 1 Dowl. 366.

(d) *Youde* v. *Youde*, 3 A. & E. 311.

(e) *Pray* v. *Eadie*, 1 T. R. 267: *Lloyd* v. *Davies*, 1 T. R. 533; 1 Price, N. R. 11: *Baker* v. *Hargreaves*, 6 T. R. 597: *De Marneffe* v. *Jackson*, 13 Price, 603.

(f) *Raeburn* v. *Andrew*, L. R., 9 Q. B. 118; 43 L. J., Q. B. 73. Ireland and Scotland are not within the rule by reason of 31 & 32 V. c. 54, s. 2, noticed post, Ch. LXXI. See sect. 5 of this Act. See accord, *White* v. *Carroll*, 8 Ir. R., C. L. 296: *Yorke* v. *M'Laughlin*, 8 Ir. R., C. L. 547, Q. B.: contra, *Clarke* v. *Croker*, 8 Ir. R., C. L. 318, C. P.: *Corner* v. *Irwin*, 8 Ir. R., C. L. 504, Ex.

(g) See per *Jessel*, M. R., 2 Ch. D. 531, *In re Percy and Kelly Nickel Co.*

(h) *D'Hormusgee* v. *Grey*, 10 Q. B. D. 13; 52 L. J., Q. B. 192: *Orr* v. *Bowles*, 1 Hodges, 23, C. P.: *Anon.*, 7 Taunt. 307: *Anon.*, 2 C. & J. 88; 1 Dowl. 300: *Doe* d. *Bawden* v. *Roe*, 1 Hodges, 315: *Thornel* v. *Rowlants*, 2 C. B. 290.

(i) *M'Connell* v. *Johnston*, 1 East, 431.

(k) *Henshen* v. *Garves*, 2 H. Bl. 383: *Ford* v. *Boucher*, 1 Hodges, 58: *Duff* v. *Hore*, 6 Ir. R., C. L. 509.

PART V.

country (*m*), he will not be compelled to give this security (*n*). As to what is a temporary absence, it perhaps may be taken as a rule that it will not be such where the plaintiff would be absent beyond the time when judgment could in the ordinary course of proceeding be obtained against him; there has not, however, been any decision to this effect (*o*). Nor will this security be required to be given on the ground of plaintiff's absence abroad, when such absence is not voluntary, and the plaintiff is an Englishman (*p*); as in the case of naval and military officers, and other persons engaged abroad in the public service (*q*). Therefore, the Court would not require it where the plaintiff was an English officer serving in South America (*r*); nor where he held the offices of port-captain and harbour-master in the Island of Barbadoes (*s*); nor where he was an officer in the Indian army (*t*); nor where he was a private in the East India Company's service in India (*u*). But the security was ordered notwithstanding the plaintiff was in the civil service of the East India Company (*x*). A plaintiff domiciled abroad will not be compelled to give security for costs whilst he is in this country (*y*); so that a foreigner, temporarily residing in this country, when the application is made, will not be compelled to give security (*y*). On the other hand, a plaintiff who

Nor is an involuntary absence.

Residence at time of application.

(*m*) *Nelson* v. *Ogle*, 2 Taunt. 253. Plaintiff, a foreigner, master of a foreign vessel, having no permanent residence in this country, being here when action brought, but having since left with his vessel on a voyage to a foreign port, was ordered to give security for costs. *Nylander* v. *Barnes*, 30 L. J., Ex. 151.

(*n*) See *Kasten* v. *Plaw*, 1 M. & P. 30: *Jacobs* v. *Stevenson*, 1 B. & P. 96: *Anon.*, 2 Chit. 152: *Cole* v. *Beale*, 7 Moore, 613: *Taylor* v. *Fraser*, 2 Dowl. 622: *Boustead* v. *Scott*, 2 Dowl. 622: *Frodshan* v. *Myers*, 4 Dowl. 280: *Le Normans* v. *The Prince of Capua*, 6 Jur. 64. A distinction has been made where the absence is temporary, between a residence abroad when the action is commenced, and going abroad afterwards and while it is pending: in the former case, *Patteson*, J., has considered that the plaintiff ought to find security, but not in the latter. See *Wells* v. *Barton*, 2 Dowl. 160. But this distinction was not recognized in the Common Pleas. See *Ford* v. *Bowker*, 1 Hodg. 58.

(*o*) See *Foss* v. *Wagner*, 2 Dowl. 499.

(*p*) *Chappell* v. *Watts*, 29 L. J., Q. B. 167.

(*q*) *Willis* v. *Garbutt*, 1 Y. & J. 511: *Durrell* v. *Matheson*, 8 Taunt. 711: *Ciragno* v. *Hassan*, 6 Taunt. 20 *Dowling* v. *Harman*, 6 M. & W. 131 8 Dowl. 165: *Oliva* v. *Johnson*, infra: *Lord Nugent* v. *Harcourt*, 2 Dowl. 578, where the plaintiff was a commissioner of the Ionian Islands.

(*r*) *O'Lawler* v. *Macdonald*, 3 Moore, 77; 8 Taunt. 736.

(*s*) *Evering* v. *Chiffenden*, 7 Dowl. 536.

(*t*) *Whittall* v. *Campbell*, 29 L. J., Ex. 326. See 21 & 22 V. c. 106.

(*u*) *Garwood* v. *Bradburn*, 9 Dowl. 1031. See *Chappell* v. *Watts*, supra, per cur.

(*x*) *Plowden* v. *Campbell*, 23 L. J., Q. B. 384.

(*y*) *Redondo* v. *Chaytor*, 4 Q. B. D. 453; 48 L. J., Q. B. 697, C. A.: *Dowling* v. *Harman*, 6 Dowl. 165; 6 M. & W. 131: *Tambisco* v. *Pacifico*, infra: *Ciragno* v. *Hassan*, 6 Taunt. 20: *Willis* v. *Garbutt*, 1 Y. & J. 511. The cases contra, *St. Leger* v. *Di* [illegible], 2 Sc. N. R. 587: *Oliva* v. *Johnson*, 5 B. & Ald. 908; 1 D. & R. [illegible]: *Naylor* v. *Joseph*, 10 Moore, 22: *Gurney* v. *Key*, 3 Dowl. 559: *Anon.*, 2 Chit. Rep. 152: *Anon.*, 8 Taunt. 737, are overruled. And see *Drummond* v. *Tillinghurst*, 16 Q. B. 740. A plaintiff subsequently returning to England cannot get the order rescinded. *Westenberg* v. *Hawtimore*, post, p. 402, n. (*u*).

goes out of the country, whilst the action is pending, to reside abroad, may be compelled to give security for costs both past and future (*z*). A foreigner in this country, though his permanent residence be abroad, will not be compelled to give this security (*a*). It is no answer to the application that the plaintiff is in the possession of money, or exchequer bills, or other floating capital in this country, sufficient to answer for the costs; but it would be so if he be in possession of chattels real, or other property, of a fixed and permanent nature and available to process by the defendant, unless, indeed, he be a foreigner (*b*). The order for security may be made although there is no defence on the merits (*c*); but where the defendant admits the plaintiff's claim (*d*), or where he admits it and relies on a counterclaim arising out of a distinct matter (*e*), the plaintiff will not be compelled to give security (*f*); but he will where the defendant relies on a set-off, although he has no other defence (*e*). A peer, whose person is privileged from arrest (*g*), or a foreign ambassador, or his servant, will not be compelled to give security for costs (*h*); although ambassadors and their suites, by a fiction of the *jus gentium*, are considered as still resident in the state from which they have been sent, and are not amenable to process in the country in which they actually reside. In two cases, foreign potentates have been compelled to give such security, in causes arising out of commercial transactions (*i*); and, in general, the rank of the plaintiff will afford no answer to the application. A foreign railway company is bound to give security for costs, notwithstanding it has personal property in England, and some of its shareholders reside in England, who are responsible to the extent of their unpaid capital (*k*).

Possession of property when an answer to application.

When no defence.

Peers, ambassadors, &c.

Foreign potentates.

Foreign corporations.

(*z*) *Massey* v. *Allen*, 12 Ch. D. 807; 48 L. J., Ch. 692: *Vale* v. *Oppert*, 30 L. T. 417; 22 W. R. 629.

(*a*) *Tambisco* v. *Pacifico*, 21 L. J., Ex. 276: *Porrier* v. *Castor*, 1 H. Bla. 106: *Anon.*, 8 Taunt. 737: *Ciragno* v. *Hassan*, 6 Id. 20: *Anon.*, 3 Moore, 78: *Dowling* v. *Harman*, 6 M. & W. 131; 8 Dowl. 165: *Durrell* v. *Mattheson*, 8 Taunt. 711. See *Drummond* v. *Tillingkurst*, 15 Jur. 384, Q. B.

(*b*) *Hamburger* v. *Poetting*, 47 L. T. 249; 30 W. R. 769, V.-C. B.: *Limerick R. Co.* v. *Fraser*, 4 Bing. 394: *Edinburgh R. Co.* v. *Dawson*, 7 Dowl. 573: *Kilkenny, &c. R. Co.* v. *Feilden*, 6 Ex. 81: *Swinburne* v. *Carter*, 23 L. J., Q. B. 16. The affidavit in answer to the application on this ground must show that the real property is available to process by the defendant; and merely stating "that the plaintiff is possessed of landed estates in the county of D., of considerable value over and above all charges affecting the same," is not sufficient, inasmuch as the property might be for all that is stated in mortgage. *Swinburne* v. *Carter*, supra. In *Hamburger* v. *Poetting*, 47 L. T. 249; 30 W. R. 769, V.-C. B. refused to compel a foreign plaintiff resident abroad in a partnership action to give security, where it was admitted that a substantial sum must ultimately be due to him.

(*c*) *Edinburgh and Leith R. Co.* v. *Dawson*, 7 Dowl. 573.

(*d*) *De St. Martin* v. *Davis & Co.*, W. N. 1884, 86; Bitt. Ch. Cas. 53.

(*e*) Per *Grove*, J., *Mapleson* v. *Masini*, 5 Q. B. D. at p. 147.

(*f*) *Winterfield* v. *Bradnun* (C. A.), 3 Q. B. D. 324; 47 L. J., Q. B. 270.

(*g*) *Ferrars* (*Earl*) v. *Robins*, 2 Dowl. 636: *Lord Nugent* v. *Harcourt*, 2 Dowl. 578. But qy., see *Lord Aldborough* v. *Burton*, 9 Legs. Obs. 171, 26 July, 1824.

(*h*) *Duke de Montellano* v. *Christin*, 5 M. & Sel. 509.

(*i*) *The Emperor of Brazil* v. *Robinson*, 5 Dowl. 522; 1 N. & P. 887: *Otho, King of Greece* v. *Wright*, 6 Dowl. 12. See *Repub. of Costa Rica* v. *Erlanger*, 3 Ch. D. 62.

(*k*) *The Kilkenny, &c. R. Co.* v. *Feilden*, 6 Ex. 81; 20 L. J., Ex. 141: *Limerick and Waterford R. Co.* v. *Fraser*, 4 Bing. 394.

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Defendant not ordered to give security.

It is only the plaintiff, or person in the position of plaintiff, who will be ordered to give security for costs (*l*), and a party to an interpleader issue who only appears on the record as a plaintiff, but is not really interested as such, will not be compelled to give security (*m*). In ordinary actions a defendant cannot be compelled to give security (*n*), nor will he be compelled to do so when he sets up a counter-claim against the plaintiff, arising out of the same matter as the claim (*o*). But in some cases, where the defendant is quasi a plaintiff, as in replevin, and he resides abroad, he may be compelled to find security for costs (*p*). So he may be compelled to do so in an interpleader issue (*q*).

Where plaintiff a bankrupt, insolvent, or pauper.

The plaintiff will not be compelled to give security for costs merely because he is a pauper or bankrupt, or insolvent, and this even in a *qui tam* action (*r*). And this rule applies where the plaintiff is trustee of a bankrupt and is suing for the benefit of the estate (*s*); or where the plaintiff is suing as executor for the benefit of the testator's estate (*t*). Nor will such security be compelled, though the plaintiff became bankrupt after action brought, unless the trustees interfere, and the action is carried on for their benefit in his name (*u*), the defendant's remedy in such a case being to plead the bankruptcy (*x*). Where, however, the plaintiff took *liquidation proceedings*, he would be compelled to give security for past as well as future costs (*y*). The security will not be compelled where a bankrupt is suing on his own behalf, for his own benefit, as for a cause of

(*l*) *In re Percy and Kelly Nickel, &c. Co.*, 2 Ch. D. 531; 45 L. J., Ch. 520, where it was held that a shareholder opposing a winding-up petition could not be compelled to give security.

(*m*) *Belmonte* v. *Aynard*, 4 C. P. D. 352; 28 W. R. 789, affirming *S. C.*, 40 L. T. 627.

(*n*) *Baxter* v. *Morgan*, 6 Taunt. 379. See *In re Percy and Kelly Nickel, &c. Co.*, supra. And see *Ford* v. *Stock*, 1 Dowl., N. S. 763.

(*o*) *Mapleson* v. *Masini*, 5 Q. B. D. 144; 49 L. J., Q. B. 423.

(*p*) *Selby* v. *Crutchley*, 1 B. & B. 505; 4 Moore, 280: *Hiskett* v. *Biddle*, 1 Hodges, 119; 3 Dowl. 634.

(*q*) See *Benazech* v. *Bessett*, 1 C. B. 313: *Williams* v. *Crosslina*, 4 D. & L. 660; 3 C. B. 956: *Melin* v. *Dumont*, W. N. 1868, 299; 17 W. R. 673: *Tomlinson* v. *Land and Finance Corpn.* (C. A.), 28 Sol. J. 734; 19 L. Jour. (Jour.) 509. See *Belmonte* v. *Aynard*, supra.

(*r*) *Ross* v. *Jacques*, 8 M. & W. 135: *Armitage* v. *Grafton*, 10 Jur. 377, B. C.; 1 B. C. R. 30: *Mylet* v. *Hawkins*, 5 Dowl. 647: *Golding* v. *Barlow*, Cowp. 24: *Field* v. *Carron*, 2 H. Bl. 27: *Gregory* v. *Elgin*, 2 C. & M. 336; 4 Tyr. 235; 2 Dowl. 259.

(*s*) *Denston* v. *Ashton*, L. R., 4 Q. B. 590; 38 L. J., Q. B. 254. But see this case disapproved of, and it is submitted rightly so, by *Pearson*, J., in *Pooley's Trustee in Bankruptcy* v. *Whetham*, 32 W. R. 1017; W. N. 1884, 176; 51 L. T. 195. Cp. *United Ports, &c. Insurance Co.* v. *Hill*, L. R., 5 Q. B. 395.

(*t*) *Sykes* v. *Sykes*, L. R., 4 C. P. 645; 38 L. J., C. P. 281.

(*u*) *Stead* v. *Williams*, 5 C. B. 528. See *Snow* v. *Townsend*, 6 Taunt. 123: *Beckham* v. *Knight*, 6 Dowl. 227; 4 Bing. N. C. 74: *Doe* v. *Blick*, 5 Sc. 714: *Webb* v. *Ward*, 7 T. R. 296: *Mason* v. *Polhill*, 2 Dowl. 61; 1 C. & M. 620; 3 Tyr. 595: *Wilkinshaw* v. *Marshall*, 4 Tyr. 993: *Denton* v. *Williams*, 8 Dowl. 123: *Taylor* v. *Montagu*, 2 M. & W. 315. And see *Doyle* v. *Anderson*, 2 Dowl. 596, where no assignee had been appointed. As to the effect of bankruptcy of a plaintiff pending action, and as to the present mode of proceeding in such a case, see Ch. CII.

(*x*) *Stead* v. *Williams*, supra.

(*y*) *Malcolm* v. *Hodgkinson*, L. R., 8 Q. B. 209: *Brocklebank* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365; 38 L. T. 489: *Re Carta Para Mining Co.*, 19 Ch. D. 457; 46 L. T. 406.

Where he sues for benefit of his trustees.

action which does not vest in his trustees (*z*), or where the action was to try the validity of the fiat against him (*a*), or the like (*b*). But, when the plaintiff becomes bankrupt (*c*), after action brought, and the cause of action vests in his trustees, and they, or the bankrupt for them, continue the action for the benefit of the estate, the Court will compel the trustees to give security for costs (*d*). So where the plaintiff in an action of trover after action brought filed a petition for liquidation, and a receiver was appointed, the plaintiff was ordered to give security for costs (*e*). If the plaintiff sue *in formâ pauperis*, he should be dispaupered before the defendant makes the application for security (*f*). So, a plaintiff will be ordered to give security for costs, if he is in insolvent circumstances, and sues not for his own benefit, but for that of assignees, to whom he has assigned his property in trust for the benefit of his creditors (*g*). It may also be taken as a general rule, that where another person is, in fact, proceeding with an action in the name of the party on the record, and that party is in a state of pauperism and insolvency, the Court will stay the proceedings until security for costs be given (*h*). Therefore, they will so stay the proceedings if the action be brought at the instigation of a third party to try a right in which he is interested (*i*). If an action brought by a tenant is really and substantially the action of the landlord, the

Where plaintiff sues for benefit of third parties.

(*z*) *Andrews* v. *Marris*, 7 Dowl. 712.

(*a*) *M'Cullock* v. *Robinson*, 2 N. R. 352. See *Kennett* v. *Duff*, 2 Smith, 523. *Roper* v. *Phillips*, 3 M. & R. 84.

(*b*) *Wray* v. *Brown*, 6 Bing., N. C. 271; 8 Sc. 557: *M'Connell* v. *Johnston*, 1 East, 431: *Minchin* v. *Hart*, 1 Chit. Rep. 215: *M'Cullock* v. *Robinson*, 2 N. R. 352: *Anon.*, 2 Taunt. 61: *Clapworthy* v. *Collier*, 2 C. & J. 631: *Beckham* v. *Knight*, 4 Bing., N. C. 74.

(*c*) *Webb* v. *Ward*, 7 T. R. 296: *Mason* v. *Polhill*, 1 C. & M. 620: *Doyle* v. *Anderson*, 2 Dowl. 596: *Heaford* v. *M'Knight*, 14 D. & R. 81; 2 B. & C. 579: *Clapworthy* v. *Collier*, 2 C. & J. 631. See *Snow* v. *Townsend*, 6 Taunt. 123.

(*d*) *Manley* v. *Mayne*, 3 M. & R. 381: *Alexander* v. *Townley*, 5 Sc. N. R. 452; 4 M. & Gr. 772: *Minchin* v. *Hart*, 1 Chit. Rep. 215. As to the present effect of the bankruptcy of a party pending suit, and the course to be pursued in such an event, see post, Vol. 2, Ch. CII.

(*e*) *Malcolm* v. *Hodgkinson*, L. R., 8 Q. B. 209; 21 W. R. 360: *Re Carta Para Mining Co.*, 19 Ch. D. 457; 46 L. T. 406. Cp. *Brocklebank and Co.* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365; 47 L. J., C. P. 321.

(*f*) *Mylett* v. *Hacker*, 5 Dowl. 647.

(*g*) *Perkins* v. *Adcock*, 14 M. & W. 808; 3 D. & L. 270; 15 L. J., Ex. 7: *Hearsey* v. *Pechell*, 7 Dowl. 437: *Elliott* v. *Kendrick*, 12 A. & E. 597; 4 P. & D. 305; 9 Dowl. 195: *Solomon* v. *Leek*, 9 Dowl. 361: *Goatley* v. *Emmart*, 15 C. B. 291; 24 L. J., C. P. 38: *The San Megantic*, 36 L. T. 183, Adm., where it was held that in these cases the onus of proving that he is solvent lies on the plaintiff. See *Pooley's Trustee*, ante, n. (*s*).

(*h*) Per *Coleridge*, J., in *Andrews* v. *Marris*, 7 Dowl. 712: *Elliott* v. *Kendrick*, 12 A. & E. 597; 9 Dowl. 195; 4 P. & D. 306. See *Solomon* v. *Leek*, 9 Dowl, 361: *Mais* v. *M'Namara*, 5 Ex. 267: *Gell* v. *Curzon*, 4 Ex. 813; 19 L. J., Ex. 225, where the action was carried on for the benefit of the solicitor: *Haggarth* v. *Wilkinson*, 12 Q. B. 851: *Parker* v. *The Great Western R. Co.*, 19 L. J., C. P. 335, where the plaintiff had assigned his claims in the action by way of mortgage, and the Court refused to order security to be given for costs: *Wray* v. *Brown*, 8 Sc. 557, where a person in insolvent circumstances sued as trustee, and security for costs was refused. And see *Morgan* v. *Evans*, 7 Moore, 344: *Day* v. *Smith*, 1 Dowl. 460.

(*i*) See per *Tindal*, C.J., in *Hearsey* v. *Pechell*, 7 Dowl. 437; 7 Sc. 477. And see *Tenant* v. *Brown*, 5 B. & C. 208.

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Court will order the latter to give security for costs (*k*). It may here be added, that, except in an action for the recovery of land, or where he is an officer of the Court, the only mode of compelling a stranger to the action to pay costs is by an application to the Court to *stay proceedings* until security for costs be given; for the Court will not, except in those cases, order a stranger to the action to pay the costs of an action, although he be substantially a party to it (*l*).

In actions by limited company.

As to security for costs in actions by limited companies, *see* 25 & 26 *V. c.* 89, *s.* 69, *post*, *Vol.* 2, *Ch. XCII.*

Lunacy or infancy of plaintiff.

Lunacy of the plaintiff is no ground for requiring security for costs (*m*). As to security for costs in an action by an infant, *see post*, *Vol.* 2, *Ch. XCIX.*

Conviction of plaintiff for felony, &c.

Formerly, if the plaintiff was convicted of felony, and under sentence, he might be ordered to give security for costs (*n*). And where the plaintiff absconded to avoid a charge of bigamy, he was ordered to give this security (*o*).

In ejectment.

As to security for costs in an action for the recovery of land, *see post*, *Vol.* 2, *Ch. CVI.*

Next friend.

The next friend of a married woman, if she be insolvent, might have been ordered to give security for costs (*p*); but not so the next friend of an infant (*q*).

Application for, when to be made.

Application for, when to be made, and how, and subsequent Proceedings.]—It cannot be made until the defendant has appeared (*r*). In the case of several defendants, one may make it after he has appeared, though the rest have not done so (*s*). It may be made at any time either before or after issue joined (*t*). The rule of *H. T.* 1853 (*r.* 22), requiring it to be made before issue joined, is abolished (*t*). It may be made whilst a summons for judgment under *Ord. XIV.* is pending (*u*). The defendant does not in general waive his right to have the security by taking any step in the cause, as by obtaining an order for time to deliver his defence, or the like, with knowledge of the ground for it (*x*). And he may apply even after an undertaking to take short notice of trial, or such notice as the plaintiff can give, or notice for a specific day (*y*). If the defendant make the application

(*k*) *Ball* v. *Ross*, 1 Sc. N. R. 217; 1 M. & Gr. 445.

(*l*) See post, Ch. LXVII.

(*m*) *Steel* v. *Allan*, 2 B. & P. 437.

(*n*) *Harvey* v. *Jacob*, 1 B. & Ald. 159: *Barrett* v. *Payne*, 9 Ex. 338; 23 L. J., Ex. 1[illegible]2. But probably this would not be done since the statute 33 & 34 Vict. c. 23.

(*o*) *Rogers* v. *Bangor*, 4 Dowl. 411. But see *Lloyd* v. *Davis*, 1 Tyr. 533.

(*p*) *Martano* v. *Mann*, 14 Ch. D. 419: cf. *In re Payne*, *Randle* v. *Payne*, 23 Ch. D. 288. See post, Vol. 2, Ch. CI.

(*q*) See post, Vol. 2, Ch. XCIX.

(*r*) *De la Preuve* v. *Duc de Biron*, 4 T. R. 697.

(*s*) See *Carr* v. *Shaw*, 6 T. R. 496.

(*t*) *Martano* v. *Mann*, 14 Ch. D. 419; 49 L. J., Ch. 501, C. A. See per *Jessel*, M. R., 14 Ch. D. at p. 421. See Ord. LXV. r. 6, post, p. 401: *Sydney, &c. Co.* v. *Bird*, 23 Ch. D. 358; 52 L. J., Ch. 410.

(*u*) *La Banque des Travaux Publiques* v. *Wallis*, W. N. 1884, [illegible]: Bitt. Ch. Cas. 52.

(*x*) See *Fletcher* v. *Lew*, 5 N. & M. 351; 3 A. & E. 551; 1 H. & W. 430: *Fry* v. *Wills*, 3 Dowl. 6: *Edinburgh and Leith R. Co.* v. *Dawson*, 7 Dowl. 573: *Dowling* v. *Harman*, 6 M. & W. 131; 8 Dowl. 165: *Otho, King of Greece* v. *Wright*, 6 Dowl. 12.

(*y*) *Edinburgh and Leith R. Co.* v. *Dawson*, 7 Dowl. 573: *Dowling* v. *Harman*, supra: *West* v. *Cook*, 1 C. B. 312; 2 D. & L. 834: *De Montellano*

after issue joined, he must, in general, do so promptly, and within a reasonable time after being first apprised of the ground for making it (*z*). The security may be applied for where the plaintiff at a late stage of the action amends his statement of claim so as to introduce a new cause of action (*a*). Where all the costs, as far as a demurrer was concerned, had been incurred, and the plaintiff then went to reside abroad, the Court thought the justice of the case would be met by letting the demurrer be argued, and, if judgment were given for the plaintiff, staying the proceedings until security was given for costs (*b*). In one case, under particular circumstances, the Court ordered the plaintiff to give security for costs after the cause was referred (*c*).

The application should be made to a master, whose decision is subject to appeal (*d*).

Demand of security.

In general, it is best in all cases, if there be time, to make a demand on the plaintiff, or his solicitor or agent, for the security, before applying to the Court or a Judge for the same.

Application for plaintiff's residence.

If the defendant grounds the application upon the fact of the plaintiff being resident abroad, and he cannot otherwise ascertain the fact, so as to make a positive affidavit of it, his course is to take out a summons, and obtain an order to be furnished with the plaintiff's residence. (*See ante*, p. 226.)

Affidavit in support of.

The affidavit in support of the application should state in what stage the proceedings are (*e*). On an application on the ground of the plaintiff's residing out of the jurisdiction, the application should show such grounds for the deponent's belief of that fact as would establish a *primâ facie* case (*f*). An affidavit, stating that the plaintiff resides out of the jurisdiction, as the deponent is informed and believes, would, it seems, be insufficient (*g*). A statement that the plaintiff is residing abroad, is *primâ facie* a sufficient statement that he is not abroad for a merely temporary purpose (*h*). The affidavit need not swear to merits (*i*).

Amount of—Time for giving security.

By *R. of S. C., Ord. LXV. r.* 6, "In any cause or matter in which security for costs is required, the security shall be of such amount,

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v. Garcias, 1 Bing. 67, per *Patteson*, J.: *Muller* v. *Gurnon*, 4 Taunt. 273: *Steel* v. *Lacy*, Id. (n.).

(*z*) *Wainwright* v. *Bland*, 2 C., M. & R. 740; 4 Dowl. 547: *Young* v. *Rishworth*, 8 A. & E. 479, n.: *Doe* v. *Brood*, 1 Dowl., N. S. 857.

(*a*) *Northampton Coal, &c. Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500; 38 L. T. 82; 26 W. R. 485, C. A.: cp. *Corp. of Saltash* v. *Goodman*, 43 L. T. 464.

(*b*) *Kemble* v. *Mills*, 8 Sc. N. R. 402; 1 M. & Gr. 565.

(*c*) *Gell* v. *Lord Curzon*, 4 Ex. 813. See *Baillie* v. *De Bernales*, 1 B. & Ald. 331: *Hancock* v. *Smith*, 2 Chit. 150: *Jones* v. *Jones*, 2 C. & J. 207; 1 Dowl. 313: *Fountain* v. *Steele*, 5 Dowl. 331, Ex.: *Huntley* v. *Bulmer*, 6 Dowl. 633; 6 Sc. 247: *Otho, King of Greece* v. *Wright*, 6 Dowl. 12: *Fletcher* v. *Lew*, 3 A. & E. 551: *Adams* v. *Brown*, 1 Dowl. 273: 2 M. & Sc. 154: *Buss* v. *Clive*, 3 M. & Scl. 283.

(*d*) See *Northampton Coal, &c. Co.* v. *Midland Waggon Co.*, 7 Ch. D. 500, 503; 38 L. T. 82; 26 W. R. 485, C. A.

(*e*) See *Huntley* v. *Bulmer*, supra: but see *Cole* v. *Beardy*, 5 Dowl. 161: *Jones* v. *Jones*, 10 L. J., Ex. 77; 2 C. & J. 207.

(*f*) *Cardwell* v. *Baynes*, 23 L. T. 179.

(*g*) *Joynes* v. *Collinson*, 2 D. & L. 449; 13 M. & W. 558: *Sandess* v. *Hohler*, 6 Dowl. 274, *sed quære*. And see *Dowling* v. *Harman*, 6 M. & W. 131, per *Alderson*, B. See form of affidavit, Chit. Forms, p. 222.

(*h*) *Hanmer* v. *Mangles*, 12 M. & W. 313.

(*i*) Ante, p. 397.

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and be given at such times (*k*), and in such manner and form as the Court or a Judge shall direct."

The order may (*l*), and generally does, stay the proceedings until security be given (*m*). Where the security is to be given to the satisfaction of the master, if the parties cannot agree upon the form or sufficiency of it, the plaintiff should procure an appointment from one of the masters, for the purpose of settling the same; and should serve a copy of the appointment on the defendant's solicitor or agent one day before the day appointed.

Where the amount and sufficiency of the security is to be decided by the master (*n*), there is no fixed rule as to the amount, which is in the discretion of the master, and varies according to the amount claimed and the nature of the action (*o*). The Court will not interfere with the master's decision, unless a case of manifest and gross error be made out (*p*). Security must be given for past as well as future costs (*q*).

Bond (*r*).

By *R. of S. C., Ord. LXV. r.* 7, "Where a bond is to be given as security for costs, it shall, unless the Court or a Judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court."

The security is usually given by a bond (*r*). The fee on taking the bond is 10*s.*, which is taken by means of a stamp impressed on the bond (*s*).

Fresh security.

If, after the security is given, one or both of the sureties become bankrupt, or insolvent, that will afford no ground for the opposite party insisting on fresh security (*t*).

Discharge of order for security.

Where an order has been properly made for a plaintiff to give security on the ground that he is residing abroad, he is not entitled to have the order rescinded if he afterwards returns to England although he has no intention of going abroad again (*u*). Where the plaintiff had an unsatisfied judgment against the defendant for a large sum, the Court refused a rule for security for costs, upon the plaintiff undertaking that the costs, in the event of the defendant obtaining a verdict, should be set off against the former judgment (*x*).

(*k*) See *Martano* v. *Mann*, 14 Ch. D. 419; 49 L. J., Ch. 501: cp. *Broughton* v. *Jeremy*, 1 H. & W. 525: *Kelly* v. *Brown*, 5 Dowl. 264: *Tassie* v. *Kennedy*, 5 D. & L. 587.

(*l*) *Lewis* v. *Ovens*, 5 B. & Ald. 265.

(*m*) See *Hill* v. *Fletcher*, 5 Ex. 470; 19 L. J., Ex. 320: *Todd* v. *Johnson*, 2 C. B. 203.

(*n*) *Mais* v. *M'Namara*, 5 Ex. 267.

(*o*) *Massey* v. *Allen*, 12 Ch. D. 807; 48 L. J., Ch. 692: *Arkwright* v. *Newbold*, W. N. 1880, 59.

(*p*) *French* v. *Maule*, 4 Sc. N. R. 719; 4 M. & Gr. 107: see *Kent* v. *Poole*, 7 Dowl. 572.

(*q*) *Massey* v. *Allen*, 12 Ch. D. 807; 48 L. J., Ch. 692: *Harvey* v. *Jacob*, 1 B. & Ald. 150: *Brocklebank* v. *King's Lynn Steamship Co.*, 3 C. P. D. 365; 47 L. J., C. P. 321; 38 L. T. 489, overruling *Oxenden* v. *Cropper*, 4 Dowl. 574.

(*r*) See form, Chit. F. p. 224. See *Youde* v. *Youde*, 3 Ad. & El. 311.

(*s*) Ord. as to Fees, Vol. 2, Appendix.

(*t*) *Jones* v. *Jacobs*, 2 Dowl. 442. See *Foster* v. *Colby*, 27 L. J., Ex. 55: *R.* v. *The Southampton Harbour Commissioners*, 34 L. J., Q. B. 164: *Hazeltine* v. *Watkins*, 28 L. J., Ex. 40.

(*u*) *Westenberg* v. *Mortimore*, L. R., 10 C. P. 438; 44 L. J., C. P. 289. See contra *Place* v. *Campbell*, 6 D. & L. 113, C. P.: *Badnall* v. *Haley*, 7 Dowl. 19; 4 M. & W. 535: *Thraser* v. *Busk*, 2 Dowl., N. S. 51, which were not cited in the above case.

(*x*) *Bristowe* v. *Needham*, 5 Sc. N. R. 799; 2 Dowl., N. S. 658; 4 M. & Gr. 906.

Time for pleading after security given.

By *Ord. LXIV. r.* 6, "The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceeding in the cause or matter."

Dismissing action pending order.

The fact that a plaintiff has been ordered to give security for costs, and that all proceedings have been stayed meanwhile, does not prevent the defendant from applying to have the action dismissed for want of prosecution on the ground that the plaintiff has not delivered a statement of claim, or on any other ground (*y*).

On appeal.

On Appeal.]—As to security for costs on appeals to the Court of Appeal and to the House of Lords, *see Vol.* 2, *Chs. LXXXV. and LXXXVI.*

(*y*) *La Grange* v. *M'Andrew*, 4 Q. B. D. 210; 48 L. J., Q. B. 315. See *Jackson* v. *Ivimey*, L. R., 1 Eq. 693.

CHAPTER XXXIV.

SECURITY IN ACTIONS ON LOST BILLS OF EXCHANGE.

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By the Bills of Exchange Act, 1882 (45 & 46 *V. c.* 61), *s.* 70, "In any action or proceeding upon a bill the Court or a Judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or Judge, against the claims of any other person upon the instrument in question." By the *Com. Law Proc. Act*, 1854, *s.* 87 (which is not repealed), "In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the Court or Judge, or a Master, against the claims of any other person upon such negotiable instrument" (*a*).

The plaintiff should offer an indemnity to the defendant before bringing the action (*b*), otherwise he may be ordered to pay the defendant's costs (*b*).

Before the above Act, if a bill, note or cheque, made or become payable to bearer, was lost, no action would lie upon it for the loser against any one of the parties to it, either on the instrument itself, or on the consideration (*c*). It seems that the loss of a bill, &c., which is not negotiable, affords no defence to an action upon it (*d*). As to the remedy the loser of a bill had in equity before the passing of the above Act, *see* 9 & 10 *W.* 3, *c.* 17, *s.* 3; 3 & 4 *Anne*, *c.* 9: *and see Walmsley* v. *Child*, 1 Ves. sen. 345: *Glyn* v. *Bank of England*, 2 Ves. sen. 38: *Ex parte Greenway*, 6 Ves. 812: *Davies* v. *Dodd*, 4 Price, 176, cases in equity.

Bank notes (*e*) and half bank notes (*f*) are within the section.

If a negotiable bill be destroyed, an action may be maintained on it (*g*).

(*a*) As to the amount of, and time for, giving the security, see Ord. LXV. r. 6, ante, p. 401.

(*b*) *King* v. *Zimmerman*, L. R., 6 C. P. 466; 40 L. J., C. P. 278. See *Arangura* v. *Scholfield*, 1 H. & N. 494.

(*c*) Byles on Bills: *Hansard* v. *Robinson*, 7 B. & C. 90: *Crowe* v. *Clay*, 9 Ex. 604: *King* v. *Zimmerman*, supra.

(*d*) See *Charnley* v. *Grundy*, 23 L. J., C. P. 122: *Wain* v. *Bailey*, 10 A. & E. 616: *Long* v. *Baillie*, 2 Camp. 214, n.

(*e*) *M'Donnell* v. *Murray*, 9 Ir. C. L. R. 495.

(*f*) *Redmayne* v. *Benson*, 2 L. T. 324.

(*g*) See *Wright* v. *Lord Maidstone*, 24 L. J., Ch. 623.

CHAPTER XXXV.

JOINDER OF CAUSES OF ACTION AND ORDERING SEPARATION OR SEPARATE TRIALS OF CAUSES OF ACTION IMPROPERLY JOINED.

What causes of action may be joined.

Joinder of Causes of Action.]—By *R. of S. C., Ord. XVIII. r.* 1 (*a*), "Subject to the following rules of this order, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof."

This order treats of the joinder of causes of action between the same parties in one action; *Ord. XVI.* (*see post, Vol.* 2, *Ch. LXXXVII.*, "*Parties*") treats of the joinder of parties and of claims by different parties in the same action. This rule enables the plaintiff to join several separate or alternative causes of action against the same defendant (*b*). It abolishes any objections on the ground of multifariousness (*c*). *Ord. XVI.* allows the joinder of plaintiffs claiming or of defendants against whom claims are made, jointly, severally or in the alternative (*d*). The rules do not, however, enable the plaintiff to join in the same action several distinct and separate claims against different defendants (*e*).

By *Ord. XVIII. r.* 6, "Claims by plaintiffs jointly may be joined with claims by them, or any of them, separately against the same defendant." This rule is subject to rule 1, *supra*, and rules 8 and 9, *infra*.

By *r.* 3, "Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity." *See fully, post, Vol.* 2, *Ch. CII.*, "*Actions by and against Bankrupts*," &c.

By *r.* 4, "Claims by or against husband and wife may be joined with claims by or against either of them separately" (*f*).

(*a*) See former enactment, C. L. P. Act, 1852, s. 41.

(*b*) *Bagot* v. *Easton*, 7 Ch. D. 1; 47 L. J., Ch. 225: cp. *Evans* v. *Buck*, 4 Ch. D. 432.

(*c*) *Cox* v. *Barker*, 3 Ch. D. 359, 370.

(*d*) *Howell* v. *West*, W. N. 1879, 90. See *Honduras, &c. R. Co.* v. *Lefevre*, 2 Ex. D. 301, in which principal and agent were joined as co-defendants: *Child* v. *Stenning*, 5 Ch. D. 695; 46 L. J., Ch. 523, where trespass against one and breach of covenant against another defendant were joined in the alternative: *Booth* v. *Briscoe*, 2 Q. B. D. 496; 25 W. R. 838, where eight plaintiffs joined in an action for libel. See *Dessilla* v. *Schunk & Co.*, W. N. 1880, 96: *Smith* v. *Richardson*, cited post, n. (*h*). See fully post, Vol. 2, Ch. LXXXVII., "*Parties.*"

(*e*) *Burstall* v. *Beyfus*, 26 Ch. D. 35, 39; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418.

(*f*) This is subject to rr. 1, 8 and 9, as to ordering separate trials. R. 7, infra.

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See fully, post, Vol. 2, Ch. CI., "Actions by and against Husband and Wife."

By *r.* 5, "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator" (*f*). *See fully, post, Vol.* 2, *Ch. XCVII., "Actions by and against Executors," &c.*

By *r.* 7, "The last three preceding rules [*i. e. rr.* 4, 5 and 6] shall be subject to rules 1, 8 and 9 of this Order."

As to the joinder of causes of action in actions for recovery of land, *see Ord. XVIII. r.* 2, *post, Vol.* 2, *Ch. CVI., "Actions for Recovery of Land."*

An objection that the plaintiff has without leave joined claims to you, which leave is necessary, is waived by appearance (*g*).

Separation &c. of causes of action.

Separation, &c. of Causes of Action.]—By *Ord. XVIII. r.* 8, "Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of together."

R. 1, *supra*, empowers the Judge to order separate trials of the causes of action joined, and *Ord. XXXVI. r.* 8 (*post, Ch. LVII., "Notice of Trial"*), enables him to order different questions of fact arising in any action to be tried separately and by different modes of trial (*h*).

Any application under this rule should be made by summons before a master, and should be made as soon as possible after the necessity for it becomes apparent. Where the vendor of goods and the indorsee of a bill given by the purchaser to the vendor jointly sued the purchaser for the price of the goods and on the bill, the claim was struck out as embarrassing (*i*).

By *Ord. XVIII. r.* 9, "If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of together, the Court or Judge may order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just."

As to separating causes of action when parties are inconveniently joined, *see post, Vol.* 2, *Ch. LXXXVII., "Parties."*

(*f*) See n. (*f*), ante.

(*g*) *Mulckern* v. *Doerks*, 53 L. J., Q. B. 526.

(*h*) See *Child* v. *Stenning*, 7 Ch. D. 413: *Hall* v. *Old Talargoch Lead Mining Co.* (*Limited*), 45 L. J., Ch. 775; 34 L. T. 901.

(*i*) *Smith* v. *Richardson*, 4 C. P. D. 112; 48 L. J., C. P. 140.

CHAPTER XXXVI.

CONSOLIDATING ACTIONS.

By *R. of S. C., Ord. XLIX. r.* 8, "Causes or matters pending in the same Division may be consolidated by order of the Court or a Judge in the manner in use before the commencement of the principal Act in the superior Courts of common law."

Where several actions between the same parties.

Actions can only be *consolidated* at the instance of a defendant and not at the instance of a plaintiff (*a*), but if several actions between the same parties be brought, and are pending for the same cause, or substantially so, the Court may stay the proceedings in all but one (*b*). If two or more actions be brought by the same plaintiff, at the same time, against the same defendant, for causes of action which might have been joined in the same action, the Court or a Judge, if they deem the proceedings vexatious or oppressive, will in general compel the plaintiff to consolidate them, and to pay the costs of the application (*c*). Where a solicitor did different kinds of professional work for a client, and, after all the business was transacted, sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action on the first bill before the expiration of the month after the delivery of the second bill, and after the expiration of that month commenced an action for the other bill, the Court (diss. *Erle*, J.) made an order for the consolidation of the two actions (*d*).

Where parties not the same.

In one case, where five separate actions had been brought against five different individuals, upon five several guarantees given to secure distinct portions of the same debt, a Judge made an order for consolidating them, the defence being the same in them all; and the Court refused to rescind the order (*e*). But where the plaintiffs had brought ten separate actions of *indebitatus assumpsit* against ten separate defendants, for certain tolls, port dues, anchorage, buoyage, and other duties alleged to have been incurred by them in-

(*a*) *Amos* v. *Chadwick*, 4 Ch. D. 869; 47 L. J., Ch. 871; ante, p. 371.

(*b*) See ante, p. 371: *Nicholls* v. *Lefevre*, 3 Dowl. 132: *Chamberlayne* v. *Green*, 9 M. & W. 792, per *Parke*, B.: *Jones* v. *Prichard*, 6 D. & L. 529; 18 L. J., Q. B. 104: *Haigh* v. *Paris*, 16 M. & W. 144: *Carne* v. *Legh*, 6 B. & C. 124; 9 D. & R. 126: *Parkin* v. *Scott*, 1 Taunt. 565: *Wade* v. *Simeon*, 1 C. B. 610: *Miles* v. *The Inhabitants of Bristol*, 3 B. & Ad. 945.

(*c*) *Ward* v. *Pomfret*, 1 Sc. N. R. 403; 1 M. & Gr. 559: *Cecil* v. *Briggs*, 2 T. R. 639. See *Benton* v. *Praed*, Smith, 423: *Oldershaw* v. *Tregwell*, 3 C. & P. 58: *The Vildosala*, 42 L. T. 96, Adm.: cp. *The Jacob Landstrom*, 4 P. D. 191. As to what causes of action may now be joined, ante, p. 405.

(*d*) *Beardsall* v. *Cheetham*, 1 El. B. & El. 243; 27 L. J., Q. B. 367.

(*e*) *Sharpe* v. *Lethbridge*, 4 Sc. N. R. 722; 4 M. & Gr. 7. See *Anderson* v. *Towgood*, 1 Q. B. 245: *Bartlett* v. *Bartlett*, 4 Sc. N. R. 779.

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dividually as commanders of their respective vessels, it was held that the Court had no power, at the request of the defendants, to consolidate the above actions; although it was sworn that the actions were brought in respect of the same right, and that the trial of one would decide the right in all (*f*). Where separate actions were brought by the same plaintiff against several members of the committee of a railway company, for work done for the company, a Judge's order to stay proceedings in all but one, made on the plaintiff's refusal to elect on which he would proceed, was rescinded by the Court (*g*). Three actions against different persons for the same assault were ordered to be consolidated (*h*); but in another and similar case the application was refused (*i*). If another action be pending for the same cause against the defendant jointly with another person, and there be oppression or vexation on the part of the plaintiff in bringing the action, the Court will interfere in a summary way (*k*). Where six actions of trover had been brought against the same defendant by different plaintiffs employing the same solicitor, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, it being sworn that the causes of action were different in all of them, and that the witnesses were different (*l*).

At the suit of the same plaintiff.

The above cases seem to be somewhat conflicting. It is submitted that the Court or a Judge will, where many actions are oppressively and vexatiously brought by the same plaintiff for the purpose of trying the same question, interfere, either by staying the proceedings or giving time to plead in all the actions but one upon terms, or in some other way, as the Courts have an unlimited power over their own process for the purpose of preventing the same being abused or made the instrument of oppression.

Several ejectments.

If several actions for the recovery of land be brought against different occupiers, the Court might, under circumstances, if the same question had to be tried in each, stay the proceedings in all the actions but one, and order the actions so stayed to abide the event of the one to be tried (*m*).

Penal actions.

It seems that the order will seldom be granted in penal actions (*n*).

Issues under Tithe Acts.

If actions are brought for the purpose of trying issues under the 46th section of 6 & 7 *W.* 4, *c.* 71, by the vicar against one of the landowners, and by a great number of the landowners against the vicar, the Court has no power, at the instance of the vicar, to direct the proceedings in the actions against him to abide the event of the issues to be directed in the action brought by him (*o*).

(*f*) *Corporation of Saltash* v. *Jackman*, 1 D. & L. 851.

(*g*) *Newton* v. *Belcher*, 9 Q. B. 612: *Giles* v. *Tooth*, 3 C. B. 665. As to staying proceedings where the debt and costs have been paid in one action, see ante, p. 369.

(*h*) Prac. Reg. 151: *Anon.*, 1 Crabt. Rep. 709, n.; Barnes, 341. And see *Key* v. *Hill*, 2 B. & Ald. 598.

(*i*) *Catlin* v. *Elliott*, 1 Str. 420.

(*k*) *Sowter* v. *Dunston*, 1 M. & R. 508: *Carne* v. *Legh*, 6 B. & C. 124; 9 D. & R. 126. See *Newton* v. *Belcher*, supra.

(*l*) *Nicholls* v. *Leferre*, 3 Dowl. 135: *Westbrook* v. *The Australian Royal Mail Steam Navigation Co.*, 23 L. J., C. P. 42.

(*m*) 2 Sellon, 144: *Doe* d. *Pulteney* v. *Cavan*, Imp. K. B. 731. And see *Grimstone* v. *Burgess*, Barnes, 176: *Doe* v. *Brenton*, 6 Bing. 469; Cas. Pr. C. B. 119: *Smith* v. *Crabb*, 2 Str. 1149.

(*n*) See *Benton* v. *Fraed*, 1 Smith, 423.

(*o*) *Ward* v. *Pomfret*, 1 Sc. N. R. 403.

When several actions are brought in respect of practically the same subject-matter, or raising the same question, the Court may stay them all or enlarge the time for proceeding in all, except one until that one has been tried as a test action (*q*).

Staying proceedings in several actions pending the trial of a test action.

Where several actions are brought upon the same policy of insurance, the Court or a Judge, upon application of the defendants, will grant an order to stay the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in that one, and to pay the amount of their several subscriptions and costs if the plaintiff should recover, and submitting to such other terms as the Court or Judge may think proper to impose upon them (*r*). The Court may order several actions, by the same plaintiff, against different underwriters, upon mutual insurance policies, to be consolidated according to the usual practice in actions upon ordinary policies (*s*).

Several actions on one policy of insurance.

It seems that the actions may now be consolidated at any time after appearance, even though before statement of claim (*t*). In two actions between the same parties on different bills of exchange, the Court consolidated them after issue joined and notice of trial given, upon payment of all the costs in the second action (*u*).

At what time consolidation order applied for.

The application for the consolidation order may be made to a Master on a summons at chambers. It seems, one summons only is necessary, intituled in the several actions (*x*).

How applied for.

Formerly, it was thought that a consolidation order bound the plaintiff as well as the defendant, and the Court could not, though fresh evidence had been discovered, permit the plaintiff to try the other actions (*y*). But now a different doctrine is established (*z*), the order being for the benefit of the defendant. And where actions against underwriters had been consolidated by rule of Court, and the defendant had obtained a verdict in one, the Court refused to restrain the plaintiff from trying a second cause included in the same rule, till the costs of the first were paid (*y*). The plaintiff, however, by proceeding in a second consolidated action, without applying to the Court, loses the benefit of any terms which were imposed on the defendants by the consolidation rule (*a*). Where one of two actions is stayed upon the defendants undertaking to be bound by the verdict in the other, this means the ultimate event of the action (*b*); and if an appeal be brought after verdict for the plaintiff in the action tried, the proceedings in the other will be stayed on the defendants giving security to abide by the decision

Effect of the consolidation order.

(*q*) *Amos* v. *Chadwick*, 4 Ch. D. 869: *Bennett* v. *Lord Bury*, 5 C. P. D. 339; 42 L. T. 480, plaintiff's application. See fully ante, p. 371: cp. *Thomson* v. *South East. R. Co.*, 9 Q. B. D. 320; 46 L. T. 513: *McHenry* v. *Lewis*, 22 Ch. D. 397, 47 L. T. 549.

(*r*) See ante, p. 371; 4 N. & M. 873. See *Sharpe* v. *Lethbridge*, 4 Sc. N. R. 722: *Syers* v. *Pickersgill*, 27 L. J., Ex. 5.

(*s*) *Lewis* v. *Banks*, 27 L. J., C. P. 247.

(*t*) *Hollingsworth* v. *Brodrick*, 4 A. & E. 646; 6 N. & M. 240.

(*u*) *Booth* v. *Payne*, 1 Dowl., N. S. 348. See *Hollingsworth* v. *Brodrick*, supra.

(*x*) *Ward* v. *Pomfret*, 1 Sc. N. R. 410, n.; 1 M. & Gr. 559. See form, Chit. Forms, p. 228.

(*y*) *Doyle* v. *Douglas*, 4 B. & Ad. 544.

(*z*) See *M'Gregor* v. *Horsfall*, 4 M. & W. 320.

(*a*) See *Long* v. *Douglas*, 4 B. & Ad. 545, n.

(*b*) *Hodson* v. *Richardson*, 3 Burr. 1477.

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of the Court of Appeal (*c*). Where actions brought against several defendants were consolidated by rule of Court, and by consent, to abide the event of one of them, which was proceeded with, the Court inferred from the facts of the case that the rule and subsequent proceedings operated as a joint retainer by the defendants of the solicitor in the action so proceeded with, and held that they were jointly liable for the costs of such action (*d*).

Order when opened.

The Master, Court or Judge, under circumstances, may open the consolidation order for the defendants, and permit a second cause to be tried upon terms (*e*). But in general this will not be allowed (*f*).

Application for leave to sign judgment in actions not tried.

After a verdict for the plaintiff (if the actions have been consolidated by order), and judgment signed thereon, take out a summons before a Master, and obtain his order to enter up judgment in the several other actions which were consolidated, and that the plaintiff be at liberty to sue out execution thereon; also, that one of the Masters may tax the costs in all the actions, and that the defendants pay the costs of the application to be taxed—the form of the summons and order will of course depend on what terms were imposed by the consolidation order. Judgment must be signed, costs taxed, and execution sued out (according to the terms of the order), as in other cases (*g*).

Costs where money paid into Court.

By *Ord. XXII. r.* 8, "Where money is paid into Court in two or more actions which are *consolidated*, and the plaintiff proceeds to trial in one, and fails, the money paid in and the costs in all the actions shall be dealt with under this order in the same manner as in the action tried."

(*c*) *Gill* v. *Hindley*, 1 Moore, 79: *Aylwin* v. *Favine*, 2 N. R. 430.

(*d*) *Anderson* v. *Boynton*, 19 L. J., Q. B. 42.

(*e*) *Cohen* v. *Bulkeley*, 5 Taunt. 165: *Amos* v. *Chadwick*, 9 Ch. D. 459; 47 L. J., Ch. 871; 39 L. T. 50: *Robinson* v. *Chadwick*, 7 Ch. D. 878.

(*f*) *Foster* v. *Allenby*, 5 Dowl. 619; 3 Bing. N. C. 892, nom. *Foster* v. *Steele*, *Foster* v. *Alvez*, 3 Bing. N. C. 896.

(*g*) See form of judgment, Chit. Forms, p. 230.

CHAPTER XXXVII.

TRANSFER OF ACTIONS.

1. *Transfer from one Division to another.*

Power of transfer.

Power to Transfer.]—The 33rd and 34th sections of the *Judicature Act*, 1873, provide for the distribution of actions amongst the different divisions of the High Court, and assign certain actions to particular divisions (*a*).

Sect. 11 of the *Judicature Act*, 1875, empowers the plaintiff, subject to the above mentioned sections, and the Rules of Court hereinafter mentioned, to commence or assign his action to any division which he may think fit, subject (amongst others) to the following proviso (sub-sect. 2):

"If any plaintiff or petitioner shall at any time assign his cause or matter to any division of the said High Court to which, according to the Rules of Court or the provisions of the principal Act or this Act, the same ought not to be assigned, the Court, or any Judge of such division, upon being informed thereof, may, on a summary application at any stage of the cause or matter, direct the same to be transferred to the division of the said Court to which, according to such rules or provisions, the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner or by any other party in any such cause or matter, and all orders made

(*a*) See these sections, ante, p. 9. The following matters are by sect. 34 assigned to the Chancery Division:—

"All causes and matters for any of the following purposes:—

The administration of the estates of deceased persons;

The dissolution of partnerships or the taking of partnership or other accounts;

The redemption or foreclosure of mortgages;

The raising of portions, or other charges on land;

The sale and distribution of the proceeds of property subject to any lien or charge;

The execution of trusts, charitable or private;

The rectification, or setting aside, or cancellation of deeds or other written instruments;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;

The partition or sale of real estates;

The wardship of infants and the care of infants' estates."

It may be observed that this section does not prevent any other Division from giving effect to an equity to have a deed set aside, and treating the deed, for the purposes of a defence, as if it were set aside (*Mostyn* v. *West Mostyn Coal, &c. Co.*, 1 C. P. D. 145: *Breslauer* v. *Barwick*, 36 L. T. 52); and, also, that although the section assigns the *execution* of trusts to the Chancery Division, it does not so assign their *creation*. *Anon.*, W. N. 1876, 106.

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therein by the Court or any Judge thereof before any such transfer shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper division of the said Court to which such cause or matter ought to have been assigned" (*b*).

By *Judicature Act*, 1873, *s.* 36, "Any cause or matter may at any time, and at any stage thereof, and either *with or without application from any of the parties thereto*, be transferred by such authority and in such manner as [*sic*] Rules of Court may direct, from one division or Judge of the High Court of Justice to any other division or Judge thereof, or may by the like authority be retained in the division in which the same was commenced, although such may not be the proper division to which the same cause or matter ought, in the first instance, to have been assigned."

Transfer of action at any stage.

Order for Transfer (*c*).]—By *R. of S. C., Ord. XLIX. r.* 3, "Any cause or matter may, at any stage, be transferred from one Division to another by an order made by the Court or any Judge of the Division to which the cause or matter is assigned: Provided that no such transfer shall be made without the consent of the President of the Division to which the cause or matter is proposed to be transferred."

An application for the transfer of an action must be made to a Judge of the Division in which the action sought to be transferred is pending (*d*). It should be made by summons, and not *ex parte* (*e*). The summons must be made returnable before a Judge, as a master has no jurisdiction to order the transfer (*f*). The order is made subject to the consent of the President of the Division to which the action is transferred being obtained (*g*), and is not effectual until that consent is given (*h*). It appears doubtful

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(*b*) As to the power of detention when the action has been brought in the wrong Division, see *Pinney* v. *Hunt*, 6 Ch. D. 98: per *Jessel*, M. R., *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. at p. 149.

(*c*) By R. of S. C., Ord. XLIX. r. 1, "Causes or matters may be transferred from one Division to another of the High Court, or from one judge to another of the Chancery Division by an order of the Lord Chancellor, provided that no transfer shall be made from or to any Division without the consent of the president of the Division." Under this rule the Lord Chancellor will direct the transfer of an action on a written application to his secretary, accompanied by the written consent of the parties. Where the parties do not consent, the Lord Chancellor must be moved in Court (*Memorandum*, 1 Ch. D. 41).

Rule 3 is confined to transfers from one Division to another, and does not apply to transfers from one judge of a Division to another judge of the same Division: *Chapman* v. *Real Property Trust, Limited*, 7 Ch. D. 732; 25 W. R. 587: *In re Madras, &c. Co.*, 16 Ch. D. 702. As to transfer from one judge of the Chancery Division to another, see Ord. XLIX. r. 2: *Shaw* v. *Brown*, W. N. 1881, 27: *Smith* v. *Day*, Id.: *Orr Ewing* v. *Johnston*, 41 L. T. 467: *Porter* v. *West*, 43 L. T. 569.

(*d*) Before the Queen's Bench, Common Pleas and Exchequer Divisions were consolidated it was held that a judge of either of these divisions sitting at Chambers had power to order the transfer of an action, although he was not a judge of the particular Division to which the action was assigned: *Hillman* v. *Mayhew*, 1 Ex. D. 132; 45 L. J., Ex. 334.

(*e*) *Humphreys* v. *Edwards*, 45 L. J., Ch. 112; W. N. 1875, 208.

(*f*) R. of S. C., Ord. LIV. r. 12.

(*g*) See form, Chit. F. 239.

(*h*) *Humphreys* v. *Edwards*, supra.

whether the consent of the President of the Division from which the action is transferred is not necessary as well as that of the President of the Division to which it is transferred (*i*).

The power to order the transfer is discretionary (*k*), and some sufficient reason for the transfer must in each case be shown (*l*). *Primâ facie* it would probably be sufficient to show that the action was one which is specially assigned to another Division; and an order for transfer would in these cases be made if the Division in which the action was commenced has not the suitable machinery for dealing with it (*m*). But the 36th and 11th sections noticed above give any Division power to retain such action, and the power would, it is submitted, be exercised when no real inconvenience would result from it (*n*). The mere fact that the defendant sets up a counterclaim which if it had been an original action would have been assigned to another Division, is not a sufficient reason for transferring an action to the latter Division (*o*). Thus, a transfer was refused when the defendant in an action in the Queen's Bench Division set up a counterclaim for specific performance and the rectification of a deed (*p*). But in several cases where it was said that the Chancery Division alone had the requisite machinery for giving effect to the counterclaim for specific performance, actions have been transferred to that Division on this ground (*q*). Where the defendant in an action for money lent set up a counterclaim to have a partnership account taken, a transfer was ordered (*r*). A transfer may be ordered where an action in respect of the same subject is pending in another Division (*s*); but where an action is

(*i*) Per *James*, L. J., *Storey* v. *Waddle*, 4 Q. B. D. 289.

(*k*) *Metropolitan, &c. R. Co.* v. *Metropolitan District R. Co.*, W. N. 1879, 193 (C. A.).

(*l*) *Storey* v. *Waddle*, 4 Q. B. D. 289; 27 W. R. 833 (C. A.): *Anon.*, W. N. 1876, 55, where *Archibald*, J., in refusing an application for transfer, said that the fact that both parties consented to the transfer was not sufficient. See *Young* v. *King*, W. N. 1876, 11; Bitt. cxcvi, where an action by a mortgagor for possession was transferred to the M. R.: *Johnson* v. *Moffatt*, Id. 21, when an action was transferred to the V.-C. Malins on the ground that in commencing it the plaintiff had committed a breach of an order of the Vice-Chancellor: *Anon.*, Id. 22: *Barr* v. *Barr*, Id. 44, where the M. R. ordered the transfer to the Probate Division of an action for the appointment of a receiver of rents, &c. of the estate of a testator, the validity of whose will was being contested in the latter Division. *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.*, Id. 56, where *Archibald*, J., refused to transfer to the Adm. Div. an action for negligence, causing a collision in the Thames; and cases cited infra.

(*m*) *Leslie* v. *Clifford*, 50 L. T. 590, partnership accounts.

(*n*) See per *Jessel*, M. R., *Pinney* v. *Hunt*, 6 Ch. D. at pp. 100, 101; per Id. *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. at p. 149. Cp. *Glossop* v. *Heston, &c. Local Board*, 12 Ch. D. 102.

(*o*) *Storey* v. *Waddle*, supra: *Newbould* v. *Steade*, 49 L. T. 649.

(*p*) *Storey* v. *Waddle*, supra. In *Padwick* v. *Scott*, W. N. 1876, 74, an action was transferred to the Chancery Division on the ground that the defendant set up a counterclaim to have a deed set aside. See *Mostyn* v. *West Mostyn Coal Co.*, cited ante, p. 411, n. (*a*).

(*q*) *London Land Co.* v. *Harris*, 13 Q. B. D. 540; 53 L. J., Q. B. 536; 51 L. T. 296; 33 W. R. 14: *Holloway* v. *York*, 2 Ex. D. 333; 25 W. R. 403 (C. A.): *Hillman* v. *Mayhew*, 1 Ex. D. 132; 45 L. J., Ex. 334: *Smith* v. *Levinge*, 39 L. T. 579.

(*r*) *Warne* v. *Dell*, W. N. 1875, 259. See *Ladd* v. *Puleston*, 52 L. J., Ch. 976; 48 L. T. 950: *Leslie* v. *Clifford*, 50 L. T. 590.

(*s*) *Holmes* v. *Harvey*, 35 L. T. 669, 25 W. R. 800. See *Smith* v. *Whichcord*, 24 W. R. 900: *Metrop.*,

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brought in the Queen's Bench Division a defendant does not necessarily entitle himself to a transfer by commencing a cross-action in the Chancery Division, including matters specially assigned to that Division (*t*). An action for personal injuries caused by a collision between ships was transferred to the Probate, &c. Division, where an action for limitation of liability was pending (*u*). The fact that an action is brought in a particular Division in order to avoid payment of the costs of a former action in another Division, is not a sufficient reason for a transfer (*x*); nor will the mere fact that there is a question which may be conveniently tried by a jury, be a sufficient reason for refusing a transfer to the Chancery Division (*y*).

By *Ord. XLIX. r.* 7, "Any cause or matter transferred from any other division to the Chancery Division shall, by the order directing the transfer, be assigned to one of the Judges of that division to be named in the order."

Before the consolidation of the Common Law Divisions it was held that the prerogative of the Crown to have matters affecting its rights and revenues determined in the Exchequer Division was not affected by the Judicature Acts (*z*).

Transfer after order winding up or administration (*a*).

2. *Transfer after Order for Winding up or Administration* (*a*).

By *R. of S. C., Ord. XLIX. r.* 5, "When an order *has been made* by any Judge of the Chancery Division for the winding up of any company, or for the administration of the assets of any testator or intestate, the Judge in whose Court such winding up or administration shall be pending shall have power, without any further consent, to order the transfer to such Judge of any cause or matter pending in any other Court or Division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered, as the case may be."

Any application under this rule must be made to the Judge by whom the winding up or administration order is made. It should be made *ex parte* (*a*). In order to bring an action against an executor within the rule it must be against him *quâ* executor (*b*). The rule only applies to the transfer of actions pending before another Division, and not to the transfer of actions pending before another Judge of the same Division to which rules 1 and 2, *ante*, p. 412, apply (*c*).

&c. R. Co. v. *Metrop. District R. Co.*, W. N. 1879, 193 (C. A.), where the transfer was refused. Cp. *Lucas* v. *Siggers*, L. R., 7 Ch. 517.

(*t*) *Standard Discount Co.* v. *Barton*, 37 L. T. 581.

(*u*) *Hawkins* v. *Morgan*, 49 L. J., Q. B. 618.

(*x*) *Cannot* v. *Morgan*, 1 Ch. D. 1; 45 L. J., Ch. 50.

(*y*) *Cannot* v. *Morgan*, supra: *Holmes* v. *Harvey*, 35 L. T. 600: *The Fulica*, W. N. 1880, 172. See *China, &c. Co.* v. *Marine Ins. Co.*, W. N. 1881, 89, where a transfer from the Chancery Division was ordered.

(*z*) *Att.-Gen.* v. *Constable*, 4 Ex. D. 172.

(*a*) *In re Landore Siemens Steel Co.*, 10 Ch. D. 489; 40 L. T. 35. See as to this case *In re Madras, &c. Co.*, 16 Ch. D. 702: *Field* v. *Field*, W. N. 1877, 98: *Whitaker* v. *Robinson*, Id. 201. See *Re Timms*, 47 L. J., Ch. 831; 38 L. T. 679: *In re Stubbs' Estate*, 8 Ch. D. 154: *Re Thames Steam Ferry Co.*, 40 L. T. 422: *In re United Kingdom Electric Telegraph Co.*, 29 W. R. 332.

(*b*) *Mason* v. *Chapman*, 40 L. T. 678. See *Re Timms*, supra.

(*c*) *In re Madras, &c. Co.*, 16 Ch. D. 702.

As to staying proceedings against companies before and after the winding-up order is made, *see post*, *Vol.* 2, *Ch. XCII.*, "*Actions by and against Companies.*"

As to staying proceedings in actions against executors or administrators after an administration order has been made, *see post*, *Vol.* 2, *Ch. XCVII.*, "*Actions by and against Executors*," &c. An action against an executor or administrator will be stayed until the administration order is actually made (*d*).

3. *Transfer from Master to Master.*

Assignment of actions to particular masters.

By *Ord. V. r.* 6, "Every action in the Queen's Bench Division not proceeding in a District Registry shall be assigned to one of the Masters of the Supreme Court at the time and in manner provided by *Ord. LIV.*, and all documents and proceedings therein shall thereafter be marked with the name of the Master to whom the action has become so assigned, and every application or proceeding therein which by these Rules is to be heard and dealt with by a Master, including taxation of the costs, shall be heard and dealt with by such Master."

Transfer from master to master.

By *Ord. V. r.* 7, "Where actions have become assigned to the masters under the provisions of the last preceding rule, it shall be lawful for the Lord Chief Justice of England to transfer all or any number of actions from any one master to any other master."

By *r.* 8, "During the absence from illness or any other urgent cause, or during a vacancy in the office, of any master to whom any action may have been assigned, or during any vacation, any other master may hear and dispose of any application therein on behalf or in the place of such master."

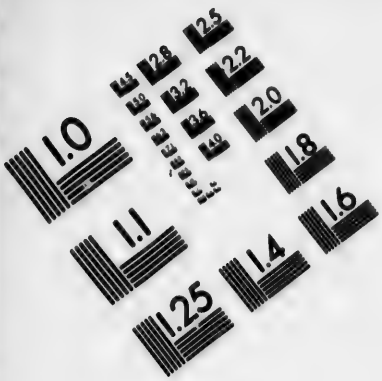
4. *Transfer from Judge to Judge on death, &c.*

Transfer from judge to judge on death, &c.

By *Ord. LIX. r.* 2, "Where, by sect. 17 of the *Appellate Jurisdiction Act*, 1876, or by these rules, any application ought to be made to, or any jurisdiction exercised by the Judge by whom a cause or matter has been tried, if such Judge shall die or cease to be a Judge of the High Court, or if such Judge shall be a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the President of the Division to which the cause or matter belongs may either by a special order in any cause or matter, or by a general order applicable to any class of causes or matters, nominate some other Judge to whom such application may be made, and by whom such jurisdiction may be exercised."

See the Appellate Jurisdiction Act, 1876, *s.* 17, *ante*, p. 16, *n.* (*c*); *and also the Judicature Act*, 1884, *ss.* 5 *and* 6, *ante*, p. 18.

(*d*) *Crowle* v. *Russell*, 4 C. P. D. 186; 39 L. T. 320.



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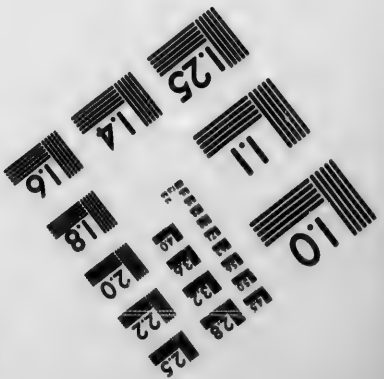

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(716) 872-4503

CHAPTER XXXVIII.

PROCEEDINGS BY DEFENDANT CLAIMING CONTRIBUTION OR INDEMNITY.

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Claims by defendants against persons other than plaintiff.

A defendant who has a cross-claim against a plaintiff may set it up by way of counterclaim or set-off (*a*). So a defendant who has a claim against a plaintiff and a person not a party to the action, may set it up by way of counterclaim (*b*). But a counterclaim is only applicable when the plaintiff is a party to it, and a claim against a third party alone cannot be raised by a defendant in this manner (*c*).

Claim for contribution or indemnity over.

When the defendant claims contribution or indemnity over against any person not a party to the action (*d*), or one defendant claims contribution or indemnity against any other defendant to the action (*e*), he may, under the present rules, make and enforce such claim by proceedings in the action brought against him.

In all cases other than those above referred to, claims against persons not parties to the action can only be enforced by separate proceedings (*f*).

The power to ask for and to grant relief against persons not already parties to the action, is given by sub-sect. 3 of sect. 24 of the *Judicature Act*, 1873, but it must be premised that the literal effect of that section is qualified and limited by the Rules of Court.

By *Judicature Act*, 1873, *s.* 24, *sub-s.* 3, "The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner, and also all such relief *relating to or connected with the original subject*

(*a*) See ante, p. 304.
(*b*) See Id.
(*c*) See Id.
(*d*) See post, p. 418.
(*e*) See post, p. 424.
(*f*) It must not be forgotten, however, that Ord. XVI. r. 11, provides that "The Court or a Judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties, improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." See post, Vol. 2, Ch. LXXXVII., "*Parties.*"

of the cause or matter, and in like manner claimed against any other person, *whether already a party* to the same cause or matter *or not*, who shall have been *duly served with notice in writing* of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth *be deemed a party* to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

The only rules under this section at present in force are those mentioned in this chapter. The former rules confined the operation of the section to enabling the defendant to bind the third party conclusively by the judgment given as between the plaintiff and the original defendant, and if he wanted to get an indemnity or other relief against the third party it was still necessary to bring an action of his own (*g*).

Under the present rules the Court has power to give judgment against the third party.

The present rules enable a defendant who "claims to be entitled to contribution or indemnity over against any person not a party to the action" (*h*), or against a co-defendant (*i*), to serve such person with a notice (*h*), and to bind such person by the proceedings in the action, and obtain judgment against him. The rules only apply where the claim over is to contribution or indemnity (*k*). The claim to indemnity must be one that arises out of some contract express or implied (*k*). Thus when the plaintiff's claim is on a covenant to repair on a lease, the defendant cannot bring in as third party a sub-tenant who has entered into a covenant in identically the same words in an underlease, as the claim is not one for contribution or

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(*g*) *Trelevan* v. *Bray* (C. A.), 45 L. J., Ch. at p. 114; 33 L. T. at p. 828; 24 W. R. 198: *S. C.*, 1 Ch. D. 176. In the latter report, which is very brief, the words above referred to are not reported. Accord. per *Hall*, V.-C., *Padwick* v. *Scott*, 2 Ch. D. at 743: *The Cartsburn*, 5 P. D. 59; 41 L. T. 710, C. A.

(*h*) See Ord. XVI. r. 48, post. The present rules are confined to cases where contribution or indemnity is claimed. Under the former rules it was sufficient if there was a material question common to the plaintiff and defendant, and the defendant and the third party. *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644; 45 L. J., Q. B. 638, C. A.: *Beneeke* v. *Frost*, 1 Q. B. D. 419; 45 L. J., Q. B. 693: *Ex p. Smith, In re Collier*, 2 Ch. D. 51; 45 L. J., Bk. 116: *Trelevan* v. *Bray*, 1 Ch. D. 176; 45 L. J., Ch. 113; 33 L. T. 827: *Bower* v *Hartley*, 1 Q. B. D. 652; 46 L. J., Q. B. 126: *Padwick* v. *Scott*, 2 Ch. D. 736: *Macdonald* v. *Bode*, W. N. 1876, 23, per *Lindley*, J. In *Horwell* v. *London General Omnibus Company*, 2 Ex. D. 365; 36 L. T. 637 (C. A.), where the plaintiff sued the defendants for negligence, leave to bring in a tramway company, by whose negligence the defendants alleged the injury had been done, was refused. In this case it was clear that if the defendants were not guilty, they could obtain nothing by bringing in the other company, and that if it were a case of joint negligence they could have no claim for contribution.

(*i*) Ord. XVI. r. 55, post, p. 424.

(*k*) *Pontifex* v. *Foord*, 12 Q. B. D. 152; 53 L. J., Q. B. 321; 49 L. T. 808; 32 W. R. 316: *Speller* v. *Bristol Steam Navigation Co.*, 13 Q. B. D. 96; 53 L. J., Q. B. 322; 50 L. T. 360; 32 W. R. 522: *Catton* v. *Bennett*, 26 Ch. D. 161; 53 L. J., Ch. 685; 50 L. T. 383; 32 W. R. 485.

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indemnity (*l*). So, where the plaintiff claimed damages for injury to goods whilst being carried in the defendants' vessel, by reason of her being unseaworthy, the defendants were refused leave to serve the notice on the persons from whom they had hired the vessel with a warranty that she was seaworthy (*m*). So where, in an action for specific performance of a contract to purchase a house, the defendant alleged that he was induced to do so by the statements of a third party who purported to be acting as the vendor's agent but had no authority, leave to serve the third party with a notice was refused (*n*).

The application has been granted in an action for breach of warranty on the sale of goods, where the defendant had bought the goods from a third party under a contract identical in its terms with that between the plaintiff and defendant (*o*).

The object of the rules is to prevent the same question being tried twice, and thus not only to save time and expense, but also to obviate the scandal occasioned by the same question being differently decided by different juries (*p*). To effect this object, the rules provide a means whereby persons other than the original parties to the action may be bound by the decision arrived at on the questions, or one or more of the questions involved, the decision of which would otherwise be as regards them *res inter alios acta*, and not of any binding effect in any subsequent proceedings against them (*q*). Apart from these rules, a verdict or finding in an action by A. against B., as, for instance, in an action by a creditor against a surety, is of no effect in a subsequent action by B., the surety, against the principal debtor C. for indemnity, but it is necessary to prove the liability of B. to A. over again (*q*).

The present rules also enable a defendant to obtain the relief to which he may be entitled as against the third party.

"Third party notice," leave to issue, &c.

Third Party Notice—Leave to issue, &c.]—By *Ord. XVI. r.* 48, "Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called *the third party notice*) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be *filed* with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix B. (*r*), with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no

(*l*) *Pontifex* v. *Foord*, supra. See *Hornby* v. *Cardwell*, 8 Q. B. D. 329; 51 L. J., Q. B. 89, where the sublease contained a covenant to perform the covenants contained in the original lease, and leave to serve the subtenant was given.

(*m*) *Speller* v. *Bristol Steam Navigation Co.*, supra.

(*n*) *Catton* v. *Bennett*, supra.

(*o*) *Finlay* v. *Scott*, W. N. 1884, 8; Bitt. Ch. Cas. 222; *Jacobs* v. *Brown*, W. N. 1884, 23; Bitt. Ch. Cas. 230: *Hart* v. *Brown*, 28 Sol. Jour. 577.

(*p*) Per *Blackburn*, J., *Benecke* v. *Frost*, 1 Q. B. D. at p. 422; 45 L. J., Q. B. 693.

(*q*) *Ex p. Young*, *In re Kitchin*, 17 Ch. D. 668.

(*r*) See the form, Chitty's Forms, p. 234.

statement of claim, then a copy of the writ of summons in the action."

The application for leave to issue.

Application for Leave to issue the Notice.]—The application for leave to issue the notice on the third party is made to a Master at Chambers *ex parte* (*s*); but the Master may, and in many cases will, require a summons to be taken out and served on the plaintiff (*t*). The application should be supported by an affidavit stating shortly the grounds on which the defendant seeks to issue the notice. This may be done by stating the nature of the claim to contribution or indemnity which he may make against the third party, and the grounds on which he bases it. The application should be made at an early stage of the action, and, except in special cases, before the defence is delivered, otherwise the defendant will not be able to serve the notice within the time limited for delivering his defence as required by *r.* 48 (*supra*). It is generally best to make it at once after the statement of claim is delivered (*u*). Where the defendant did not apply until after the defence was delivered and the action was set down for hearing, the application was refused on the ground of delay (*x*).

Leave may be given to serve the notice out of the jurisdiction (*y*), but it will not be given when the plaintiff would be considerably delayed by doing so (*z*). Such leave cannot be granted when the third party resides in Scotland or Ireland (*a*).

As between co-defendants, it appears that leave to serve the notice is not necessary (*b*). The defendant who is served with the notice may move to set it aside (*b*).

The costs are usually reserved (*c*).

The granting or refusing of the leave to serve the notice is a matter in the discretion of the Master to whom the application is made (*d*), and leave will be refused when the introduction of the third party would prejudice or delay the plaintiff (*d*).

The plaintiff may appeal from an order giving leave to serve the notice (*e*).

(*s*) *Corrie* v. *Allen* (C. A.), 48 L. T. 464: *Pearson* v. *Lane*, W. N. 1875, 248; Bitt. No. cxxxix. But see *Wye Valley R. Co.* v. *Hawes*, 16 Ch. D. at p. 491; 50 L. J., Ch. 75, per *Hall*, V.-C., which was affirmed on appeal, but the decision in the Court of Appeal does not affect this point. The practice in the Q. B. D. is still to apply ex parte, see *Finlay* v. *Scott*, W. N. 1884, 8.

(*t*) *Finlay* v. *Scott*, supra.

(*u*) See rule 48 (supra, p. 418), ad fin.

(*x*) *Associated Home Co.* v. *Whichcord*, 38 L. T. 602.

(*y*) *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644; 45 L. J., Q. B. 638: *In re Luckie*, W. N. 1880, 12. See *Bank of Ireland* v. *Forbes*, 6 L. R., Ir. 19, where leave was refused.

(*z*) *Hutchinson* v. *Colorado United Mining Co.*, W. N. 1884, 40; Bitt. Ch. Cas. 225, refused as involving delay of three months.

(*a*) *Speller* v. *Bristol Steam Navigation Co.*, 13 Q. B. D. 96; 53 L. J., Q. B. 322; 50 L. T. 419; 32 W. R. 670.

(*b*) *Towse* v. *Loveridge*, 25 Ch. D. 76; 53 L. J., Ch. 499; 49 L. T. 466; 32 W. R. 151.

(*c*) *Benecke* v. *Frost*, 1 Q. B. D. 419.

(*d*) *Bower* v. *Hartley*, 1 Q. B. D. 652; 46 L. J., Q. B. 126: *Associated Home Co.* v. *Whichcord*, 8 Ch. D. 457; 47 L. J., Ch. 652; 38 L. T. 602: *Wye Valley R. Co.* v. *Hawes* (C. A.), 16 Ch. D. 489; 50 L. J., Ch. 75: *Corrie* v. *Allen*, 48 L. T. 464: *Seligman* v. *Mansfield*, W. N. 1875, 240; Bitt. No. cxxxi. See cases cited ante, p. 417, n. (*k*).

(*e*) *Finlay* v. *Scott*, W. N. 1884, 8.

PART V.

Form, service, &c.

The Notice, Form, Service, &c.]—The notice must be prepared by the defendant. It must be in writing (*c*), and must state shortly the nature and grounds of the claim which he makes against the third party (*d*).

The notice must be stamped with the seal with which writs of summons are sealed (*e*). A copy of it must be filed with the proper officer at the Central Office or in the Registry (*e*). It must be served on the third party in the same manner as a writ of summons (*e*); and, unless otherwise ordered, it must be served within the time limited for delivering the defence (*e*). A copy of the statement of claim, or if there is no statement of claim, of the writ of summons, must be served with the notice (*e*).

Appearance by third party.

Appearance by the Third Party.]—By *R. of S. C., Ord. XVI. r.* 49, "If a person not a party to the action, who is served as mentioned in Rule 48 (hereinafter called the third party), desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, *and his own liability to contribute or indemnify*, as the case may be, to the extent claimed in the third-party notice. Provided always, that a person so served and failing to appear within the said period of eight days may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit."

A form of appearance is prescribed by the *R. of S. C.*, App. A., Part II., No 5 (*f*).

The appearance is entered in the same manner as that of a defendant (*g*). It has been said that the right of the third party to apply to set the notice aside is not prejudiced by his entering an appearance (*h*). If the third party do not appear, no further steps are necessary, and he will be bound by the judgment (if any) obtained against the defendant, whether by consent or otherwise. *See rr. 50 and 51, post*, p. 421.

Leave to appear after eight days.

Leave to appear after Time limited.]—If the third party does not appear within eight days after the service of the notice, he cannot do so afterwards without leave (*i*). The leave may be obtained from a Master at Chambers (*i*), and may be granted on such terms as the Master may think fit (*i*).

Proceedings on default of appearance by third party.

Proceedings on Default of Appearance by Third Party.]—It will be observed that Rule 49 (*supra*) provides that if the third party served with the notice does not enter an appearance, he will be deemed to admit both the validity of the judgment obtained against the de-

(*c*) R. of S. C., Ord. LXVI. r. 1.
(*d*) Ord. XVI. r. 48. See form in R. of S. C., App. B., No. 1; Chit. F. p. 234.
(*e*) Ord. XVI. r. 48, supra. As to the manner in which writs of summons are served, see ante, p. 232 et seq.
(*f*) See form, Chit. F. p. 235.
(*g*) See ante, p. 251 et seq.
(*h*) Per *Blackburn*, J., *Benecke* v. *Frost*, 1 Q. B. D. at p. 421.
(*i*) See Ord. XVI. r. 49, supra.

fendant, and his own liability to contribute or indemnify to the extent claimed by the notice. The latter provision is new (*k*), and greatly increases the efficacy of the third-party procedure.

—1. Where the defendant suffers judgment by default.

—1. *Where the Defendant suffers Judgment by Default.*]—By *Ord. XVI. r.* 50, "Where a third party makes default in entering an appearance in the action, in case the defendant giving the notice *suffer judgment by default*, he shall be entitled at any time, after satisfaction of the judgment against himself, or before such satisfaction by leave of the Court or a Judge, to enter judgment against the third party to the extent of the contribution or indemnity claimed in the third-party notice: provided that it shall be lawful for the Court or a Judge to *set aside or vary* such judgment upon such terms as may seem just."

The judgment by default mentioned in this rule would appear to refer to judgment in default of pleading, as it is submitted that the defendant cannot apply for leave to serve the notice before he has entered an appearance. If the third party does not appear, and the defendant thereupon suffers judgment by default, he may, without any leave, sign judgment against the third party for the contribution or indemnity claimed by the notice (*l*). No provision is contained in the rule as to the costs, and a special application under *r.* 54 will be necessary to obtain them.

—2. Where the action is tried or otherwise decided.

—2. *Where the Action is tried or otherwise decided.*]—By *Ord. XVI. r.* 51, "Where a third party makes default in entering an appearance in the action, in *case the action is tried* and results in favour of the plaintiff, the Judge who tries the action may, at or after the trial, enter such judgment as the nature of the case may require for the defendant giving the notice against the third party; provided that execution thereof be not issued without leave of the Judge until after satisfaction by such defendant of the verdict or judgment against him. And if the action is *finally decided* in the plaintiff's favour, *otherwise than by trial*, the Court or a Judge may, on application by motion or summons, as the case may be, order such judgment as the nature of the case may require to be entered for the defendant giving the notice against the third party at any time after satisfaction by the defendant of the amount recovered by the plaintiff against him."

Proceedings where third party appears.

Proceedings where Third Party appears—Application for Directions.]—By *Ord. XVI. r.* 52, "If a third party *appears* pursuant to the third-party notice, the defendant giving the notice may apply to the Court or a Judge for directions, and the Court or Judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or Judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party."

(*k*) See cases cited ante, p. 417, n. (*g*).

(*l*) See form, Chit. F. 235.

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If the third party enters an appearance it is necessary for the defendant to apply for directions as to the further proceedings. If no such application is made, or if no order is made on it, the proceedings against the third party are of no effect at all (*m*).

The application for directions is made by a summons before a Master, which must be served on the plaintiff and the third party. It should be made as soon as possible after issue joined, but not before. The plaintiff may, on the hearing of the summons, object to the proceedings against the third party on the ground that they prejudice or embarrass him, and if the Master be of this opinion he may refuse to give any directions (*m*), in which case the proceedings against the third party fail, and are of no effect at all (*m*). If, however, the case be a proper one the Master may make such order as may be necessary.

In an action brought by a landlord against his tenant for breach of covenant when the latter had served the notice on a sub-tenant, who had entered into a similar covenant with him, directions were refused on the ground that the covenant in the underlease, though in identical terms with that in the original lease, was not a covenant to indemnify the defendant against or to perform the covenant in the original lease (*n*).

The order may be made where the third party is a married woman whose separate estate it is sought to charge (*o*), but it will not be made in such a case unless there is separate estate (*p*).

—Judgment against third party on application for directions.

If on the hearing of the application for directions the third party admits that he has no defence against the defendant's claim, or declines to state any, judgment may be ordered to be signed by the defendant against him (*q*). This may be done when the defendant admits the plaintiff's claim by paying money into Court (*q*). When, however, an order for judgment under *Ord. XIV.* has been obtained, it has been held that the order cannot be made (*r*). And where the plaintiff's claim is admitted by the defendant, but there is a question as to the claim against the third party, the defendant will generally be left to bring an action against the third party (*s*). An order for judgment against the third party will not be made where he has a counterclaim against the defendant (*t*).

—Liberty to defend or to appear at trial, &c.

By *Ord. XVI. r. 53*, "The Court or a Judge upon the hearing of the application mentioned in rule 52, may, if it shall appear desir-

(*m*) *Schneider* v. *Butt*, 8 Q. B. D. 701; 45 L. T. 371, C. A.: *The Bianca* (C. A.), 8 P. D. 91; 52 L. J., P. 56: *Blaina Iron Co.* v. *Garbutt*, 46 L. T. 162: *Piller* v. *Roberts*, 21 Ch. D. 198; 46 L. T. 467: *Hutchinson* v. *Colorado United Mining Co.*, W. N. 1884, 40; Bitt. Ch. Cas. 225, third party abroad.

(*n*) *Pontifex* v. *Foord*, cited ante, p. 417. See also *Hornby* v. *Cardwell*, and other cases cited ante, p. 418.

(*o*) *Gloucestershire Banking Co.* v. *Phillipps*, 12 Q. B. D. 533; 53 L. J., Q. B. 493; 50 L. T. 360; 32 W. R. 522.

(*p*) *Jones* v. *Elderton*, W. N. 1883, 39; Bitt. Ch. Cas. 235.

(*q*) *Gloucestershire Banking Co.* v. *Phillipps*, 12 Q. B. D. 533; 53 L. J., Q. B. 493; 50 L. T. 360; 32 W. R. 522, where an order for judgment against the separate estate of a married woman brought in as a third party was made.

(*r*) *Rich* v. *Darrett*, 28 Sol. Journ. 513, *sed quære*. See *Gloucestershire Banking Co.* v. *Phillipps*, supra.

(*s*) *Bell* v. *Von Darelszon*, W. N. 1883, 208; Bitt. Ch. Cas. 229: *Caister* v. *Chapman*, W. N. 1884, 31; Bitt. Ch. Cas. 232.

(*t*) *Borough* v. *James*, W. N. 1884, 32; Bitt. Ch. Cas. 234.

able to do so, give the third party *liberty to defend the action*, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action."

If the third party appears and the defendant suffers judgment by default or otherwise, the direction enabling defendant to go on to trial against the third party will generally be refused (*u*).

If the third party appears and admits his liability to the defendant, he will be allowed to defend the action (*x*). If he does not admit such liability he will be allowed to intervene at the trial, and the question as to such liability will be ordered to be tried then (*x*). A very general form of order is that the third party be at liberty to appear at the trial by counsel and call witnesses, and that if he relies on any points of defence not raised by the defendant, he deliver a notice of them to the plaintiff within a limited time (*y*), and that the question of the defendant's right to contribution or indemnity be determined at or after the trial as the Judge at the trial shall direct.

The third party is not bound by admissions made by the defendant, but may raise any defence that the defendant might have raised (*z*).

Leave to third party to serve notice on fourth.

Leave to Third Party to serve Notice on Fourth.]—Leave may be given to the party served with notice by the defendant to serve a similar notice on a fourth party (*a*).

Discovery.

Discovery.]—The plaintiff may obtain an order for discovery of documents against the party served with notice, if he has appeared (*b*).

Subsequent proceedings.

Subsequent Proceedings.]—The subsequent proceedings are regulated by the order for directions.

The Judge at the trial may order judgment to be entered for the

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(*u*) *Caister* v. *Chapman*, W. N. 1884, 31.

(*x*) *Coles* v. *Civil Service Supply Association*, 26 Ch. D. 529; 53 L. J., Ch. 638; 50 L. T. 114; 32 W. R. 485.

(*y*) See form, Chit. F. p. 237: *Benecke* v. *Frost*, 1 Q. B. D. 419, 422; 45 L. J., Q. B. 693: *Morris* v. *Beazley*, 46 L. J., C. P. 515; 36 L. T. 409: *Witham* v. *Vane*, 49 L. J., Ch. 242; 41 L. T. 729; 28 W. R. 276. See a form of order, in a case in which the holder of a bill of exchange sued the acceptor, and the latter claimed an indemnity from the drawer, on the ground of partial failure of consideration. *National Provincial Bank of England* v. *Bradly Bridge, &c. Co.*, W. N. 1876, 63; Bitt. No. cclxxxv. See also *Measures* v. *Thomas*, W. N. 1875, 203; Bitt. No. xliii.; and *Tebbs* v. *Lewis*, W. N. 1875, 204; Id. 260; Bitt. No. xlviii., where an auctioneer who was sued by an intending purchaser for deposit money claimed an indemnity from the vendor.

(*z*) *Callender* v. *Wallingford*, 32 W. R. 491.

(*a*) *Witham* v. *Vane*, 49 L. J., Ch. 242; 41 L. T. 729; 28 W. R. 276, *Fry*, J.: *Fowler* v. *Knoop*, 36 L. T. 219, Ex. D. But see per *Lush*, J., *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. at p. 269: *Walker* v. *Balfour*, 25 W. R. 511.

(*b*) *MacAllister* v. *Rochester (Bishop of)*, 5 C. P. D. 194; 42 L. T. 481.

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defendant against the third party or co-defendant served with the notice (*c*).

As to the measure of damages in these cases, *see Fisher* v. *Val de Travers Asphalte Co.*, 1 C. P. D. 511, and per *Mellish*, L. J., in *Swansea, &c. Co.* v. *Duncan*, 1 Q. B. D. 644, at p. 651.

Costs.

Costs.]—By *Ord. XVI. r.* 54, "The Court or a Judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such direction as to costs as the justice of the case may require."

The order made on the defendant's application for directions usually reserves the question of costs (*d*). The above rule gives the Judge full power to deal with them. Under the former rules it was held that the Judge had full power to order the defendant to pay the costs of the third party (*e*), or for the third party to pay the defendant's (*f*) or plaintiff's (*g*) costs, or the costs payable by an unsuccessful defendant to the plaintiff (*h*), but not to order the plaintiff to pay the costs of the third party (*i*). The present rule, however, would appear to give such power. Where the third party without entering an appearance and without the defendant's knowledge paid the plaintiff's claim, he was ordered to pay the defendant's costs of the action (*k*). The *County Courts Act*, 1867, *s.* 5, limiting the right to costs (*see post, Ch. LXVII.*), does not apply as between the defendant and a third party (*i*). Where the third party paid 5*l.* into Court in satisfaction of the defendant's claim, and the defendant took it out, the defendant was allowed his costs (*i*).

Claims between co-defendants.

Claims between Co-Defendants.]—By *R. of S. C., Ord. XVI. r.* 55, "Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action."

Where a defendant claims relief against one or more of his co-defendants, together with the plaintiff, he may set up his claim by

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(*c*) See Ord. XVI. r. 52. This was not so under the former rules. *The Cartsburn*, 5 P. D. 59; 41 L. T. 710, C. A.

(*d*) *Benecke* v. *Frost*, supra. It would appear that there was no power to make an anticipatory order as to costs on the application for directions: *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268, as explained in *Dawson* v. *Shepherd*, 42 L. T. 611 (C. A.). See *Beynon* v. *Godden*, 4 Ex. D. 246.

(*e*) *Dawson* v. *Shepherd*, 42 L. T. 611 (C. A.), in which *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268, is explained. See *Hornby* v. *Cardwell*, infra.

(*f*) *Hornby* v. *Cardwell*, 8 Q. B. D. 329; *Beynon* v. *Godden*, 4 Ex. D. 246.

(*g*) *Piller* v. *Roberts*, 21 Ch. D. 198; 46 L. T. 527.

(*h*) *Hornby* v. *Cardwell*, 8 Q. B. D. 329.

(*i*) *Witham* v. *Vane* (C. A.), 44 L. T. 718, reversing *S. C.*, 42 L. T. 686: *Fry*, J., *Williams* v. *South Eastern R. Co.*, 26 W. R. 352.

(*k*) *Jablochkoff Electric Light Co.* v. *McMurdo*, W. N. 1884, 95; Bitt. Ch. Cas. 227.

way of counterclaim (*l*). But the course is only open to him where the relief or remedy sought is sought against the co-defendant or co-defendants jointly with the plaintiff (*m*). In other cases, where the plaintiff is no party to the claim, the defendant must proceed by notice under *Ord. XVI. r.* 48 (*n*). Under the former rules it was held that the notice for the purpose might be sufficiently given by stating the claim or the defence and delivering a copy of it to the co-defendant against whom it was made (*o*). Under the present rule, however, a notice should be given in the same manner as if the co-defendant were a third party.

In the case of a co-defendant the notice may be issued and served without any leave being previously obtained (*p*). The defendant served with the notice must, it would seem, enter an appearance to it, and in the event of his doing so the same application for directions must be made as in the case of a third person not a party to the action (*q*).

(*l*) See ante, pp. 304, 416.

(*m*) *Furness* v. *Booth*, 4 Ch. D. 586; 46 L. J., Ch. 112: *Harris* v. *Gamble*, 6 Ch. D. 748; 47 L. J., Ch. 344. *Shepherd* v. *Beane*, 2 Ch. D. 223; 45 L. J., Ch. 429, is wrong. See ante, p. 305.

(*n*) Id. See Ord. XVI. r. 55, ante, p. 424.

(*o*) *Furness* v. *Booth*, 4 Ch. D. 586; 46 L. J., Ch. 112: *Marner* v. *Bright*, 11 Ch. D. 394 (n.): *Bagot* v. *Easton*, 11 Ch. D. 392; 27 W. R. 404: *Butler* v. *Butler*, 14 Ch. D. 329; 49 L. J., Ch. 742: *Steel* v. *Dixon*, 42 L. T. 765; 28 W. R. 796.

(*p*) *Towse* v. *Loveridge*, 25 Ch. D. 76; 53 L. J., Ch. 499; 49 L. T. 466; 32 W. R. 151, *Pearson*, J. But see *Catton* v. *Bennett*, 26 Ch. D. 161; 53 L. J., Ch. 685; 50 L. T. 383; 32 W. R. 485, where leave was refused, but no point was made as to its being necessary.

(*q*) *Flower* v. *Todd*, W. N. 1884, 47; Bitt. Ch. Cas. 240. See *Sawyer* v. *Sawyer*, W. N. 1883, 212.

CHAPTER XXXIX.

INJUNCTION, MANDAMUS OR RECEIVER ON INTERLOCUTORY APPLICATION (a).

PART V.

Power to grant.

Power to grant.]—An injunction or mandamus may now be granted or a receiver appointed on an interlocutory application by the Court or by a Judge at Chambers.

Jud. Act, 1873, s. 25, sub-s. 8.

By the *Judicature Act*, 1873, *s.* 25, *sub-s.* 8, "A mandamus or an injunction may (*b*) be granted or a receiver appointed by an interlocutory order (*c*) of the Court in all cases in which it shall appear to the Court to be just or convenient (*d*) that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just (*e*); and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title, or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable" (*f*).

"Interlocutory order."

The section, it will be observed, is confined to "interlocutory orders," but it appears that any order which, under the section, could be made on an interlocutory application may, *à fortiori*, be made at the trial or by a final order (*g*). The words "interlocutory order" are not limited to an order made before final judgment, but embrace all orders other than final judgment (*h*). They extend, therefore, to an order made for the purpose of giving effect to a final judgment (*h*).

In what cases.

It will be observed that the section gives power to grant the order in all cases in which it shall appear to the Court to be "just or convenient" that such order should be made. There has been considerable discussion as to the effect of these words, and whether

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(*a*) As to injunction and mandamus in other cases, see post, Ch. CVIII. and Ch. CIX. As to execution by appointing a receiver, post, Ch. LXXX.

(*b*) *Widnes, &c. Co.* v. *Sheffield, &c. Co.*, 37 L. T. 131.

(*c*) See post, n. (*h*).

(*d*) See post, n. (*m*).

(*e*) See post, p. 429.

(*f*) As to whether the latter part of this section is confined to the case of injunctions, see per *Quain*, J., W. N. 1878, 91: *Porter* v. *Lopes*, 7 Ch. D. 358: *Pease* v. *Fletcher*, 1 Ch. D. 273: *Salt* v. *Cooper*, 16 Ch. D. 544: *Smith* v. *Cowell*, 6 Q. B. D. 75: *Real and Personal Advance Co.* v. *McCarthy*, 40 L. T. 878.

(*g*) *Beddow* v. *Beddow*, 9 Ch. D. at p. 93: *North London R. Co.* v. *Great Northern R. Co.*, 11 Q. B. D. 30, per *Cotton*, L. J., at pp. 33 and 39.

(*h*) *Smith* v. *Cowell*, 6 Q. B. D. 75; 50 L. J., Q. B. 38: *Salt* v. *Cooper*, 16 Ch. D. 544; 50 L. J., Ch. 529.

they create an unlimited jurisdiction to make the order. It is now settled, however, that the section does not create any new jurisdiction or enable the Courts to interfere in any case where, prior to the Judicature Acts, they could not have interfered or granted any remedy at all (*i*). But the section gives power to grant the remedy by mandamus, injunction or receiver, in all cases where a legal or equitable right exists which, prior to the Judicature Acts, could have been enforced by these or any other remedies (*k*).

The section does not alter the principles on which the Judge or Court should act (*l*). It must be "just" as well as "convenient" that the order should be made (*m*), that is to say, the order must in each case be consistent with the well-settled principles of law and equity as well as convenient (*m*).

Injunction.

Injunction.]—Under this section an injunction may be granted in all cases where it is shown that a legal or equitable right exists and is being, or is in danger of being, infringed. The section, as has been pointed out (*supra*), does not create any new jurisdiction, but it extends the cases to which the remedy by injunction may be applied (*n*).

The technical objections formerly existing in cases where the defendant was in possession under any claim of title, or being out of possession claimed a right to do the act complained of under colour of some title, and the distinction between claims under legal and equitable titles, are expressly abolished by the section (*o*).

All acts which could formerly have been restrained by injunction either at law or in equity, may now be restrained by an interlocutory injunction (*p*), and this power is not now confined to cases where property is affected but extends to cases affecting personal status (*q*).

(*i*) *North London R. Co.* v. *Great Northern R. Co.* (C. A.), 11 Q. B. D. 30; 52 L. J., Q. B. 380: *Day* v. *Brownrigg*, 10 Ch. D. 294, 305, 307: *Gaskin* v. *Balls*, 13 Ch. D. 324, 329. See *Aslatt* v. *Southampton* (*Corporation of*), 16 Ch. D. 143: *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501. So far as these latter cases are inconsistent with the proposition stated in the text, they must be considered as overruled by *North London R. Co.* v. *Great Northern R. Co.*, supra.

(*k*) Id.: *Malmesbury R. Co.* v. *Budd*, 2 Ch. D. 113: *Beddow* v. *Beddow*, 9 Ch. D. 89, 93: *Hedley* v. *Bates*, 13 Ch. D. 498: *Stannard* v. *Vestry of St. Giles, Camberwell*, 20 Ch. D. 190.

(*l*) Per *James*, L. J., *Day* v. *Brownrigg*, 10 Ch. D. at p. 307: per *Thesiger*, L. J., *Gaskin* v. *Balls*, 13 Ch. D. at p. 329: per *Cotton* and *James*, L.JJ., *Fletcher* v. *Rodgers*, 27 W. R. at p. 98.

(*m*) Per *Jessel*, M. R., *Day* v. *Brownrigg*, 10 Ch. D. at p. 307: Id. *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. at p. 148: Id. *Beddow* v. *Beddow*, 9 Ch. D. at p. 93: *Corporation of Cork* v. *Rooney*, 7 L. R., Ir. 191: *Real and Personal Advance Co.* v. *McCarthy*, 27 W. R. 706.

(*n*) See cases cited supra, n. (*i*). And see *Corporation of Cork* v. *Rooney*, 7 L. R., Ir. 191: per *Thesiger*, L. J., *Gaskin* v. *Balls*, 13 Ch. D. at p. 329: per *Jessel*, M. R., *Hedley* v. *Bates*, 13 Ch. D. at p. 501: Id. *Beddow* v. *Beddow*, 9 Ch. D. at p. 93: per Lord *Coleridge*, C. J., *Shaw* v. *Earl of Jersey*, 4 C. P. D. at p. 124, affirmed in C. A., Id. p. 359: per *Fry*, J., *Thomas* v. *Williams*, 14 Ch. D. at p. 873. See contra, per *Bacon*, V.-C., *Dick* v. *Brooks*, 15 Ch. D. at p. 25.

(*o*) See the section, ante, p. 426.

(*p*) Per *Jessel*, M. R., *Beddow* v. *Beddow*, 9 Ch. D. at p. 93.

(*q*) Per *Jessel*, M. R., *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. at p. 148.

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In order to justify the granting of an injunction it must be shown that some legal or equitable right exists (*r*), and also that some act or thing is being done or threatened which is, or will inevitably be, or result in, an infringement or violation of that right (*s*). But, whenever the existence of such a right is shown, and it is shown that it is being infringed or threatened with infringement, an injunction will, subject to the question of its being convenient in the particular case, be granted restraining the infringement (*t*). Where then the question of title is disputed, but the threatened injury is clearly established, the injunction will be granted unless the plaintiff's allegation of his title is distinctly and clearly rebutted (*u*).

By *R. of S. C., Ord. L. r.* 12, "In any cause or matter in which an injunction has been, or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and the Court or a Judge may grant the injunction, either upon or without terms, as may be just."

The granting or refusing of an injunction is a matter of discretion (*x*), and depends in each case on the particular circumstances before the Judge (*y*). The balance of convenience must in each case be considered (*z*). If, on the one hand, the injury resulting from the act which it is sought to restrain can be compensated by damages, and the inconvenience and loss to the defendant will be considerable or irreparable in the event of his being restrained, the order should be refused (*z*). If, on the other hand, irreparable injury would be caused to the plaintiff by withholding the injunction, and the injury is one which can be compensated by damages, the injunction should be granted on the usual undertaking as to damages (*a*).

When the defendant offers to discontinue the acts complained of and gives an undertaking that he will discontinue them the injunction will not generally be granted (*b*).

A mandatory injunction compelling the defendant to perform a statutory duty (*c*), or a covenant, or to desist from breaking it,

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(*r*) *North London R. Co.* v. *G. N. R. Co.*, ante, p. 427, n. (*i*): per *James*, L. J., *Day* v. *Brownrigg*, 10 Ch. D. at p. 305.

(*s*) *Pattisson* v. *Gilford*, L. R., 18 Eq. 259, per *Jessel*, M. R., at pp. 262, 263: *Lord Cowley* v. *Byas*, 37 L. T. 238.

(*t*) Per *Jessel*, M. R., *Cooper* v. *Whittingham*, 15 Ch. D. at p. 507: Id. *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. at p. 148: *Fullwood* v. *Fullwood*, 9 Ch. D. 176, per *Fry*, J., at p. 179.

(*u*) *Crosse* v. *Duckers*, 27 L. T. 816, V.-C. W.

(*x*) *Shaw* v. *Earl of Jersey*, 4 C. P. D. 359, per *Brett*, L. J., at p. 360: *Widnes Alkali Co.* v. *Sheffield, &c. R. Co.*, 37 L. T. 131, per *Grove*, J. at p. 132.

(*y*) *Corporation of Cork* v. *Rooney*, 7 L. R., Ir. 191: *Attenborough* v. *London, &c. Telephone Co.*, W. N. 1884, 2; Bitt. Ch. Cas. 109.

(*z*) *Cooper* v. *Crabtree*, 20 Ch. D. 589; 47 L. T. 5, light: *Newson* v. *Pender* (C. A.), 27 Ch. D. 43.

(*a*) *Corporation of Cork* v. *Rooney*, 7 L. R., Ir. 191.

(*b*) *Dale* v. *Smith*, W. N. 1882, 145.

(*c*) *Price* v. *Bala, &c. R. Co.*, 50 L. T. 787.

or to restore fences destroyed contrary to covenant (*d*), or to remove buildings built contrary to a restrictive covenant (*e*), or so as to obstruct light (*f*), or to perform other duties (*g*), may be granted in proper cases.

Terms.

The usual terms imposed on the granting of an interlocutory injunction are, that the plaintiff should give an undertaking to abide by any order which the Court or Judge may afterwards make as to damages occasioned to the defendant by the granting of the injunction, and the order should never be made without such an undertaking (*h*), even when the Crown is plaintiff (*i*). In some cases, as was done when the Court granted an injunction against a distress for rent, the plaintiff may be ordered to bring money into Court (*k*). In some cases the injunction will be refused on the defendant undertaking to keep an account (*l*), or to abide by any future order of the Court as, for instance, to pull down buildings (*m*). In some cases the application will be referred to the trial (*n*); and, as a general rule, when it is refused on the ground that it is made too late, it should be so referred, or if refused, the costs made costs in the action. Any breach of an undertaking imposed on the defendant as a condition to refusing an injunction, is a contempt of Court, and may be punished as such (*o*).

Instances where injunction granted.

Under this section interlocutory injunctions have been granted to restrain an infringement of a statutory right (*p*), to restrain a contractor from preventing a corporation taking possession of works pursuant to a clause in a contract (*q*), to restrain the committee of a club from expelling a member contrary to the rules (*r*), to restrain the infringement of a copyright (*s*), to restrain the vendor of the goodwill of a business from soliciting (but not from dealing with) his former customers (*t*), to restrain the publication of written (*u*) or

(*d*) *Newton* v. *Nock*, 43 L. T. 197. See *Shelly* v. *Pearson*, 15 Ch. D. 113; 49 L. J., Ch. 406.

(*e*) *Gaskin* v. *Balls*, 13 Ch. D. 324. The Court will not, in general, on an interlocutory application, order buildings to be pulled down: *Johnstone* v. *Royal Courts of Justice Chambers Co.*, W. N. 1883, 5.

(*f*) *Lawes* v. *Carter*, W. N. 1880, 203: cp. *Bonner* v. *G. W. R. Co.*, 48 L. T. 619: *Chitty* v. *Bray*, 48 L. T. 860.

(*g*) *Herman Loog* v. *Bean* (C. A.), 26 Ch. D. 306; 32 W. R. 994.

(*h*) *Graham* v. *Campbell*, 7 Ch. D. 490: *Re Johnstone, Ex p. Abrams*, 50 L. T. 184. As to the costs of the inquiry, see *Slack* v. *Midland R. Co.*, 16 Ch. D. 81.

(*i*) *H. M. Principal Secretary of State for War* v. *Chubb*, 43 L. T. 83.

(*k*) *Shaw* v. *Earl of Jersey*, 4 C. P. D. 120, affirmed in C. A., 4 C. P. D. 359: *Hill* v. *Kirkwood*, 42 L. T. 105; 28 W. R. 358.

(*l*) *Elwes* v. *Payne*, 12 Ch. D. 468: *Mitchell* v. *Henry*, 15 Ch. D. 181.

(*m*) *Smith* v. *Day*, 13 Ch. D. 651 (C. A.).

(*n*) See *Fritz* v. *Hobson*, 14 Ch. D. 542.

(*o*) *Buenos Ayres Gas Co.* v. *Wilde*, 42 L. T. 657.

(*p*) *Cooper* v. *Whittingham*, 15 Ch. D. 510.

(*q*) *Corporation of Cork* v. *Rooney*, 7 L. R., Ir. 191.

(*r*) *Labouchere* v. *Wharncliffe*, 13 Ch. D. 346; 41 L. T. 638: *Fisher* v. *Keane*, 11 Ch. D. 353; 49 L. J., Ch. 11.

(*s*) *Cooper* v. *Whittingham*, 15 Ch. D. 510: *Maple* v. *Junior A. and N. Stores, Limited*, 47 L. T. 589: *Agar* v. *Peninsular and Oriental S. S. Co.*, 26 Ch. D. 637: *Nichols* v. *Pitman*, 26 Ch. D. 374.

(*t*) *Leggott* v. *Barrett*, 15 Ch. D. 306; 51 L. J., Ch. 90: *Mogford* v. *Courtenay*, 45 L. T. 303: Cf. *Ginesi* v. *Cooper*, 14 Ch. D. 596: *Pearson* v. *Pearson*, 27 Ch. D. 145. See *Walker* v. *Mottram*, 45 L. T. 659, where the trustee in bankruptcy had sold the goodwill and an injunction against the bankrupt was refused.

(*u*) *Quartz Hill, &c. Co.* v. *Beall*,

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oral (*x*) slanders or statements injurious to or likely to injure a man in his trade, or to injure a friendly society or company (*y*), or reflecting on the conduct of the promoters of a company (*z*), to restrain a distress for rent (*a*), to compel the lessee of a brick field to restore a fence pursuant to contract (*b*), to restrain the breach of a negative covenant, even though the contract was not one of which specific performance would have been granted (*c*), to restrain mining operations being carried on so as to remove support (*d*), to restrain the lessee of a mine from ceasing pumping operations necessary to prevent its being drowned (*e*), to restrain the erection of buildings, infringing on ancient lights, although the buildings in respect of which the light was claimed were pulled down at the time of application (*f*), to restrain the trustee in liquidation of a mortgagor from removing crops after a demand of possession by the mortgagee (*g*), to restrain a mortgagor from interfering with the management of business and possession of premises by legal mortgagee (*h*), at the suit of an equitable mortgagee to restrain dealings with the legal estate (*i*), to restrain the continuance of a nuisance (*k*), to restrain a company from paying over a dividend (*l*), in lieu of prohibition to restrain proceedings before justices on an irregular notice (*m*), to restrain the infringement of a trade mark or trade name (*n*), to restrain the removal of a vessel out of the jurisdiction pending proceedings to enforce a mortgage on her (*o*), and to restrain the presentation of a winding-up petition (*p*), and to restrain an infringement of a patent (*q*).

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20 Ch. D. 501: *Thomas* v. *Williams*, 14 Ch. D. 864: *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763.

(*x*) *Hermann Loog* v. *Bean*, 26 Ch. D. 306; 32 W. R. 994.

(*y*) *Hill* v. *Hart Davies*, 21 Ch. D. 798.

(*z*) *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501; 46 L. T. 746.

(*a*) *Shaw* v. *Earl of Jersey*, 4 C. P. D. 120, affirmed 4 Id. 359, granted for a fortnight and to be continued only if amount claimed for rent were brought into Court. See *Walsh* v. *Lonsdale*, 21 Ch. D. 9, at p. 17.

(*b*) *Newton* v. *Noel*, 48 L. T. 197.

(*c*) *Donnell* v. *Bennett*, 22 Ch. D. 835; 48 L. T. 68, *Fry*, J. See *Jackson* v. *Winnifrith*, 47 L. T. 243: *Thornewell* v. *Johnson*, 39 W. R. 677: *Worsley* v. *Swann*, 51 J., Ch. 576.

(*d*) *Mundy* v. *Duke of Rutland*, 46 L. T. 477.

(*e*) *Strelley* v. *Pearson*, 15 Ch. D. 113.

(*f*) *Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213; 49 L. J., Ch. 529 (C. A.): *Newson* v. *Pender*, 27 Ch. D. 43.

(*g*) *Bagnall* v. *Villar*, 12 Ch. D. 812; 48 L. J., Ch. 695.

(*h*) *Truman & Co.* v. *Redgrave*, 45 L. T. 605; 30 W. R. 421. See form there.

(*i*) *London and County Banking Co.* v. *Lewis*, 21 Ch. D. 490.

(*k*) *Vernon* v. *St. James's Vestry*, 49 L. J., Ch. 130, affirmed 50 Id. 81; 29 W. R. 222: *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch. D. 102: *Charles* v. *Finchley Local Board*, 23 Ch. D. 767; 48 L. T. 569: *Att.-Gen.* v. *Acton Local Board*, 22 Ch. D. 221: *Att.-Gen.* v. *Dorking (Guardians, &c.)*, 20 Ch. D. 595: *Truman* v. *London, B. and S. C. R. Co.*, 25 Ch. D. 423; 50 L. T. 89; 32 W. R. 364.

(*l*) *Dent* v. *London Tramways Co.*, 16 Ch. D. 344.

(*m*) *Hedley* v. *Bates*, 13 Ch. D. 498. See *Stannard* v. *Vestry of St. Giles, Camberwell*, 20 Ch. D. 190.

(*n*) *Read* v. *Richardson*, 45 L. T. 54 (C. A.): *Hoby* v. *Grosvenor Library Co.*, 28 W. R. 386: *Mitchel* v. *Henry*, 15 Ch. D. 181: *Berliner, &c. Tivoli* v. *Knight*, W. N. 1883, 70. See *Guardian Fire, &c. Co.* v. *Guardian General, &c. Co.*, 43 L. T. 791: *Cowen* v. *Hutton*, 46 L. T. 897: *Grafton* v. *Watson*, 51 L. T. 141.

(*o*) *Clavering* v. *Aguire*, 5 L. R., Ir. 97: cp. *Hart* v. *Herwig*, L. R., 8 Ch. 860.

(*p*) *Cercle Restaurant Castiglione Co.* v. *Lavery*, 18 Ch. D. 555.

(*q*) *Sheehan* v. *G. E. R. Co.*, 16 Ch. D. 59.

Injunctions, as has been seen (*ante*, p. 361), will not be granted to restrain proceedings in Divisions of the High Court other than that in which the application is made (*r*). They have also been refused to restrain proceedings in foreign Courts (*s*); to compel the defendant to pull down buildings erected in breach of covenant, but which had been allowed to stand for five years before application (*t*); to restrain distress for rent by owner of reversion; to restrain lessors from taking possession on forfeiture for breach of covenant (*u*); to restrain interference with a market (on ground of difficulty in ascertaining compensation, defendant undertaking to keep an account) (*x*); to restrain defendant calling his house by the same name as that by which plaintiff called his (*y*); to restrain slander of title (*z*); to restrain the issue of a *bonâ fide* trade circular not issued in breach of any contract (*a*). In a case where the plaintiff had obtained an interlocutory injunction restraining the defendant from erecting buildings, this was discharged on the defendant undertaking to abide by any order as to pulling them down or altering them (*b*).

Instances when refused.

As a general rule, the Court will not interfere to retrain a mortgagee or the grantee of a bill of sale from enforcing his security by sale or otherwise, unless the mortgagor pays into Court the whole amount which the mortgagee swears is due on the mortgage for principal, interest and costs (*c*). This rule, however, does not apply where it is apparent on the face of the mortgage or bill of sale that the mortgagee or grantee is claiming more than is due (*d*). The Court will not restrain a mortgagee from distraining for rent due under an attornment clause (*e*).

—Against mortgagees, &c.

Mandamus.]—The section (*ante*, p. 426) empowers any Court or Judge to grant a mandamus in any case where it may be just or convenient (*f*); but when the remedy sought is really the prerogative writ formerly issued by the Court of Queen's Bench only, no Division other than the Queen's Bench Division ought to grant it (*g*). The granting of a mandamus on an interlocutory application

Mandamus.

(*r*) See cases referred to ante, p. 361, n. (*d*).

(*s*) *Fletcher* v. *Rogers*, 27 W. R. 97: *Hyman* v. *Helm*, 49 L. T. 376.

(*t*) *Gaskin* v. *Balls*, 13 Ch. D. 324. See per *Thesiger*, L. J., at p. 329.

(*u*) *Kinsman* v. *Jackson*, 42 L. T. 558 (C. A.).

(*x*) *Elwes* v. *Payne*, 12 Ch. D. 468. See *Goldsmid* v. *Great Eastern R. Co.*, 25 Ch. D. 511.

(*y*) *Day* v. *Brownrigg*, 10 Ch. D. 294.

(*z*) *Burnett* v. *Tate*, 47 L. T. 743: *Anderson* v. *Leibig's Extract Co.*, 45 L. T. 757: *Halsey* v. *Brotherhood*, 19 Ch. D. 386. Cp. Patents, &c. Act, 1883, s. 32. See ante, p. 429, nn. (*u*) et seq.

(*a*) *Société Anonyme des Manufactures de Glaces* v. *Tilghman's, &c. Co.*, 25 Ch. D. 1; 32 W. R. 71.

(*b*) *Smith* v. *Day*, 13 Ch. D. 651 (C. A.).

(*c*) *Macleod* v. *Jones*, 24 Ch. D. 289, where it was held that the general rule did not apply when the mortgagee was the solicitor of the mortgagor: *Hill* v. *Kirkwood* (C. A.), 28 W. R. 358; 42 L. T. 105: cp. *Ex p. Bayley*, 43 L. T. 181 (C. A.).

(*d*) *Hickson* v. *Barlow*, 23 Ch. D. 690.

(*e*) *Carter* v. *Salmon*, 43 L. T. 490. See *Shaw* v. *Earl of Jersey*, cited ante, p. 430, n. (*a*).

(*f*) *In re Paris Skating Rink Co.*, 6 Ch. D. 731.

(*g*) *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch. D. 102. With reference to the prerogative writ, see Tapping on Mandamus. Mews' Fisher's Digest, tit. "*Mandamus*."

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is discretionary, and it will not be granted unless it is clear that the plaintiff will suffer some injury by waiting until the trial of the action (*h*).

Receiver.

Receiver.]—Subject to what has been pointed out *ante*, pp. 426 and 427, this section empowers a Judge to appoint a receiver in any case where it appears to be just or convenient to do so (*i*); and this is often done when it is necessary in order to preserve or protect property in dispute pending an action. The application may be made at any stage of the proceedings, even before the service of the writ (*k*), and by either plaintiff or defendant (*l*), and in urgent cases *ex parte* (*m*). The power to grant the application is considerably extended by the above section (*n*), so that it is not confined to cases where the Court of Chancery would formerly have granted it (*o*). Thus, a receiver has been appointed over the whole property comprised in a plaintiff's mortgage, as to part of which he was legal, and as to part equitable, mortgagee (*o*); and where there was a dispute as to the title to property (*p*).

Application.

Instances.

Receivers have been appointed under this section in many cases. Thus, in an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an *ex parte* motion before appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) *interim* receiver for fourteen days, or until a receiver should be appointed under a reference to chambers for that purpose which the Vice-Chancellor had directed, the plaintiff undertaking to deal with the property only under the direction of the Court, and to abide by any order which the Court might make as to damages or otherwise (*q*). So a receiver was appointed on the application of a legal mortgagee of land (*r*). So, on the application of a legal mortgagee of an hotel who was prevented by the mortgagor from taking possession, a receiver and manager was appointed pending the trial of an action (*s*). So, in an action for specific performance of a lease, the plaintiff was appointed receiver pending the action (*t*). So, pending an action for recovery of land, where it was shown that the property was being wasted, a receiver was appointed (*u*). So,

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(*h*) *Widnes Alkali Co.* v. *Sheffield, &c. Co.*, 37 L. T. 131.

(*i*) *Real and Personal Advance Co.* v. *McCarthy*, 40 L. T. 878; 27 W. R. 706, *Fry*, J.: *Berry* v. *Keen* (C. A.), 51 L. J., Ch. 912: *Gwatkin* v. *Bird*, 52 L. J., Q. B. 264.

(*k*) *In re H., H.* v. *H.*, 1 Ch. D. 276; 45 L. J., Ch. 749.

(*l*) *Sargant* v. *Read*, 1 Ch. D. 600.

(*m*) *Taylor* v. *Eckersley*, 2 Ch. D. 302; 45 L. J., Ch. 527: *Hicks* v. *Lockwood*, W. N. 1883, 48.

(*n*) *Berry* v. *Keen* (C. A.), 51 L. J., Ch. 912: *Porter* v. *Lopes*, 7 Ch. D. 358; 37 L. T. 824: *Pease* v. *Fletcher*, 1 Ch. D. 273; 45 L. J., Ch. 265: *Real, &c. Advance Co.* v. *McCarthy*, supra.

(*o*) *Pease* v. *Fletcher*, supra.

(*p*) *Berry* v. *Keen*, supra.

(*q*) *Taylor* v. *Eckersley*, 2 Ch. D. 302; 45 L. J., Ch. 527.

(*r*) *Tillett* v. *Nixon*, 25 Ch. D. 238; 53 L. J., Ch. 199; 49 L. T. 598; 32 W. R. 226.

(*s*) *Truman & Co.* v. *Redgrave*, 18 Ch. D. 547; 50 L. J., Ch. 830. See *Deacon* v. *Arden*, 50 L. T. 584.

(*t*) *Hyde* v. *Warden*, 1 Exch. D. 309; 25 W. R. 65.

(*u*) *Real and Personal Advance Co.* v. *McCarthy*, 40 L. T. 878; 27 W. R. 706, *Fry*, J.: *Gwatkin* v. *Bird*, 52 L. J., Q. B. 264: cp. *Habershon* v. *Gill*, W. N. 1875, 231.

also, in a partition action (*x*), or pending administration proceedings (*y*). So, in an action by an unpaid vendor against an insolvent company (*z*), or by debenture holders to enforce foreclosure (*a*).

Equitable execution.

The appointment of a receiver is the mode now generally adopted when the plaintiff is desirous of taking in execution on a judgment property which cannot be reached by the ordinary modes (*b*), such as equitable interests in land (*b*) or money which cannot be attached (*c*).

Who may be appointed.

The plaintiff may be appointed receiver (*d*); but should not be so without consent of the other side or in a very special case (*e*). His solicitor never should be appointed (*f*). The application must be supported by an affidavit showing that the person whom it is proposed to appoint is a fit and proper person.

Affidavit of fitness.

An interim order until a day named, so as to give the applicant an opportunity of taking out a summons, is often made *ex parte* without requiring security. But security is generally required when the order is made on a summons.

Security.

When the order is that the receiver be appointed on giving security he is not constituted receiver until he has given the security (*g*); but when once the security is given the appointment relates back to the date when the order was made (*h*), and his liability to account commences as soon as he is appointed, and extends to all moneys received, whether before or after he has given security (*i*).

As to the proceedings to be taken by a person who is not a party to the action but whose rights are affected by the appointment of the receiver, *see post, Ch. LXXIX.*

Remedies against.

A person who is not a party to the action cannot apply by motion for payment of money to him by a receiver appointed in the action even though a debt due to him be properly payable out of funds in the receiver's hands (*k*). But it has been held that money in the hands of a receiver, and which he has been ordered to pay to a judgment debtor, may be attached (*l*). Money due from and not accounted for by a receiver is a debt of record (*m*).

When a receiver has been appointed and has gone into possession, and received rents with the knowledge of a mortgagee, such mortgagee, upon taking possession, is only entitled to the rents in the

(*x*) *Porter* v. *Lopes*, 7 Ch. D. 358; 37 L. T. 824.

(*y*) *In re Capper, Robertson* v. *Capper*, 26 W. R. 434: *Nothard* v. *Proctor*, 1 Ch. D. 4; 45 L. J., Ch. 302.

(*z*) *Boyle* v. *Bettws Llantwit Colliery Co.*, 2 Ch. D. 726; 45 L. J., Ch. 748.

(*a*) *Peek* v. *Trinsmaran Coal, &c. Co.*, 2 Ch. D. 115; 45 L. J., Ch. 281.

(*b*) *Smith* v. *Cowell*, 6 Q. B. D. 75: *Salt* v. *Cooper*, 16 Ch. D. 544. See fully post, Ch. LXXIX.

(*c*) *Westhead* v. *Riley*, 25 Ch. D. 413; 49 L. T. 776; 23 W. R. 273: *Fuggle* v. *Bland*, 11 Q. B. D. 711: *Webb* v. *Stenton*, 11 Q. B. D. 518.

(*d*) *Sargant* v. *Read*, 1 Ch. D. 600.

(*e*) *In re Lloyd, Allen* v. *Lloyd*, 12 Ch. D. 447; 41 L. T. 171, per *Jessel*, M. R., at p. 451.

(*f*) Id.

(*g*) *Edwards* v. *Edwards*, 1 Ch. D. 291; 45 L. J., Ch. 391, C. A.

(*h*) *Ex p. Evans, In re Watkins*, 13 Ch. D. 252.

(*i*) *Smart* v. *Flood*, 49 L. T. 467.

(*k*) *Brocklebank* v. *East London R. Co.*, 12 Ch. D. 839.

(*l*) *In re Cowan's Estate, Rapier* v. *Wright*, 14 Ch. D. 638, V.-C. H. Sed quære, see post, Ch. LXXXVI.

(*m*) *Seagram* v. *Tuck*, 18 Ch. D. 296.

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receiver's hands after deduction of the receiver's remuneration and expenses (*n*).

The application, to whom.

Application, how made.]—The application may be made to a Judge at Chambers or to the Court (*o*). In ordinary cases it should be made to the former. It cannot be made to a Master, as he has no jurisdiction to make the order even by consent (*p*). By *R. of S. C., Ord. L. r.* 6, "An application for an order under sect. 25, sub-sect. 8 of the Principal Act, or under rules 2 or 3 of this Order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said sub-section 8 it may be made either *ex parte* or with notice, and if for an order under rules 2 or 3 of this Order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

Ex parte or on notice.

The application, if made by the plaintiff, may be made *ex parte* (*o*), or on notice or by a summons (*o*). It should not be made *ex parte* except in very urgent cases, when the delay involved in taking out a summons might cause irreparable injury or defeat the object of the application (*q*). The order should not be made *ex parte* after the defendant has been served with a notice or summons (*r*). If made *ex parte*, the Judge generally grants the injunction (if at all) only for a few days, so as to enable the applicant to take out a summons to continue it (*s*). In ordinary cases the application should be made by a summons. The defendant may, it appears, apply, under sect. 25, sub-sect. 8, *ex parte* notwithstanding the above rule (*t*).

Indorsement of claims.

In cases where the plaintiff seeks an injunction, mandamus or receiver, he should indorse on his writ a claim to that effect (*u*); but an interlocutory order may be made notwithstanding that no such claim is indorsed on the writ (*x*), and if it be thought necessary leave to add such a claim may be granted on the hearing of the application for the order (*u*).

Affidavit in support.

The application must be supported by an affidavit which, in the case of an application for an injunction, should state distinctly the nature of the right, the infringement or threatened infringement of which the plaintiff seeks to restrain; how the plaintiff is entitled to that right; the facts constituting the alleged infringement or from which such infringement is apprehended, and facts showing that the infringement is or will be irreparable or sufficiently serious to justify the Judge in restraining it.

Copies.

If the application is made *ex parte*, the opposite party is entitled to copies of the affidavit or affidavits used, on requesting to be supplied with them and giving an undertaking to pay the proper

(*n*) *Davy* v. *Price*, W. N. 1883, 226; Bitt. Ch. Cas. 182.

(*o*) As to applying *ex parte*, see per *Jessel*, M. R., *Cooper* v. *Whittingham*, 15 Ch. D. at p. 505.

(*p*) R. of S. C., Ord. LIV. r. 12, expressly excludes the master's jurisdiction in respect of "injunctions and other orders under sub-sect. 8 of sect. 25 of the Act."

(*q*) See per *Lindley*, J., *Anon.*, W. N. 1876, 12.

(*r*) Per *James*, L. J., *Graham* v. *Campbell*, 7 Ch. D. at p. 493.

(*s*) *In re Blakesley's Trusts*, 23 Ch. D. 549. But see *Norris* v. *Ormond*, W. N. 1883, 58.

(*t*) *Hick* v. *Lockwood*, W. N. 1883, 48.

(*u*) *Colebourne* v. *Colebourne*, 1 Ch. D. 690.

(*x*) *Salt* v. *Cooper*, 16 Ch. D 544.

charges. This is provided for by *Ord. LXVI. r.* 7, *sub-r.* (j). By this rule, "In the case of an *ex parte* application for an injunction or writ of *ne exeat regno*, the party making such application is to furnish copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the Court or a Judge."

If the copies are not supplied within twenty-four hours from the time of the application, office copies may be taken, and no costs of the copies applied for can be recovered by the party omitting to supply them. *Ord. LXVI. r.* 7, *sub-r.* (n).

Power to order early trial on application for injunction, &c.

By *Ord. L. r.* 1a (*R. of S. C., October*, 1884, *r.* 11) "Whenever an application shall be made before trial for an injunction or other order, and on the opening of such application, or at any time during the hearing thereof, it shall appear to the Judge that the matter in controversy in the cause or matter is one which can be most conveniently dealt with by an early trial, without first going into the whole merits on affidavit or other evidence for the purposes of the application, it shall be lawful for the Judge to make an order for such trial accordingly, and to direct such trial to be held at the next or any other assizes for any place, if from local or other circumstances it shall appear to him to be convenient so to do, and in the meantime to make such order as the justice of the case may require."

The order.

The Order.]—The order, if made, should be drawn up in the usual manner (*a*). It must be served on the defendant or his solicitor (*b*) in the usual way (*c*). The order or copy served must be indorsed with a notice directed to the defendant and other persons served as follows:—"If you, the within-named C. D., neglect to obey this order [by the time therein limited] you will be liable to process of execution, for the purpose of compelling you to obey the same order" (*d*). As to the undertaking as to damages, *see ante*, p. 429.

In the case of an injunction a writ is no longer issued, but the order has the same effect as a writ formerly had (*e*). When the application is made *ex parte*, the order is generally confined to the granting of an interim injunction for a limited time only, so as to enable the plaintiff to apply by summons in the regular way (*f*). When an order is so granted, until the next motion-day, or until further order, it may be dissolved on the application of either party before the time fixed, but cannot be extended beyond it without a further order (*g*).

(*a*) See post, Vol. 2, Ch. CXXIII., "*Summonses and Orders.*"

(*b*) See post, Vol. 2, Ch. LXXXIII., "*Attachment.*"

(*c*) See post, Vol. 2, Ch. CXXIII., "*Summonses and Orders.*"

(*d*) R. of S. C., Ord. XLI. r. 5.

(*e*) By R. of S. C., Ord. L. r. 11, "No writ of injunction shall be issued. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had."

(*f*) See *Re Johnstone, Ex p. Abrams*, 50 L. T. 184.

(*g*) *Bolton* v. *London School Board*, 7 Ch. D. 766.

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Notice of the order may be effectually given by telegram (*h*), but whether such notice is sufficient to subject a party disobeying the order to committal for contempt is a question dependent on the facts of each particular case (*h*). A party who has notice of the order is liable to committal if he disobeys it, although it is not served on him (*i*).

Attachment.

Attachment.]—Any breach of an injunction is a contempt of Court and may be punished by attachment (*k*). The Judge may also allow the party obtaining the order to perform the act required by it to be done at the expense of the party refusing to obey it (*l*).

It is not necessary that the order should have been served on the party against whom the order is made if it is proved that he had notice of it (*k*). Notice by telegram may be sufficient (*m*).

Enforcing undertaking.

Enforcing the Undertaking as to Damages.]—The undertaking as to damages, if the defendant succeeds in showing that the injunction should not have been granted, may be enforced by an order made by the Judge at the trial, or on summons afterwards (*k*), even though it appears that the injunction was granted owing to some mistake on the part of the Judge (*n*). The plaintiff cannot avoid the consequences of the undertaking by discontinuing the action (*o*). The application to enforce the undertaking must be made within a reasonable time after the possibility for making it arises (*p*). A delay of four years has been held to be a fatal objection (*p*). The undertaking is usually enforced by an order for payment by the plaintiff of a given amount as damages, or for an inquiry as to damages and payment by the plaintiff of the amount found due on such inquiry.

(*h*) *Ex p. Langley*, 13 Ch. D. 110.

(*i*) *United Telephone Co.* v. *Dale*, 25 Ch. D. 778; 53 L. J., Ch. 295; 50 L. T. 85; 32 W. R. 428.

(*k*) Id. See *Avery* v. *Andrews*, 51 L. J., Ch. 414. See post, Ch. LXXXIII., "*Attachment.*"

(*l*) R. of S. C., Ord. XLII. r. 30, post, Ch. CIX.

(*m*) See supra, n. (*h*).

(*n*) *Griffith* v. *Blake* (C. A.), 53 L. J., Ch. 965; 51 L. T. 274; 32 W. R. 833, dissenting from *Smith* v. *Day*, 21 Ch. D. 421, 423, 424.

(*o*) *Newcomen* v. *Coulson*, 7 Ch. D. 764, where the Court, after the discontinuance, directed a reference as to damages.

(*p*) *Ex p. Hale, In re Woods* (C. A.), 23 Ch. D. 644; 52 L. J., Ch. 709; 32 W. R. 179.

CHAPTER XL.

ORDERS AS TO CUSTODY, SALE, ETC. OF PROPERTY (*a*).

UNDER the rules below set out the Court or a Judge may, in proper cases, make an order for the interim preservation, detention or custody of the subject-matter of the litigation or for securing the amount in dispute (*Ord. L. rr.* 1 and 3), or for the sale of perishable articles (*Ord. L. r.* 2), or for the inspection of property (*Ord. L. r.* 3), or taking samples, or making observations or experiments (*Ord. L. r.* 3). They may also order the delivery up of property which is detained by virtue of a lien on payment of the amount of the lien into Court (*Ord. L. r.* 8).

Preservation or custody of property.

Order for Preservation or Custody of Property or securing Amount when Primâ Facie Liability on Contract established.]—By *R. of S. C., Ord. L. r.* 1, "When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured."

By *r.* 7, "An application for an order under rule 1 of this Order may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a Judge."

The application should be made by summons at chambers. It must be made to a Judge, as a Master has no jurisdiction (*b*).

Sale, &c.

Order for Sale of Goods, &c.]—By *R. of S. C., Ord. L. r.* 2, "It shall be lawful for the Court or a Judge, on the application of any party, to make any *order for the sale*, by any person or persons named in such order, and in such manner, and on such terms as the Court or Judge may think desirable, of any goods, wares, or merchandise which may be of a *perishable nature* or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

The application under this rule should be made in the first instance to a Judge at chambers. A Master has no jurisdiction in the matter (*c*). It should be made by summons in the usual way (*d*) and supported by an affidavit stating the facts on which

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(*a*) As to inspection of property, see post, Ch. LII., "*Inspection of Property.*"

(*b*) R. of S. C., Ord. LIV. r. post, Ch. CXXIII., "*Summonses Orders.*"

(*c*) See R. of S. C., Ord. LIV. r. 12, post, Ch. CXXIII.

(*d*) By R. of S. C., Ord. L. r. 6, "An application for an order under section 25, sub-section 8, of the

PART V.

the application is made, unless these sufficiently appear on the pleadings or answers to interrogatories.

Under this rule an order for the sale of a horse that had been returned under conditions of sale as not being in accordance with a warranty has been made (*e*). So, in an action to enforce a charge on certain bonds where the claim was admitted by the pleadings, an order was made for sale of the bonds before trial (*f*). In an action to enforce a charge against real estate an interlocutory order for sale may be made if the plaintiff shows a case which would entitle him to such an order at the trial (*g*). An order for sale of real estate was refused where unborn persons might be interested (*h*).

Detention or preservation, &c. of property.

Order for Detention or Preservation, &c. of Property.]—By *R. of S. C., Ord. L. r.* 3, "It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, *or as to which any question may arise therein*, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

The application under this rule should be made in the first instance to a Judge at chambers (*i*). A Master has no jurisdiction (*k*). It should be made by summons in the usual way (*i*), and supported by an affidavit of the facts on which it is based, unless these sufficiently appear in the pleadings.

The principle upon which the Courts act in making orders for the preservation of property pending litigation is that the party ultimately successful is to reap the fruits of the litigation and not merely a barren success (*l*).

In *Hyde* v. *Warden* (*m*) the preservation of the property was secured by appointing the plaintiff receiver and manager (without security). In *Velati & Co.* v. *Braham & Co.* (*n*), which was an action against a jeweller for the return of goods deposited with

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principal Act, or under Rules 2 or 3 of this order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said subsection 8 it may be made either ex parte or with notice, and if for an order under Rules 2 or 3 of this order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

(*e*) *Bartholomew* v. *Freeman*, 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743.

(*f*) *Coddington* v. *Jacksonville, &c. R. Co.*, 39 L. T. 12, C. A.

(*g*) *Davis* v. *Ashwin*, 47 L. J., Ch. 70; 26 W. R. 139.

(*h*) *Miles* v. *Jarvis*, 50 L. T. 48.

(*i*) See R. of S. C., Ord. L. r. 6, supra, n. (*d*).

(*k*) Ord. LIV. rr. 1, 2, post, Ch. CXXIII.

(*l*) Per *Jessel*, M. R., *Polini* v. *Gray*, 12 Ch. D. 438, at p. 443. In that case an order was made for the preservation of a fund pending an appeal to the House of Lords.

(*m*) 1 Ex. D. 309. See further as to receivers, ante, p. 432.

(*n*) 46 L. J., C. P. 415.

him, the defendant was ordered to deliver up the goods to an officer of the Court to abide the event of the action. In *Strelley* v. *Pearson* (*o*) the Court under the above rule and sub-sect. 8 of sect. 25 of the *Judicature Act*, 1873 (see *ante*, p. 430), granted an interlocutory injunction restraining the defendant from ceasing to pump water out of the mine. In *Nicholas* v. *Dracachis* (*p*) the Court restrained all persons from dealing with shares in a ship forming part of the estate of a deceased person.

Inspection.

Order for Inspection of Property or for taking Samples or making Observations or Experiments.]—*See post, Ch. LII., "Inspection of Property."*

Delivery up of property detained as lien or security.

Order for Delivery up of Property detained as Lien or Security on Payment of Amount claimed into Court.]—By *R. of S. C., Ord. L. r.* 8, "Where an action is brought to recover, or a defendant in his defence seeks by way of counterclaim to recover *specific property other than land*, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a *lien* or otherwise *as security* for any sum of money, the Court or a Judge may, at any time after such last-mentioned claim appears *from the pleadings*, or, if there be no pleadings, *by affidavit or otherwise* to the satisfaction of such Court or Judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or Judge may direct, and that, upon such payment into Court being made, the property claimed be given up to the party claiming it."

In this case a Master has jurisdiction, since *Ord. LIV. r.* 12, only excludes his jurisdiction in applications under rules 1 to 5. There must be an action or counterclaim for the recovery of specific property to bring a case within this rule (*q*). Where, therefore, in an action by a mortgagee against a mortgagor for recovery of the principal and interest due, the defendant paid the amount claimed into Court and it was accepted by the plaintiff, an application by the defendant for delivery of the title deeds was refused (*q*).

(*o*) 15 Ch. D. 113; 49 L. J., Ch. 406.

(*p*) 1 P. D. 72: cp. *The Horlock*, 36 L. T. 622.

(*q*) *Morgan* v. *Greatrex*, W. N. 1884, 2; Bitt. Ch. Cas. 63.

CHAPTER XLI.

COMPOUNDING PENAL ACTIONS.

PART V.

In what cases.

IN all actions by common informers for penalties upon any statute, the Court may give the plaintiff leave to compound with the defendant (*a*). Where the Crown is concerned, the consent of the Attorney-General must be procured (*b*). No composition can be made, unless by the leave of the Court in which the suit is pending, under pain of 10*l*., and of being ever afterwards disabled from suing in any popular action (*c*). This leave, however, is not necessary in actions by the party grieved (*d*). It is entirely in the discretion of the Court to grant it or not (*e*). They generally grant it almost as of course, where the Crown is concerned, and the consent of the Attorney-General obtained; but, in other cases, they frequently refuse it. They have refused to grant it in an action on the 25 *G.* 2, *c.* 36, for keeping a disorderly house, &c. (*f*); also, in an action where part of the penalty was given to the poor (*g*).

By *R. of S. C., Ord. L. r.* 13, "Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice (*h*) shall first have been given to the proper officer; but in other cases it may be given without notice to any officer" (*i*).

Motion for leave, when to be made.

The motion for leave to compound cannot be made before the defendant has pleaded (*k*). And the Court will seldom allow of it after verdict, unless circumstances be stated to them which entitle the defendant to such an indulgence (*l*), as where he is very poor, or the like (*m*).

The application.

The motion for this purpose *is grounded on an affidavit by the plaintiff, or his solicitor, stating shortly for what penalties and under what statute the action is brought, and the state of the action and the*

(*a*) 18 El. c. 5, ss. 3, 6. See *R.* v. *Crisp*, 1 B. & A. 282: *Williams* v. *Edley*, 8 East, 378: *Howard* v. *Sowerby*, 1 Taunt. 103: *Sheldon* v. *Mumford*, 5 Id. 268: *Whitehead* v. *Wynn*, 5 M. & S. 427: *R.* v. *Gibbs*, 3 Dowl. 345.

(*b*) *Howard* v. *Sowerby*, *Sheldon* v. *Mumford*, *R.* v. *Gibbs*, supra. As to her Majesty remitting in whole or in part any penalty, &c. imposed or recovered under the 21 G. 3, c. 49, see 38 & 39 V. c. 80.

(*c*) 18 Eliz. c. 5, s. 2.

(*d*) *Kirkham* v. *Wheeley*, 1 Salk. 30.

(*e*) *Maughan* v. *Walker*, 5 T. R. 98: *Howell* v. *Morris*, 1 Wils. 79, 130.

(*f*) *Bellis* v. *Beale*, Tidd, 9th ed. 557; 1 Chit. 381, n.: *Wood* v. *Johnson*, 2 W. Bl. 1157.

(*g*) *Watson* v. *Sprange*, 2 Smith, 195.

(*h*) See form of notice, Chit. Forms, p. 253.

(*i*) R. 118, H. T. 1853, and R. 99, H. T. 2 W. 4, the former rules on this subject, were precisely similar rules to the above. As to the practice in the Common Pleas before these rules, see *Howard* v. *Sowerby*, 1 Taunt, 103: *Sheldon* v. *Mumford*, 5 Taunt. 268: *R.* v. *Gibbs*, 3 Dowl. 345.

(*k*) *R.* v. *Collier*, 2 Dowl. 581. See *R.* v. *Crisp*, 1 B. & A. 282.

(*l*) *Crowder* v. *Wagstaffe*, 1 B. & P. 18: *Maughan* v. *Walker*, 5 T. R. 98: *Morgan* v. *Lute*, 1 Chit. 381.

(*m*) *Bradshaw* v. *Mottram*, 1 Str. 167.

agreement of the parties to apply for leave to compound the action, and the terms of composition (*n*). In cases where the Crown is not concerned, the affidavit should also state special circumstances, to induce the Court to grant the motion. By *R. of S. C., Ord. L. r.* 14, "The order to compound a penal action shall expressly state that the defendant undertakes to pay the sum for which the Court has given him leave to compound the action" (cp. *R. H. T.* 1853, *r.* 119). If the defendant does not perform the undertaking, he may be attached.

In cases where the Crown is concerned, besides giving the usual notice of motion, take to the Solicitor of the Treasury the above affidavit, with the statement of claim and the defence, and he will lay them before the Attorney-General for his consent. As soon as the Solicitor of the Treasury ascertains whether the Attorney-General consents to or refuses the composition, he generally writes to the plaintiff's solicitor informing him of it. The plaintiff's solicitor then applies to the Treasury, and if the Attorney-General consents, you have to pay the solicitor (*5l. 1s. 4d.*), *who hands to you the papers left, and also a consent brief of the Attorney-General, consenting on the part of the Crown to the action being compounded, and for one moiety of the penalty to be paid to the plaintiff, and the other moiety to remain for the Crown. The plaintiff's solicitor then indorses a brief for counsel to consent on the part of the plaintiff to the action being compounded. A like brief must be indorsed for counsel to consent on the part of the defendant. The two latter are half-guinea motions, and need not be moved in Court* (*o*). *Take the three briefs and affidavit to the proper office, and draw up the order* (*p*), *and serve a copy on defendant's solicitor, and make an appointment with him for the defendant to go with you to pay the money to the officer of the Court whose duty it is to receive the money* [*see infra*] *and give a receipt upon the original rule. The plaintiff's solicitor then makes an appointment with his client to attend and receive the moiety, and he must accompany him to identify him.* By *r.* 15, "When leave is given to compound a penal action, where part of the penalty goes to the Crown, the Queen's half of the composition shall be paid into the hands of the Master of the Crown Office Department of the Central Office for the use of her Majesty" (*q*).

Costs.

Where the Act gave costs to the prosecutor he was allowed to receive a certain sum and costs of suit, which together amounted to more than the sum paid to the Crown (*r*). But this was refused where the sum stipulated for costs was so disproportionate as to prove collusion (*s*). And where the Act did not give costs, and the defendant was willing to compound for a certain sum, and to give a further sum for costs, the Crown was entitled to half of such further sum, it being only in the nature of an addition to the composition (*t*).

(*n*) See form of affidavit, Chit. Forms, p. 254.

(*o*) *Lee* v. *Carey*, 1 Chit. Rep. 381.

(*p*) See forms, Chit. Forms, p. 254. See R. E. 33 G. 3, Q. B.

(*q*) See *Brown* v. *Bailey*, 4 Burr. 1929. Before the Jud. Acts, in the other Courts the Queen's half of the composition was paid to one of the Masters. See *Wood* v. *Ellis*, 2 W. Bla. 1154. See the former rule, r. 120, H. T. 1853.

(*r*) *North* v. *Smart*, 1 B. & P. 51: *Wood* v. *Johnson*, 2 W. Bla. 1157.

(*s*) *Wood* v. *Cassian*, 2 W. Bl. 1157.

(*t*) *Lee* v. *Cass*, 2 Taunt. 213.

CHAPTER XLII.

AMENDMENT OF PROCEEDINGS — IRREGULARITY AND NON-COMPLIANCE, SETTING ASIDE PROCEEDINGS FOR, &c.

1. *Amendment of Proceedings* ..... PAGE 442
2. *Irregularity and Non-compliance—Setting aside Proceedings for, &c.*.. 444

[As to amendment of pleadings, *see ante*, p. 315; and as to other particular proceedings, *see the Titles in the Index.*]

1. *Amendment of Proceedings.*

PART V.

Amendment of proceedings.

By *R. of S. C., Ord. XXVIII. r.* 11, "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal" (*a*).

By *r.* 12, "The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

When amendments allowed.

When Amendments allowed.]—An application to amend should be made within a reasonable time, or it may not be granted (*b*). But an application of this nature does not fall within the rules respecting the setting aside proceedings for irregularity, with regard to the promptness of the application (*c*). As to when an amendment should be allowed, *see ante*, pp. 317 *et seq.*

How proceedings amended.

How Proceedings amended.]—Parties cannot in general amend their own proceedings; the leave of the Court or a Judge must be obtained to do so (*d*).

The application to amend should in general be made to a master at chambers, by summons (*e*). The Court or Judge will seldom interfere with the decision of a master upon the subject (*f*).

(*a*) See *In re Pilling's Trusts.* W. N. 1884, 113: *Eckersley* v. *Eckersley*, W. N. 1884, 133.

(*b*) *Wood* v. *Grimwood*, 10 B. & C. 689.

(*c*) *Welsh* v. *Hall*, 9 M. & W. 14.

(*d*) See *Siggers* v. *Sansom*, 2 Dowl. 745: *Bate* v. *Bolton*, 4 Dowl. 677: *Wright* v. *Skinner*, 5 Dowl. 92.

(*e*) See *Duke of Brunswick* v. *Slowman*, 5 C. B. 218.

(*f*) *R.* v. *Archbishop of York*, 3 N. & M. 453: *Doe* v. *Errington*, Id. 646. And see *Atkinson* v. *Bayntun*, 1 Bing. N. C. 740; Hodges, 144: *Baden* v. *Flight*, 6 Dowl. 177: *King* v. *Simmonds*, 7 Q. B. 289.

As to the powers of the Court of Appeal as to amendments, *see post, Ch. LXXXV., "Appeal"* (*g*).

Terms of amendment, and remedy for costs of.

Terms of Amendment.]—The master upon granting leave to amend, may oblige the party applying to submit to such equitable terms as may be necessary to prevent the opposite party from being prejudiced by the amendment (*h*). The costs are generally made costs of the opposite party in any event, but sometimes the amendment will only be allowed upon payment of costs (*i*). Where an order for leave to amend is upon payment of costs, such payment is a condition precedent to the amendment (*j*). Where such an order is so made, and the costs are taxed and ascertained by the Master's allocatur, the party, in order to avail himself of the leave to amend, must tender the full amount of the allocatur, and not a less sum, although he may be prepared to show that a mistake has been made in allowing certain items (*i*). Where a defendant obtained leave to amend a plea and to add another upon the terms of paying the costs of the amendment and of the application, but afterwards declined to avail himself of the rule; the Court refused to grant a rule ordering him to pay such costs (*k*). The nonpayment of the costs, under an order giving leave to amend on the payment of them, but not ordering the payment of them, cannot be enforced by execution (*l*). The party who obtains an order to amend in the usual form is at liberty to act upon it, or to abandon it at his option; if he abandon it, he may proceed as if the order had not been made (*m*). If abandoned after service, the opposite party has no right to costs incurred before the abandonment, on the supposition that the order would be acted upon by the party obtaining it (*n*).

If a party serve an order, or otherwise act upon it, he is bound by its terms, and cannot in general get it rescinded (*o*).

If no time is specified in the order, the amendment must be made within fourteen days (*p*).

(*g*) See *Rutter* v. *Redstone*, 2 Str. 837; Tidd, 714: *Anon.*, Cro. Jac. 429; *Grenville* v. *Smith*, Id. 628: *Newton* v. *Boodle*, 5 C. B. 206: *De Tastet* v. *Rucker*, 3 B. & B. 65: *Wood* v. *Matthews*, Poph. 102: *Wilkinson* v. *Sharland*, 11 Ex. 33; 24 L. J., Ex. 116: *Scales* v. *Cheese*, 1 D. & L. 657: *Mellish* v. *Richardson*, 1 C. & F. 224; 7 B. & C. 819.

(*h*) *Alder* v. *Chip*, 2 Burr. 756. And see 1 Salk. 47; 3 Id. 31: *Havers* v. *Bannister*, 1 Wils. 7: *Low* v. *Newland*, Id. 76: *Waters* v. *Bovell*, Id. 223.

(*i*) A judge has power to fix the amount of costs, upon payment of which an amendment is to be allowed, and the Court will not review the exercise of his discretion: *Tomlinson* v. *Bollard*, 12 L. J., Q. B. 257; 4 Q. B. 642; 3 G. & D. 607: *Wall* v. *Lyon*, 9 Bing. 411; 1 Dowl. 714: *Beaumont* v. *Cosin*, Barnes, 17: *Parsons* v. *Gill*, 2 Ld. Raym. 897: *Moody* v. *Stracey*, 4 Taunt. 588.

(*j*) *Levy* v. *Drew*, 5 D. & L. 307. See *Rishworth* v. *Dawes*, 16 M. & W. 440: *Thompson* v. *Parish*, 28 L. J., C. P. 153; 5 C. B., N. S. 605.

(*k*) *Field* v. *Sawyer*, 6 C. B. 71, et per *Coltman*, J., "You should have taken care at the time to have it made a part of the rule that the costs should be paid, though the defendant should not avail himself of the rule." See infra.

(*l*) *Turner* v. *Gill*, 3 Dowl. 30.

(*m*) *Black* v. *Sangster*, 1 C. M. & R. 521. See *Pugh* v. *Kerr*, 6 M. & W. 17; 8 Dowl. 218.

(*n*) *Brown* v. *Millington*, 22 L. J., Ex. 138: *Pugh* v. *Kerr*, supra.

(*o*) *Girand* v. *Austen*, 1 Dowl. N. S. 703: *King* v. *Simmonds*, 7 Q. B. 289.

(*p*) Master's Practice Rules, post, Vol. 2, Appendix.

2. *Irregularity and Non-compliance—Setting aside Proceedings for, &c.*

Irregularity, non-compliance, &c.

Effect of Non-compliance.]—By *R. of S. C., Ord. LXX. r.* 1, "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit" (*p*).

It would appear that where a rule of practice would defeat a legal and proper claim, the Court has power to dispense with the rule (*q*). Under the above rule, when short notice of motion had been irregularly applied for and served, but the party served was not injured by the irregularity, the Court disregarded the irregularity and heard the motion (*r*).

In what cases.

Setting aside Proceedings.]—The particular cases in which proceedings are usually set aside for irregularity are noticed in the course of this work; we shall here, however, notice some of them, and attempt to deduce from them a few general rules.

Where a previous necessary proceeding has been omitted.

If any necessary proceedings have been omitted by the plaintiff, his next subsequent proceeding may be set aside for irregularity. Thus, if the plaintiff proceed to trial without having given a regular notice of trial to the defendant, the verdict (if for plaintiff) may be set aside, and a new trial granted (*s*). Where a penal statute required an affidavit to be filed before suing out process, and several actions were commenced on one affidavit, including all the defendants in the several actions, instead of a separate affidavit against each, it was held, that the affidavit was defective, and all the proceedings were set aside (*t*).

Where the proceeding is too soon or too late.

If any necessary proceeding on the part of the plaintiff be not taken within the time limited for it, or be taken before the time appointed for it by the practice of the Court, it may be set aside for irregularity. For instance, if judgment be signed for default in delivering a defence before the time for delivering one has expired, the judgment may be set aside (*u*). So, if final judgment be signed before the expiration of the time limited for signing it, it may be set aside for irregularity (*x*).

Where it is informal, or not taken in the manner prescribed.

If any necessary proceeding be informal, or not taken in the manner prescribed by the practice of the Court, it may be set aside for irregularity. Thus in some cases, if a writ of execution be improperly tested (*y*), or be made returnable improperly, or be misdirected, or if there be any other material defect in it, it may be set aside for irregularity, and the defendant ordered to be discharged, or the goods seized under the writ, or the produce of them ordered to be returned to the defendant, as the case may require (*z*).

(*p*) *Dawson* v. *Beeson*, 22 Ch. D. 504, 509; 52 L. J., Ch. 563.

(*q*) *Hunt* v. *Austin* (C. A.), 9 Q. B. D. 593, per *Brett*, L. J., at p. 599; 51 L. J., Q. B. 455.

(*r*) *Dawson* v. *Beeson*, supra.

(*s*) Bull. N. P. 327: *Douglass* v. *Ray*, 4 T. R. 552.

(*t*) *Goodwin* q. t. v. *Parry*, 4 T. R. 577.

(*u*) See ante, p. 266.

(*x*) See *Doe* v. *Hedges*, 4 D. & R. 393. See ante, p. 264.

(*y*) *Hart* v. *Weston*, 5 Burr. 2586.

(*z*) Post, Ch. LXXIV.

And, lastly, if any proceedings are taken which are not warranted by the particular circumstances of the case, according to the practice of the Court, or for which there is no foundation,—as, where judgment for want of a statement of claim is signed after defence delivered, or where the writ of execution is not warranted by the judgment, or the like, the proceedings may be set aside for irregularity. Where it is not warranted by the other proceedings in the case.

A proceeding taken contrary to good faith is not an irregularity (*a*). Proceeding against good faith.

As already noticed, *ante*, p. 444, by *Ord. LXX. r.* 1, non-compliance with any of the rules does not render the proceedings in any action void, unless the Court or a Judge so directs. Distinction between an irregularity and a nullity.

It is difficult to define the distinction between an irregularity and a nullity. Where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding in general is a nullity, and cannot be waived by any act of the party against whom it has been taken (*b*). Thus, an affidavit sworn before a person without authority to take it, is a nullity (*c*). A judgment entered up on a feigned issue as in an ordinary action was formerly a nullity (*d*). On the other hand, a pleading, dated on a day different from that on which it was delivered, cannot be treated as a nullity (*e*). A writ of execution sued out without obtaining leave for that purpose, after six years have elapsed from the time of signing the judgment, is not a nullity, though it may be set aside as irregular (*f*). Where a judge at chambers made an order to set aside a *verdict*, obtained under a writ of trial, on the ground of the insufficiency of the notice of trial, it was held that the order was not a nullity (*g*).

Who may take Advantage of.]—In general, it is only the opposite party or his representatives, or those claiming under him, that can take advantage of the irregularity, and strangers to the proceedings cannot do so (*h*). A defendant is not, it seems, disqualified by want of interest, by a petition in bankruptcy having issued against him and being still in operation, from moving to set aside an execution levied on his goods against good faith, though the debt, warrant and judgment are unimpeached (*i*). Who may take advantage of.

Within what Time the Application must be made, and when Irregularity waived.]—By *Ord. LXX. r.* 2, "No application to set aside Within what time the application must be made.

(*a*) See *Smith* v. *Clarke*, 2 Dowl. 218.

(*b*) See *Smith* v. *Sandys*, 5 N. & M. 60: *Roberts* v. *Spur*, 3 Dowl. 551: *Hanson* v. *Shackleton*, 4 Dowl. 48.

(*c*) See *Sharpe* v. *Johnson*, 2 Bing. N. C. 246; 2 Sc. 405; 4 Dowl. 324. And see Ch. XLIV.

(*d*) *Dickenson* v. *Eyre*, 7 Q. B. 307, n.

(*e*) Ante, p. 281.

(*f*) Post, Ch. LXXXIV.

(*g*) *Orgill* v. *Bell*, 1 Ex. 466. The Act under which an action was tried under a writ of trial is now repealed.

(*h*) See cases, post, Ch. CXIV., as to a warrant of attorney. And see ante, p. 241, as to applying to set aside proceedings on the ground of no service of writ.

(*i*) See post, Ch. LXXIV.

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any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying (*k*) has taken any fresh step after knowledge of the irregularity" (*l*). This rule, it seems, applies to the case of a prisoner (*m*). It applies to the representative of the party (*n*). Where there is an irregularity in a proceeding taken in vacation, and there is time in the course of that vacation to apply to a master at chambers, the application should be made accordingly; for if, as we shall presently see, a reasonable time were to elapse by waiting till the sittings, the Court would refuse the application (*o*). Where proceedings are taken against good faith, an application to set them aside must be made promptly (*p*). The above rule does not apply to setting aside a frivolous pleading, or the like (*q*).

What a reasonable time.

What is a reasonable time within which the application to set aside proceedings should be made, is considered, in each particular case, in the different Chapters throughout this work.

Waiver of irregularity by taking fresh steps.

If the party complaining of an irregularity take a fresh step in the action after knowledge of it, he cannot apply to set aside the irregular proceeding, or otherwise take advantage of it (*r*). Therefore, by entering an appearance, the defendant waives any irregularity in the writ of summons or the indorsement on it (*s*). So, by delivering a defence, the defendant waives an irregularity in the statement of claim (*t*), but where a defendant, after having applied to a Judge in vacation, within due time and in a proper manner, to set aside the declaration for irregularity, was refused an order, and to save a judgment, delivered a plea under protest, it was held he might afterwards apply to the Court in the following term to set aside the proceedings (*u*). An irregularity in a notice of trial or inquiry, or in the time and place of executing it, would be waived in general by the defendant attending and defending at the trial or inquiry (*x*). In general, applying to set aside proceedings on the ground of a certain irregularity, is a waiver of any other irregularity then known to exist (*y*). Various other instances

(*k*) Per *Parke*, B., *Chalkeley* v. *Carter*, 4 Dowl. 480: *Davies* v. *Sherlock*, 7 Dowl. 530.

(*l*) The former rule, R. 135, H. T. 1853, is in the same words.

(*m*) *Primrose* v. *Baddeley*, 2 Dowl. 350; 2 C. & M. 468; 4 Tyr. 370: *Fife* v. *Bruere*, 4 Dowl. 329: *Fownes* v. *Stokes*, 4 Dowl. 125: *Greenshield* v. *Pritchard*, 8 M. & W. 148: *R.* v. *Burgess*, 8 A. & E. 275: *Warne* v. *Haddon*, 4 Dowl. 960: *Davies* v. *Watkins*, 2 Dowl., N. S. 930: *Claridge* v. *M'Kenzie*, 5 M. & G. 251; 12 L. J., C. P. 131.

(*n*) *Weedon* v. *Garcia*, 2 Dowl., N. S. 68. See *Alcock* v. *Sutcliffe*, 2 B. C. 313, where the application was made by the assignees of a bankrupt.

(*o*) Post, p. 447.

(*p*) *Saunders* v. *Jones*, 3 D. & L. 770.

(*q*) *Cutts* v. *Surridge*, 4 D. & L. 642; 16 L. J., Q. B. 193: *Wright* v. *Burroughs*, 4 D. & L. 226; 15 L. J., C. P. 277.

(*r*) See R. 135, H. T. 1853, supra. And see *Cohn* v. *Davis*, 1 H. Bl. 80: *Rogers* v. *Mapleback*, Id. 106: *Browne* v. *Wildbore*, 1 M. & G. 276.

(*s*) *Mulckern* v. *Doerks*, 53 L. J., C. B. 526: *Fox* v. *Money*, 1 B. & P. 250: *R.* v. *Hare*, 1 Stra. 155: *Steele* v. *Morgan*, 8 D. & R. 450: *Davis* v. *Sherlock*, 7 Dowl. 530: *Chalkeley* v. *Carter*, 4 Dowl. 480. See *Ledwick* v. *Prangnall*, 1 Moore, 299.

(*t*) *Bartram* v. *Williams*, 4 Bing., N. C. 301.

(*u*) *Tory* v. *Stevens*, 6 Dowl. 275. And see *Woodcock* v. *Kilby*, 1 M. & W. 41: *Bellotti* v. *Bavella*, 4 Dowl. 719: *Coxeter* v. *Burke*, 5 East, 461: *Sloman* v. *Gregory*, 1 D. & R. 181. See per Cur., 5 East, 462.

(*x*) *Ex p. Yeatman*, W. N. 1880, 191. See post, Ch. LVII.

(*y*) *Thorpe* v. *Beer*, 2 B. & A. 373. And see *Pike* v. *Davis*, 4 Jur. 395.

of a waiver of an irregularity, by taking a fresh step in the action, will be found noticed throughout this work.

Waiver by other means.

An irregularity may be also waived by other means than taking a fresh step in the action. Thus, an undertaking by a solicitor to appear, waives an irregularity in the writ or in the copy or service (*z*). In general, a defendant's asking for time to pay the debt, &c. does not of itself waive an irregularity in the plaintiff's last proceeding (*a*). It has been held that the non-indorsement of an order with the notice required by *Ord. XLI. r.* 5, was not waived by a summons for time to file affidavits (*b*).

No waiver unless with knowledge of irregularity.

In general, a party cannot waive an irregularity, unless he has knowledge of it (*c*). It seems that a party is bound to take advantage of an irregularity within a reasonable time after he has means of knowing it (*d*). An irregularity is not waived by agreeing to terms, where the party is under a misapprehension occasioned by the mistake of a Judge in point of law (*e*).

No waiver where proceeding a nullity.

What has been here said as to the time of making the application to set aside proceedings for irregularity, must be understood only of proceedings which are merely *irregular;* for if a proceeding be completely *defective* and *void*, or, in other words, a *nullity*, the defect is not waived by any delay of the opposite party (*f*). See the instances as to what may be deemed a nullity, *ante*, p. 445. And it may be observed, as a general rule, that waiver consists in doing something after an irregularity committed, where the irregularity might have been corrected before such act done (*g*).

Excuse for not applying in time.

If there be any peculiar circumstances to excuse the lateness of the application, they must be clearly established by the party applying (*h*). Where the application was made to the Court, and the excuse for delay was a previous application at chambers, it was held that the fact of such previous application having been made should be stated in the affidavit in support of the motion to the Court (*i*). Delay occasioned by changing the solicitor has been held insufficient (*k*). So has the illness of a party whose affidavit was necessary to support the application (*l*).

(*z*) See *Anon.*, 1 Chit. 129: *Hompay* v. *Kenning*, 2 Chit. 236: *Lowes* v. *Clarke*, Id. 240: *Coates* v. *Sandy*, 9 Dowl. 381.

(*a*) *Anon.*, 1 Dowl. 23. See *Rawes* v. *Knight*, 1 Bing. 132: *Monday* v. *Sear*, 11 Price, 122.

(*b*) *Hampden* v. *Wallis* (C. A.), 26 Ch. D. 743.

(*c*) Per *Bayley*, J., in *Cox* v. *Tulloch*, 2 Dowl. 47. See *Anderdon* v. *Earl of Stirling* or *Alexander*, 2 Dowl. 267: *Herbert* v. *Darley*, 4 Dowl. 726.

(*d*) *Esdaile* v. *Davis*, 6 Dowl. 465: *Farber* v. *French*, 5 N. & M. 658.

(*e*) *Whalley* v. *Barnett*, 1 Dowl. 607; 3 Tyr. 239. And see *Woodcock* v. *Killey*, 1 M. & W. 41; 4 Dowl. 730.

(*f*) See *Mortimer* v. *Piggott*, 2 Dowl. 615: *Taylor* v. *Phillips*, 3 East, 156: *Osborne* v. *Taylor*, 1 Chit. Rep. 400: *Anon.*, 2 Id. 237: *Garrett* v. *Hooper*, 1 Dowl. 28: *Roberts* v. *Spurr*, 3 Dowl. 551. See *Moore* v. *Stockwell*, 6 B. & C. 76; 9 D. & R. 124: *Cocks* v. *Edwards*, 2 Dowl., N. S. 55: *Graham* v. *Ingleb*[illegible], 5 D. & L. 737.

(*g*) Per *Shepherd*, arg., *Stevenson* v. *Danvers*, 2 B. & P. 110.

(*h*) See *Anderdon* v. *Alexander*, 2 Dowl. 267: *Herbert* v. *Darley*, 4 Dowl. 726: *Orton* v. *France*, 4 Dowl. 598: *Esdaile* v. *Davis*, 6 Dowl. 465.

(*i*) *Sugars* v. *Concanen*, 5 M. & W. 30; 7 Dowl. 391, nom. *Shugars* v. *Concannon*. See *Goren* v. *Tute*, 7 M. & W. 142.

(*k*) *Golding* v. *Scarborough*, 2 H. & W. 94.

(*l*) *Orton* v. *France*, 4 Dowl. 598.

The application, &c.

The Application and Proceedings thereon, &c.]—Proceedings when irregular, are set aside upon application to a Master at chambers on a summons. The Master's decision is subject to appeal as in other cases.

Affidavit for.

Except in cases where the irregularity appears on the face of the proceedings, the application must be supported by an affidavit, showing the irregularity complained of (*m*); and if the irregularity be in any process, a copy of such process should be annexed to the affidavit. On an application to set aside an interlocutory judgment, it must be stated that the judgment has been signed (*n*). So, an affidavit to set aside proceedings on the ground of the defendant not having been served with process, should show that the party making the application is the defendant in the action; and that the process never came to his knowledge or possession (*o*). The affidavit need not swear to merits (*p*); but it is advisable that it should do so where the application is to set aside a judgment, and it is doubtful whether it is irregular or not, in order to prevent a total failure of the application (*q*).

Form of application should go to root of irregularity.

The application should go to the commencement or root of the irregularity complained of. Therefore, if the service of the writ be regular, but the writ be irregular, the application should be to set aside the writ (*r*).

Should correctly state the irregularity.

The summons should also correctly state the irregularity which is complained of (*s*). Where the irregularity was in the copy of the writ served, and perhaps in the writ itself, it not being in the form given by the statute, and the application was to set aside the copy, it was held to be erroneous; the motion ought to have been to set aside the service, or the copy and service (*t*), or to have set aside the writ or the service, or the copy and service (*u*).

By *Ord. LXX. r.* 3, "Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion" (*x*).

Should be for a stay of proceedings.

The summons will be no stay of proceedings until it is disposed of, unless it is so ordered (*y*). The summons should ask for the costs, otherwise the applicant may not get them; on the other hand, if so asked, and the application fail, it will, in general, be discharged with costs (*z*).

Asking for costs.

Terms imposed of bringing no action, &c.

As to imposing on the defendant the terms of not bringing an action, on the setting aside of a judgment and execution, *see ante*,

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(*m*) See Chit. Forms.

(*n*) *Classey* v. *Drayton*, 8 Dowl. 184.

(*o*) See ante, p. 264. And see *Emerson* v. *Brown*, 8 Sc. N. R. 219: *Stevenson* v. *Thorne*, 13 M. & W. 149.

(*p*) *Williams* v. *Williams*, 2 C. M. & R. 473: *Claridge* v. *M'Kenzie*, 12 L. J., C. P. 131; 5 M. & G. 251; 2 Dowl. N. S. 898.

(*q*) Ante, p. 267.

(*r*) *Edwards* v. *Danks*, 4 Dowl. 357; *Hasker* v. *Jarmaine*, 1 C. & M. 408: *Hardwicke* v. *Wardle*, 4 D. & L. 739: *Chapman* v. *Becke*, 3 D. & L. 353.

(*s*) *Huggitt* v. *Parkin*, 1 Bing. 65.

(*t*) *Hall* v. *Redington*, 5 M. & W. 605: *Crow* v. *Field*, 8 Dowl. 231: *Kenney* v. *Bishop*, 9 Id. 57.

(*u*) See *Wills* v. *Dawson*, 2 Dowl. N. S. 465: *Truslove* v. *Whitechurch*, 1 Sc. N. R. 415; 1 M. & G. 426: *Chapman* v. *Becke*, 3 D. & L. 353.

(*x*) The former rule, R. 136, H. T. 1853, was in the same words.

(*y*) Post, Ch. CXXIII.

(*z*) Id.

p. 265. Where an order is made at the instance of the defendant to set aside "the judgment and execution without costs, no action to be brought," the defendant cannot, after he has served the order, apply to set aside so much of it as directs that no action shall be brought (*a*).

Costs.

Costs.]—The costs of the application are in the discretion of the master (*b*).

By *Ord. LXX. r.* 4, "When a summons is taken out to set aside any process or proceeding for irregularity with costs, and the summons is dismissed generally without any special direction as to costs, it is to be understood as dismissed with costs" (*c*). In setting aside a judgment and execution for irregularity, unless a good case for damages be shown, the application will not be granted with costs, if the defendant will not consent to the terms of bringing no action (*d*). In the case of an order to set aside proceedings, a Master at chambers may give costs (*e*), and his discretionary power is exercised, in general, in the same way as if the case was before the Court. If he refuses to give costs, the successful party cannot afterwards apply to the Court for them (*f*).

Remedy, &c. for costs.

As to the mode of enforcing the payment of costs, ordered to be paid by a Master or Judge's order, by execution, *see Ch. CXXIII.* (*g*). If the application be by one of several defendants, the costs must be paid to him, and not to any other defendant (*h*). The costs of an application to set aside a judgment and execution for irregularity, which was granted without costs, cannot be recovered by way of aggravation of damages, in an action of trespass for seizing goods under colour of such judgment and execution (*i*).

Stay of proceedings.

Stay of Proceedings.]—As to the effect of a summons in staying the proceedings until it is disposed of, *see post, Ch. CXXIII.* (*k*); and as to the time allowed for taking the next step after the summons is disposed of, *see Id.*

Confessing irregularity, &c.

Confessing the Irregularity, &c.]—If the party who has committed the irregularity be satisfied that he has no sufficient cause to show

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(*a*) *Pearce* v. *Chaplin*, 10 Jur. 966, Q. B.

(*b*) See post, Chs. LXVII. and CXXIII.: and as to the costs of an application to the Court or a judge, *Tilley* v. *Henley*, 1 Chit. Rep. 136: *Huggett* v. *Parkin*, 1 Bing. 65; 7 Moore, 359: *Edwards* v. *Danks*, 4 Dowl. 357: *Smith* v. *Clarke*, Id.: *Rex* v. *Sheriff of Middlesex*, 2 Dowl. 5: *Jeves* v. *Hay*, 1 Sc. N. R. 399: *Re Morrison*, 8 Dowl. 94.

(*c*) The former rule, R. 137, H. T. 1853, was in the same words.

(*d*) Ante, p. 265.

(*e*) See *Doe* d. *Prescott* v. *Roe*, 1 Dowl. 274; 2 M. & Sc. 119; 9 Bing. 104. And see *Read* v. *Lee*, 2 B. & A. 415; 1 Dowl. 52: *Spicer* v. *Todd*, 1 Dowl. 306.

(*f*) *Davey* v. *Brown*, 1 Sc. 384.

(*g*) *Wenham* v. *Downes*, 5 N. & M. 244.

(*h*) *Showler* v. *Stokes*, 2 D. & L. 2.

(*i*) *Loton* v. *Devereux*, 1 L. J., Q. B. 103; 3 B. & Ad. 343: *Pritchet* v. *Bovey*, 1 C. & M. 775: *Holloway* v. *Turner*, 6 Q. B. 928.

(*k*) *Briscow* v. *Beckett*, 4 M. & R. 100: *Halton* v. *Stocking*, 2 C. & J. 60; 2 Tyr. 165; 1 Dowl. 296.

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against the summons, he may save some expense by serving the opposite party with a notice, acknowledging the defect, desiring him not to proceed with the application and offering to remedy the defect and pay the costs already incurred; or, if he perceive the defect before the other party has moved in the matter to set aside the proceedings, he may prevent all expense by a similar notice. As to the plaintiff waiving a judgment by default when he finds he has irregularly signed it, see *ante*, p. 265 (*l*).

(*l*) See *Hargrave* v. *Holden*, 3 Dowl. 176: *Clarke* v. *Crockford*, Id. 693: *Robinson* v. *Stoddart*, 5 Dowl. 266.

PART VI.

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CHAPTER XLIII.

EVIDENCE GENERALLY.

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General observation.

It does not fall within the province of the present Work to enter into any discussion of the rules of evidence. It is proposed in the present Part to discuss the means by which evidence is brought before the Courts and the practice relating to these means.

Not affected by Judicature Acts.

The *Judicature Act*, 1875, *s.* 20, provides that "Nothing in this Act or in the first schedule hereto, or in any Rules of Court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries."

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The rules relating to juries contained in the Rules of Hilary Term, 1853, are expressly excepted from the general repeal of these rules by the *R. of S. C.*, 1883 (*App. O.*).

Evidence at trial to be given *viva voce*, subject to agreement or special order.

By *R. of S. C., Ord. XXXVII. r.* 1, "In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *vivâ voce* and in open Court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by *affidavit*, or that the *affidavit of any witness may be read* at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with be *examined by interrogatories* or otherwise before a commissioner or examiner; provided that, where it appears to the Court or Judge that the other party *bonâ fide* desires the production of a witness for *cross-examination*, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

The general rule as laid down by the above order is that at the trial of an action the evidence must be given *vivâ voce*, and in open Court (*a*). To this there are two exceptions, viz. (1) when the parties agree that the evidence shall be taken by affidavit; and (2) when the Judge makes a special order admitting evidence by affidavit or the examination of witnesses before an examiner or on commission (*a*). The first of these exceptional cases is treated of *post, Ch. LVI.* The second is treated of *post, Ch. LIV.*

Evidence on motions, &c. by affidavit.

On motions, petitions, or summonses, evidence may be given by affidavit. *See Ord. XXXVIII. r.* 1, *post*, p. 453. The rules and practice with regard to affidavits will be found *post, Ch. XLIV.* (*post*, p. 453).

Reading of evidence in another cause.

By *Ord. XXXVII. r.* 3, "An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or a Judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

Office copies to be evidence.

By *Ord. XXXVII. r.* 4, "Office copies of all writs, records, pleadings and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible."

Use of evidence in proceedings subsequent to trial.

By *r.* 25, "All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter."

(*a*) See *Warner* v. *Mosses*, 16 Ch. D. 100; 50 L. J., Ch. 28, C. A.

CHAPTER XLIV.

AFFIDAVITS.

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When evidence taken by.

When Evidence taken by.]—By *R. of S. C., Ord. XXXVIII. r.* 1, "Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit."

The Court or a Judge may order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial of an action. (*See Ord. XXXVII. r.* 1, *ante*, p. 452.) The parties may also agree to the evidence at the trial being taken by affidavit. (*See post, Ch. LVI.*)

Title of Court.

Title of the Court.]—Affidavits should be intituled in the Court and Division of the Court in which the action is pending in which they are sworn (*a*), or in which they are to be used (*b*). An affidavit of debt not intituled in the Court, but purporting at the foot of it to have been sworn before "J. Y., deputy filazer" (*c*), or "at the

(*a*) *Molling* v. *Poland*, 3 M. & S. 157: *R.* v. *Hare*, 13 East, 189: *Osborn* v. *Tatum*, 1 B. & P. 271. See *Rolfe* v. *Burke*, 12 Moore, 298; 4 Bing. 101, in which case the affidavit was intituled in the "Common Place" instead of "Common Pleas," and was held good. So an affidavit intituled "In the Exchequer," instead of "In the Exchequer of Pleas," was sufficient. *Hands* v. *Clements*, 11 M. & W. 816.

(*b*) See *Osborn* v. *Tatum*, 1 B. & P. 271: *Wigden* v. *Birt*, 1 Dowl., N. S. 93: *Re Lord Cardross*, 5 M. & W. 545: *R.* v. *Hare*, 13 East, 189.

(*c*) *Bland* v. *Drake*, 1 Chit. Rep. 165.

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King's Bench Office, Inner Temple, before me, C. T." (*d*), was held sufficient. An affidavit sworn before a commissioner of the Court, but not intituled in it, was held good, as on the face of the affidavit or jurat it appeared that he was such commissioner (*e*). When an affidavit of debt was sworn in Ireland, before a commissioner of the Common Pleas and Exchequer, it was held that the title of the Court need not be prefixed to the affidavit when sworn, but that the affidavit might be taken before such commissioner, to be afterwards intituled, and used in either of the Courts (*f*). And it seems that it might have been used in either Court without being previously intituled, if it appeared by the jurat that the person before whom it was sworn was a commissioner of both Courts (*g*).

Affidavits on Crown side.

By *R. of S. C., Ord. LXVIII. r.* 4, "Affidavits used in applications on the Crown side of the Queen's Bench Division shall be intituled in the Queen's Bench Division."

Title of cause or matter.

Title of Cause or Matter.]—By *Ord. XXXVIII. r.* 2, "Every affidavit shall be intituled in the cause or matter in which it is sworn; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant respectively, and that there are other plaintiffs or defendants, as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the taxing officer."

If there be an action in Court, the affidavit in support of or in opposition to a motion respecting it must also be intituled *in the action*. Even *after* an action is removed by *certiorari* from an inferior Court, all affidavits in it must be intituled in the cause (*h*). Formerly it was necessary to set out the full names of all the parties (*i*), but the above rule dispenses with the necessity for this. The parties should be described as they are described in the writ (*k*). Where the plaintiff was described in the writ as "W. W., carrying on business under the name or style of W. T.," it was held he might be so described in the title of the affidavit (*l*). In an action between "J. S. and G. J. the elder," an affidavit was intituled omitting the words "the elder," the Court held it properly intituled, as G. J. meant G. J. the elder (*m*). But an affidavit

How parties should be described.

(*d*) *Howell* v. *Wilkins*, 7 B. & C. 783. See *Hands* v. *Clements*, 11 M. & W. 816; 1 D. & L. 379.

(*e*) *Urquhart* v. *Dick*, 3 Dowl. 17.

(*f*) *Perse* v. *Browning*, 1 M. & W. 362.

(*g*) *White* v. *Irving*, 5 Dowl. 289.

(*h*) *Franks* v. *Wicks*, 9 Dowl. 489.

(*i*) *Fores* v. *Diemar*, 7 T. R. 661: *Bullman* v. *Callow*, 1 Chit. Rep. 727: *Anderson* v. *Baker*, 3 Dowl. 107. See *Dand* v. *Barnes*, 1 Marsh. 403; 6 Taunt. 5: *Mackenzie* v. *Martin*, Id. 286: *Cohen* v. *Williams*, 8 Dowl. 418: *Bodley* v. *Reynolds*, 15 L. J., Q. B. 152: *Tomkins* v. *Geach*, 5 Dowl. 509: *Doe* d. *Pryme* v. *Roe*, 8 Dowl. 340: *Doe* d. *Welsford* v. *Roe*, 7 Sc. 172.

(*k*) See *Joll* v. *Lord Curzon*, 5 C. B. 205: *Munden* v. *The Duke of Brunswick*, 4 C. B. 321; 4 D. & L. 807, where the word "sovereign" was added in the title of the affidavit, and it was held insufficient: *Tagg* v. *Simmonds*, 4 D. & L. 582; 16 L. J., Q. B. 319, B. C.: *Hibblethwaite* v. *The Leeds and Thirsk R. Co.*, 16 Jur. 1015, Ex., where the defendant's name was changed during the pendency of the action: *Gray* v. *Coombs*, 10 C. B. 72, where the name in the title was incorrect, but idem sonans.

(*l*) *White* v. *Feltham*, 3 C. B. 658.

(*m*) *Singleton* v. *Johnson*, 9 M. & W. 67; 1 Dowl., N. S. 356. See *Young* v. *Young*, 1 Dowl., N. S. 865.

intituled "G. Shrimpton *v.* Wm. Carter *the elder*, sued as William Carter," the cause being G. Shrimpton *v.* Wm. Carter, was held bad (*n*). Where a party is described in the cause by a wrong name, he should be so described in the title of the affidavit (*o*). Where a defendant (who had not appeared) was sued by the initial letter of his christian name; it was held, that he might intitule his affidavit with his christian name in full, stating that he was sued by the initial letter of his christian name: thus,—Benjamin William May, sued as "B. W. May" (*p*). Where a party has been sued by a wrong name, or by initials, and an appearance has been entered in his right name, the affidavit should be intituled in the defendant's right name (*q*), and it may be stated in the title by what name the defendant was sued, though this it seems is not absolutely necessary (*r*). The christian names must be written at length (*s*). But an affidavit in an action in which the defendant is described by the initial letter of his christian name only, should, in the title, describe him by such initial letter (*t*).

Where several defendants.

In an action against two defendants, an affidavit, it seems, made by one of them before statement of claim may be intituled as against him only (*u*). Thus, it seems, it may be intituled "A. *v.* B." (the defendant who makes the application (*x*)), or "A. *v.* B. sued with C." (the other defendant) (*y*).

Where parties sue in autre droit, &c.

Styling the plaintiff as "assignee, &c.," without saying of whom, was formerly held defective (*z*). So in an affidavit "A. *v.* B., executor, &c.," or "administrator, &c.," without specifying the party of whom the defendant was executor or administrator (*a*). But probably these would be held sufficient under the present rule (*r.* 2, *supra*).

Prochein amy.

In a cause in which E. A. was suing by *his* next friend, an affidavit intituled "E. A. suing by *her* next friend," was held sufficient (*b*).

"Gent., one," &c.

Describing the plaintiff, in the title of the affidavit, as "Gent., one," &c., he not being a solicitor, does not vitiate it;

(*n*) *Shrimpton* v. *Carter*, 3 Dowl. 648. See *Borthwick* v. *Ravenscroft*, infra: *Singleton* v. *Johnson*, supra.

(*o*) *Borthwick* v. *Ravenscroft*, 5 M. & W. 31; 7 Dowl. 393. See *Swift* v. *Knight*, 5 M. & W. 618; 7 Dowl. 563: *Thorpe* v. *Hook*, 1 Dowl. 494: *Baldwin* v. *Bauerman*, 12 C. B. 152; 21 L. J., C. P. 160.

(*p*) *Hodgson* v. *May*, 7 D. & L. 4; 18 L. J., Q. B. 249: *Symes* v. *Prosser*, 15 M. & W. 151; 15 L. J., Ex. 199: *Jones* v. *Eldridge*, infra.

(*q*) *Lomax* v. *Kilpin*, infra.

(*r*) *Lomax* v. *Kilpin*, 16 M. & W. 94; 16 L. J., Ex. 23: *Jones* v. *Eldridge*, 1 Dowl., N. S. 710; 4 Sc. N. R. 751; 4 M. & G. 266: *Dunn* v. *Hodson*, 1 D. & L. 204. See *Finch* v. *Cocker*, 2 Dowl. 383; 2 C. & M. 412: *Sims* v. *Roper*, 15 M. & W. 151: *Franklin* v. *Hodgkinson*, 3 D. & L. 554; 15 L. J., Q. B. 132.

(*s*) *Masters* v. *Carter*, 4 Dowl. 577.

(*t*) *R.* v. *Sheriff of Surrey*, 8 Dowl. 510. See *Symes* v. *Prosser*, supra: *Hodson* v. *May*, supra: *Hilbert* v. *Wilkins*, 8 Dowl. 139.

(*u*) *Dand* v. *Barnes*, 6 Taunt. 5, 1 Marsh. 403. But see 1 Chit. Rep. 727, 728, n.

(*x*) *Dand* v. *Barnes*, supra.

(*y*) *Mackenzie* v. *Martin*, 6 Taunt. 286.

(*z*) *Steyner* v. *Cottrell*, 3 Taunt. 377: *Wright* v. *Hunt*, 1 Dowl. 457: *Anon.*, Id. 97; *Phillips* v. *Hutchinson*, 3 Dowl. 23: *Casley* v. *Smith*, 4 Dowl. 477.

(*a*) *Clark* v. *Martin*, 3 Dowl. 222: *Fletcher* v. *Lechmere*, 2 Dowl., N. S. 818; 5 M. & Gr. 265: *Engler* v. *Twysden*, 6 Sc. 580. See *Doe* d. *Jenks* v. *Roe*, 2 Dowl. 55. In a qui tam action, it was considered sufficient to intitule the plea in the cause without adding qui tam, &c., after plaintiff's name: *Dale* v. *Beer*, 7 East, 333.

(*b*) *Abrahams* v. *Taunton*, 1 D. & L. 319.

PART VI.

"Deceased."

Alias.

such description may be rejected as surplusage (*d*). But where "deceased" was added to the plaintiff's name in the title of the affidavit it was held defective (*e*). An affidavit in a cause between the plaintiff "and J. Tilly, otherwise J. Tillay," intituled as between the plaintiff and J. Tilly, was held sufficient (*f*).

Should appear who plaintiff and who defendant.

It must clearly appear from the title of the affidavit which of the parties are plaintiffs and which are defendants (*g*).

Several actions.

A motion on behalf of the same plaintiff, in two different actions, upon the same ground of application, may be made upon one affidavit intituled in both actions (*h*). On an application by bail to set aside proceedings in the original action and in the action against themselves, the proceedings might be intituled in both actions (*i*).

Where no cause in Court.

Where there is no cause in Court, the affidavits should not be intituled in any cause (*k*). In moving for leave to enter up judgment on an old warrant of attorney, the affidavit may be intituled in a cause (*l*); but this is not absolutely requisite (*m*). So may an affidavit on an application for the delivering up of a warrant of attorney (*n*). On moving for a rule *nisi* for a *certiorari*, the affidavits must not be intituled in a cause (*o*). It seems that the affidavits in support of an order for a *procedendo* should not be intituled in the cause in the inferior Court, but in the superior Court only (*p*). And this is the same in moving for a criminal information (*q*). In opposing a criminal information, or a rule *nisi* for a writ of prohibition, it seems it is optional to intitule them in a cause or not (*r*). The affidavits in support of an application for a prohibition should not be intituled in any cause but in the matter of an action in the inferior Court (*s*). Where a submission to arbitration is made a rule of Court, and no action is pending, the affidavits in support of an application to set aside the award, or for an attachment for not performing it, need not be intituled with the names of the parties (*t*), nor, it would seem, should affidavits used in opposing such applications (*u*). But in such cases it is now usual to intitule the affidavit, "In the matter of a submission to arbitration between A. B. and C. D." If affidavits used in a rule with respect to a

Motion respecting warrant of attorney.

Certiorari, &c.

Procedendo.

Criminal information.

Arbitration.

(*d*) *Reeves* v. *Crisp*, 6 M. & S. 274: *Richards* v. *Isaac*, 2 Dowl. 710.

(*e*) *Bland* v. *Dax*, 15 L. J., Q. B. 1.

(*f*) *Cooper* v. *Tilly*, 7 Jur. 679, Ex.

(*g*) *Harris* v. *Griffith*, 4 Dowl. 289; 1 H. & W. 515: *Richard* v. *Isaac*, 1 C., M. & R. 136; 2 Dowl. 710.

(*h*) *Barrack* v. *Newton*, 1 Q. B. 525: *Pitt* v. *Evans*, 2 Dowl. 226.

(*i*) *Pocock* v. *Cockerton*, 7 Dowl. 21. See *Bosanquet* v. *Graham*, 7 Jur. 831, Q. B.

(*k*) See *Ex p. Evans*, 2 Dowl., N. S. 410. See *Hargreaves* v. *Hayes*, 24 L. J., Q. B. 281; 5 El. & Bl. 272, where *Campbell*, C. J., held the addition of the cause was mere surplusage.

(*l*) *Sowerby* v. *Woodroff*, 1 B. & Ald. 567: *Poole* v. *Robberds*, Id. 568, n.

(*m*) *Davis* v. *Stanbury*, 3 Dowl. 440: *Ex p. Gregory*, 8 B. & C. 409.

(*n*) *Thompson* v. *Vaux*, 5 Dowl. 691.

(*o*) *Ex p. Nohro*, 1 B. & C. 267: *Ex p. Wallworth*, 4 D. & L. 403.

(*p*) *Jameson* v. *Schonswar*, 1 Dowl. 175.

(*q*) *R.* v. *Harrison*, 6 T. R. 60: *R.* v. *Robinson*, 6 T. R. 642.

(*r*) Id.: *Breedon* v. *Capp*, 9 Jur. 781, B. C., E. T. 1845.

(*s*) *Wallace* v. *Allen*, 32 L. T. 830: *Ex p. Evans*, 2 Dowl., N. S. 410.

(*t*) *Bainbrigge* v. *Houlton*, 5 East, 20.

(*u*) *Bainbrigge* v. *Houlton*, supra: *Re Houghton*, 2 M. & P. 452: *Bevan* v. *Bevan*, 3 T. R. 601.

matter of arbitration, where there is no cause in Court, improperly introduce the words "plaintiff" and "defendant," after the names of the parties in the title of the affidavits, these words may be treated as surplusage (*x*). Where a cause is referred under an order of Nisi Prius, the affidavits must be intituled in the action (*y*). The affidavits on applying for an order for an attachment in an action (*z*), and in showing cause against it (*a*), must be intituled in the action (*b*); but after the order is made all future affidavits (as upon an application to set aside the attachment or the like) must be intituled "*The Queen* v. ———" (the party attached) (*c*); and in the case of an attachment against the sheriff, the name of the cause should generally be added, thus:—"*The Queen against the Sheriff of Middlesex, in a cause of J. N.* against *J. S.*;" though this is not, it seems, absolutely requisite (*d*).

Attachment.

Affidavits in support of a motion for an order calling on a solicitor to answer the matters of an affidavit should be intituled in the matter of the solicitor (*e*). Upon an application for an order that a solicitor pay over a sum of money, or give up a document received by him in a particular cause, the affidavits may be intituled in the cause in which the money or document was received (*f*), or in the matter of the solicitor (*g*). They may be so intituled in the cause, although judgment has been signed and execution issued (*h*). An affidavit in support of a motion for judgment under the 6 & 7 *V. c.* 73, *s.* 43, ought to be intituled in the matter of the solicitor (*i*); but, where the original order for taxation is intituled in a cause, such affidavit may also be so intituled (*k*). See further, as to the title of affidavits on applications against solicitors, *ante*, p. 180.

Applications against solicitors.

Affidavits in answer to a rule should in general be intituled in the same way as the rule (*l*).

Affidavits in answer to a rule.

It is as well to intitule an exhibit in the same way as the affidavit is intituled, with the short title of the cause (*m*).

Title to exhibit.

If the affidavit has a defective title, the Court will not allow it to be read (*n*). The Court, when they discharge a rule nisi upon the ground that the affidavit upon which it is obtained is wrongly intituled in the cause, almost invariably do so without costs (*o*). Sometimes the Court will allow a rule or motion to be enlarged or

Consequences of defect in title to affidavit.

(*x*) *Re Imeson* v. *Horner*, 8 Dowl. 651.

(*y*) *Doe* d. *Clarke* v. *Stillwell*, 6 Dowl. 305.

(*z*) *Wood* v. *Webb*, 3 T. R. 253: *Etherington* v. *Kemp*, 1 Chit. 727, n.

(*a*) See *Masters* v. *Lowther*, 21 L. J., C. P. 130; 11 C. B. 948.

(*b*) *Whitehead* v. *Firth*, 12 East, 165.

(*c*) *Rex* v. *Sheriff of Middlesex*, 7 T. R. 439, 527: *Whitehead* v. *Firth*, 12 East, 165: *Brown* v. *Edwards*, 2 D. & L. 520.

(*d*) *Rex* v. *Sheriff of Middlesex*, 5 B. & C. 389; 8 D. & R. 149.

(*e*) See ante, p. 180.

(*f*) *Simes* v. *Gibbs*, 6 Dowl. 310.

(*g*) *Re Wood*, 6 D. & L. 154, B. C.: *Ex p. Randall*, 2 B. C. Rep. 294; 17 L. J., Q. B. 232.

(*h*) *Simes* v. *Gibbs*, 6 Dowl. 310: *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl., N. S. 669.

(*i*) *Re Hair*, 7 M. & G. 510; 8 Sc. N. R. 231; 2 D. & L. 269.

(*k*) *Re Vallance*, 7 M. & G. 511.

(*l*) *Re Grantham*, 4 D. & L. 427.

(*m*) See Ord. XXXVIII. r. 24, post, p. 462. See *Robinson* v. *Robinson*, 10 Jur. 356; 14 L. J., Q. B. 303.

(*n*) *Owen* v. *Hurd*, 2 T. R. 644.

(*o*) *Joll* v. *Lord Curzon*, 5 C. B. 205: *Doe* d. *Neville* v. *Lloyd*, 2 Dowl., N. S. 330: *Harris* v. *Matthews*, 4 Dowl. 608. As to the effect of a defect in the affidavit, &c., see post, p. 473.

PART VI.

adjourned in order that a defect in the title of an affidavit may be cured.

Form of—Must be drawn up in first person and in paragraphs.

Form of—Must be drawn up in First Person and divided into Paragraphs.]—By *R. of S. C., Ord. XXXVIII. r.* 7, "Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be, shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed bookwise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule." Cp. the former rule, *r.* 2, *M. V.* 1854.

When the affidavit is made by one person only, it begins thus (*p*):—"*I, A. B., of* ———, *Gentleman, make oath and say, that,*" &c.; but when made by more than one person, then thus:—"*We, A. B., of* ———, *Gentleman, and C. D., of* ———, *Esquire, severally make oath and say; and first, I, A. B., for myself say, that,*" &c.; "*and I, C. D., for myself say that,*" &c. And if there be any facts to which both of them can swear, then:—"*and we, A. B. and C. D., severally say that,*" &c. (*q*). This introductory sentence forms part of the affidavit, and if the address and description are given in it, then it is sufficient to satisfy a statute—*e. g.*, the Bills of Sale Act—requiring the affidavit to state them (*r*). An affidavit in which the word "oath" is omitted (*s*) is insufficient. And it seems, that, if "said" were substituted for "say," the affidavit would be insufficient (*t*).

Affirmation in lieu of oath.

(*p*) The form where the party affirms is as follows:—

"*I, A. B. of* ———, *do solemnly, sincerely and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely and truly affirm and declare as follows, that is to say:*—"

This form, except affirmant's addition and place of abode, is given by the C. L. P. Act, 1854, s. 20, which enacts, "That if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, that is to say [see the form, supra], which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form." (This section is not repealed.) It may be added that this affirmation in lieu of an oath should not be permitted unless the Judge or commissioner is satisfied of the sincerity of the objection of the affirmant to be sworn from conscientious motives. An affirmation that does not state a conscientious motive will not be received. *In re Prince Henry*, 41 L. T. 803. In the form, as given by the Act, there is nothing to show that there is any occasion to give the addition and place of abode of the affirmant: but it would probably be held that Ord. XXXVIII. r. 8, post, p. 459, requires it.

(*q*) *Preedy* v. *Lovell*, 4 Dowl. 671: *Ex p. Torkington*, L. R., 9 Ch. 298. See Chit. Forms.

(*r*) *Blaiberg* v. *Parke*, 10 Q. B. D. 90; 52 L. J., Q. B. 110; 48 L. T. 311.

(*s*) *Allen* v. *Taylor*, L. R., 10 Eq. 52; 39 L. J., Ch. 627: cp. *Ex p. Torkington*, L. R., 9 Ch. 298: *Oliver* v. *Price*, 3 Dowl. 261: *Doe* v. *Clark*, 2 Dowl., N. S. 393.

(*t*) *Howorth* v. *Hubbersty*, 3 Dowl. 455.

Deponent's Abode.]—By *R. of S. C., Ord. XXXVIII. r.* 8, "Every affidavit shall state the description and true place of abode of the deponent." Therefore the affidavit must state the true place of abode of the person making it, or the Court will not allow it to be used (*u*). And it seems that a defective addition to one of several deponents will render the whole affidavit inadmissible; though this is not free from doubt (*x*). But this rule does not extend to an affidavit made by a party in the cause, if he describe himself as such, as by the words "the above-named plaintiff," or "the above-named defendant," or the like (*y*). Deponent's abode.

It is sufficient if the deponent describe himself as "of the city of London, merchant" (*z*), or as of "Bath, in the county of Somerset, Esquire" (*a*); or as "of Kennington, in the county of Surrey" (*b*); or as "of Lawrence Pountney, in the city of London" (*c*); without stating either parish, place, or lane. So, where a deponent described himself as "late of Tyrone, in the county of Tyrone, in Ireland, but now in Dublin Castle," it was deemed sufficient (*d*). And where a foreigner, who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient (*e*). So, it is sufficient if a solicitor's clerk describe himself as of the place of business of his employer (*f*); or if a clerk describe himself of the office where he does business during the day, although he sleeps elsewhere at night (*g*). But a deponent describing himself as clerk to the defendant (*h*), or "clerk to the defendant's solicitor," without stating any residence, is insufficient (*i*). If the deponent be a prisoner in the custody of the keeper of a prison, or of the sheriff, describing him as such will suffice (*k*). What a sufficient description.

The residence stated must be the true one; therefore, a deponent cannot describe himself as *late* of a place where he has ceased to reside, when he actually resides at another place at the time of Description must be correct.

(*u*) *Jarrett* v. *Dillon*, 1 East, 18.

(*x*) *R.* v. *Carnarvonshire*, 5 N. & M. 364: sed vide *Nathan* v. *Cohen*, 3 Dowl. 370: *Ex p. Edmonds*, 5 Dowl. 702: *Cobbett* v. *Oldfield*, 16 M. & W. 469.

(*y*) *Shirer* v. *Walker*, 2 M. & Gr. 917; 3 Sc. N. R. 235; 9 Dowl. 667: *Angel* v. *Ihler*, 5 M. & W. 163: *Brooks* v. *Farlar*, 5 Dowl. 361, C. P.: *Jackson* v. *Chard*, 2 Dowl. 469, Q. B.: *Poole* v. *Pembrey*, 1 Dowl. 693; 3 Tyr. 387: *Jervis* v. *Jones*, 4 Dowl. 610; 1 H. & W. 654. See *Sharp* v. *Johnston*, 2 Bing. N. C. 246; 2 Sc. 407; 4 Dowl. 324: *Harte* v. *McCullagh*, 5 Ir. R., C. L. 537.

(*z*) *Vassier* v. *Alderson*, 3 M. & Sel. 165.

(*a*) *Coppin* v. *Potter*, 4 M. & Sc. 272; 2 Dowl. 785.

(*b*) *Wilton* v. *Chambers*, 1 H. & W. 116. And see *Hunt's bail*, 4 Dowl. 272; 1 H. & W. 520.

(*c*) *Miller* v. *Miller*, 2 Sc. 117.

(*d*) *Stuart* v. *Gaveran*, 1 H. & W. 699.

(*e*) *Boudehet* v. *Kittoe*, 3 East, 154.

(*f*) *Alexander* v. *Milton*, 1 Dowl. 570; 2 C. & J. 424: *Strike* v. *Blanchard*, 5 Dowl. 216: *Bottomley* v. *Bellchamber*, 4 Dowl. 26. An affidavit in which the deponent was described as "A. B., clerk to Mr. K., 72, Basinghall St.," was held sufficient: *Allen* v. *Thompson*, 2 Jur., N. S. 451, Ex.

(*g*) *Haslop* v. *Thorne*, 1 M. & Sel. 103: *Anon.*, 2 Chit. Rep. 15: *Alexander* v. *Milton*, supra.

(*h*) *Elton* v. *Martindale*, 5 D. & L. 248, Q. B.

(*i*) *Daniels* v. *May*, 5 Dowl. 83: *Winch* v. *Williams*, 21 L. J., C. P. 216; 12 C. B. 416. But see *Simpson* v. *Drummond*, 2 Dowl. 463: *Bottomley* v. *Bellchamber*, 4 Dowl. 26; 1 H. & W. 362.

(*k*) *Jervis* v. *Jones*, 1 H. & W. 654; 4 Dowl. 610: *Sharp* v. *Johnston*, 2 Bing. N. C. 246; 4 Dowl. 324.

making the affidavit (*l*). Where the deponent described himself as "of Dorset-place, Clapham-road, Middlesex," and his true place of residence was Dorset-place, Clapham-road, Surrey, it was held bad (*m*). The Court have in some cases refused to try the real place of the deponent's abode upon an affidavit (*n*).

This description is part of the affidavit, and the description given by it may be sufficient to satisfy the Bills of Sale Act (*o*).

Deponent's degree.

Deponent's Description.]—*Ord. XXXVIII. r.* 8, just noticed, requiring that the description of every person making an affidavit shall be inserted therein, renders it necessary for the affidavit to state the rank or degree in life, or the profession or trade of the deponent, except, as we have just seen, in case the deponent is a party in the cause; and this addition must be stated with sufficient certainty, and must be true (*p*). Merchant (*q*), manufacturer (*r*), "managing clerk to," &c. (*s*), "agent and collector to A. B. (the plaintiff) an hotel keeper" (*t*), "solicitor" or "agent of the above-named plaintiff in this cause" (*u*), or "process server" (*x*), is a sufficient addition. Describing a deponent as "of No. 21, Tokenhouse-yard, Lothbury, in the city of London, clerk to C. K., of the same place," not stating the profession of C. K., is sufficient (*y*). And an affidavit commencing "R. J., late of the city of W., victualler, but now of," &c., without any further addition, has been held sufficient (*z*). But "assessor" is not a sufficient description (*a*). Nor is "acting as managing clerk to," &c. (*b*): nor "articled clerk," without saying to whom or in what profession (*c*). The breach of this rule is only an irregularity, and may be waived (*d*).

Addition, &c. of other parties.

It is not in general necessary to give any addition to any other party but the deponent (*e*). But the christian and surnames of parties ought in general to be inserted if practicable (*f*).

Contents of.

Contents of.]—By *Ord. XXXVIII. r.* 3, "Affidavits shall be confined to such facts as the witness is able of his own knowledge

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(*l*) *Sedley* v. *White*, 11 East, 529.

(*m*) *Collins* v. *Goodyer*, 4 D. & R. 44; 2 B. & C. 563. See *Hewer* v. *Cox*, 30 L. J., Q. B. 73.

(*n*) See Tidd, 9th ed. 179; 2 Smith, 207: *Anon.*, 2 Leg. Obs. 382.

(*o*) *Blaiberg* v. *Purke*, 10 Q. B. D. 90; 52 L. J., Q. B. 110; 48 L. T. 311.

(*p*) *Collins* v. *Goodyer*, 2 B. & C. 563; 4 D. & R. 44. See *Hewer* v. *Cox*, 30 L. J., Q. B. 73.

(*q*) *Vassier* v. *Alderson*, 3 M. & S. 165.

(*r*) *Smith* v. *Younger*, 3 B. & P. 550.

(*s*) Per *Littledale*, J., in *Graves* v. *Browning*, 6 Ad. & E. 805: *Simpson* v. *Drummond*, 2 Dowl. 473. Where the word "to" was omitted the affidavit was held insufficient. *Shakspear* v. *Willan*, 19 L. J., Ex. 184.

(*t*) *Short* v. *Campbell*, 3 Dowl. 487.

(*u*) *Luxford* v. *Groombridge*, 2 Dowl., N. S. 332: *Matthewson* v. *Baistow*, 3 D. & L. 327.

(*x*) *Phillips* v. *Basford*, 4 Jur. 52, B. C. See *Anon.*, 6 Taunt. 73.

(*y*) *Cooper* v. *Foulkes*, 2 Sc. N. R. 200; 1 M. & Gr. 942; 9 Dowl. 46.

(*z*) *Angel* v. *Ihler*, 5 M. & W. 163.

(*a*) *Nathan* v. *Cohen*, 3 Dowl. 370; 1 H. & W. 107.

(*b*) *Graves* v. *Browning*, 6 Ad. & E. 805.

(*c*) *R.* v. *Reeve*, 4 Q. B. 211; 3 G. & D. 560.

(*d*) *Ex p. King*, L. R., 7 C. P. 74; 41 L. J., C. P. 59; *Seymour* v. *Maddox*, 15 Jur. 629, B. C.; 1 L. M. & P. 543.

(*e*) *Waters* v. *Joyce*, 1 D. & R. 150.

(*f*) See *Reynolds* v. *Hankin*, 4 B. & Ald. 536. But see *Howell* v. *Coleman*, 2 B. & P. 466.

to prove, except on interlocutory motions (*g*) on which statements as to his belief, with the grounds thereof (*h*), may be admitted (*i*). The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same."

In general.

The contents of an affidavit must necessarily vary according to the circumstances of each case. The rules relating to affidavits in particular cases will be found under their respective heads throughout this work. The only general rule which can be laid down is, that the affidavit should set forth all the facts and circumstances necessary to be stated in each particular case, explicitly and with certainty; and that where a deponent swears to any fact within his own knowledge, he must swear directly and positively. For instance, material dates must be sworn to positively, and the word "about," being considered to depend upon the conscience of the party making the affidavit, should not be used in specifying them (*k*). The jurat of an affidavit may be referred to for the purpose of fixing the date of an event mentioned in the body of the affidavit (*l*). An allegation, that deponent objects that there is no notice, &c. is not a sufficient averment that in fact there was no notice (*m*). Where the fact is not within the deponent's knowledge, so much precision is not necessary (*n*). Where the deponent states a fact from information, he should in general add that he verily believes it to be true (*o*).

Unnecessary or scandalous matter.

The affidavit should not contain unnecessary matter; if it does so to any great extent, the Court will refer it to the Master, and make the party using it pay the costs occasioned by the unnecessary matter (*p*), or they may order it to be taken off the file (*q*).

By *Ord. XXXVIII. r.* 11, "The Court or a Judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client." Scandalous matter may be ordered to be struck out (*r*), even on the application of a stranger to the proceedings (*s*).

Erasures.

As to erasures, &c., *see Ord. XXXVIII. r.* 12, *post*, p. 474.

(*g*) *Gilbert* v. *Endean*, 9 Ch. D. 259, at p. 269; 39 L. T. 404.

(*h*) *Fry* v. *James*, 4 Ir. R. Eq. 255.

(*i*) See *Re The New Callao Co.*, 47 L. T. 175.

(*k*) *Willes* v. *James*, 1 Dowl. 498. See *Basket* v. *Barnard*, 4 M. & S. 331.

(*l*) *Holmes* v. *The London and South Western R. Co.*, 13 Q. B. 211; 6 D. & L. 536; 18 L. J., Q. B. 87: *Craig* v. *Lloyd*, 6 D. & L. 487; 3 Ex. 232; 18 L. J., Ex. 165.

(*m*) *R.* v. *Manchester R. Co.*, 3 N. & P. 439. And see *Classey* v. *Drayton*, 6 M. & W. 17.

(*n*) See *West* v. *Eyles*, 2 W. Bl. 1059.

(*o*) Per Lord *Abinger*, *Maton* v. *Hayter*, Eq. Ex. T. T. 1839; 3 Jur. 769: *Joynes* v. *Collinson*, 13 M. & W. 558; 2 D. & L. 449. As to when it is sufficient to swear to belief, &c., see Ord. XXXVIII. r. 3, supra.

(*p*) Ord. XXXVIII. r. 3, supra: *Cracknall* v. *Janson*, 11 Ch. D. 1: *Warner* v. *Mosses*, W. N. 1881, 69: *Hirst* v. *Procter*, W. N. 1882, 12: *Walker* v. *Poole*, 21 Ch. D. 835: *Hill* v. *Hart-Davis* (C. A.), 26 Ch. D. 470: *Bromley* v. *Foster*, 1 Chit. Rep. 562: *Lewis* v. *Woolryeh*, 3 Dowl. 692: *Ex p. Heullan*, 7 Price, 594: *Thompson* v. *Dicas*, 2 Dowl. 93, 95: *Williams* v. *Hunt*, 1 Chit. Rep. 321: *The King* v. *Burn*, 7 Ad. & E. 190: *Balls* v. *Smythe*, 2 Sc. N. R. 495; 2 M. & G. 350: *Ex p. Chisman*, 2 Gl. & J. 315.

(*q*) *Hill* v. *Hart-Davis* (C. A.), 26 Ch. D. 470; 51 L. T. 279.

(*r*) *Cracknall* v. *Janson*, 11 Ch. D. 1: *Warner* v. *Mosses*, W. N. 1881, 69.

(*s*) Id.

PART VI.

Deponent's signature.

Deponent's Signature.]—Affidavits made in this country must be signed by the deponent, or, if he cannot write, he should make his mark. It is no objection that the signature is in a foreign character (*z*). An affidavit described deponent as "Edward Charles Pownall;" the signature at the end was "Charles E. Pownall:" held no objection (*a*). Where an affidavit is re-sworn, it need not be signed a second time (*b*). An affidavit sworn before a Judge in Germany, and signed by the Judge, but not by the deponent, has been held sufficient, it being sworn that such is the practice in Germany (*c*).

Certificate on an exhibit.

Certificate on an Exhibit.]—By *Ord. XXXVIII. r.* 24, "Every certificate on an exhibit referred to in an affidavit signed by the commissioner or officer before whom the affidavit is sworn shall be marked with the short title of the cause or matter."

Exhibits.

Exhibits.]—Documents referred to in the affidavit as exhibits must be marked by the commissioner so as to identify them (*d*). They should, where practicable, be inserted between the leaves of the affidavit for better security (*e*).

The Court or Judge may order inspection of a document referred to in an affidavit (*f*), or may order it to be brought into Court (*g*).

Affirmation instead of oath.

Affirmation instead of Oath.]—By the *C. L. P. Act*, 1854, *s.* 20, persons under certain circumstances, make a solemn affirmation as to the truth of an affidavit, instead of swearing to it. See this enactment, *ante*, p. 458, n. (*p*).

Jurat.

Form of (*h*).

Jurat.]—The jurat is written at the foot of the affidavit, to the left of the paper, and in general is in this form; "*Sworn at* ——, *this* —— *day of* ——, 188 , *before me, &c.*"

Where two or more deponents.

By *R. of S. C., Ord. XXXVIII. r.* 9, "In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the 'above-named' deponents" (*i*).

The form in this case will be thus: "*The above-named deponents, A. B. and C. D., were severally sworn at* ——, *this* —— *day of* ——, 188 , *before me,* ——." If the affidavit is sworn in Court, the following is the form of the jurat: "*Sworn in Court, this* —— *day of* ——, 188 " (*k*). In the case of an affirmation, the form is: "*Solemnly affirmed at* ——, *on* ——, *before me,* ——."

(*z*) *Nathan* v. *Cohen*, 3 Dowl. 370.

(*a*) *Hands* v. *Clements*, 11 M. & W. 816; 1 D. & L. 379; 12 L. J., Ex. 437.

(*b*) *Liffin* v. *Pitcher*, 1 Dowl., N. S. 767.

(*c*) *In re Eady*, 6 Dowl. 615. See *In re Howard, In re Ashcroft*, L. R., 9 C. P. 347.

(*d*) *Re Allison*, 10 Exch. 561; 3 W. R. 62.

(*e*) See the notice, post, p. 475.

(*f*) *Tebbutt* v. *Ambler*, 7 Dowl. 674.

(*g*) See *Attenborough* v. *Clark*, 2 H. & N. 588.

(*h*) *Lackington* v. *Atherton*, 6 Sc. N. R. 240.

(*i*) See *Pardoe* v. *Terrett*, 5 M. & G. 291; 6 Sc. N. R. 273: *Cobbett* v. *Oldfield*, 16 M. & W. 469.

(*k*) See *Thorne* v. *Jackson*, 3 C. B. 662, per *Maule*, J. See *Hemsworthy* v. *Bryan*, 1 C. B. 135; 2 D. & L.

By *Ord. XXXVIII. r. 5*, "Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgment of any deed, or recognizance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the Court or a Judge; and every such commissioner shall express the time when, and the place where, he shall do any other act incident to his office."

As to the time and place of swearing.

The jurat in the affidavit should distinctly state the time when it is sworn, otherwise the affidavit will be defective, and cannot be received or used (*l*). Where the jurat was "sworn by, &c. at my Chambers, Rolls' Gardens, Chancery-lane, *dated* this 24th day of April, 1850," it was held insufficient (*m*). The place and county where the affidavit is sworn, if sworn before a commissioner (*n*), or abroad (*o*), must also be stated in the jurat. The place may be stated by reference to a place mentioned in the body of the affidavit (*p*). Where no place was mentioned in the jurat, but the affidavit purported to be sworn before the Chief Justice of the King's Bench in Ireland, and to be signed by him, and the signature was verified here by affidavit, it was deemed sufficient to hold a defendant to bail (*q*).

"Before me."

If the affidavit is sworn before a commissioner, the words "before me" should be inserted in the jurat, though it seems that this is unnecessary where the affidavit is sworn before a Judge at Chambers (*r*).

When sworn before a commissioner.

If sworn before a commissioner, it should appear that the person before whom it is sworn is a commissioner of the Court (*s*). If the affidavit is duly intituled in the Court, it is sufficient in the jurat to describe the commissioner before whom it is sworn as "a commissioner, &c." (*t*). It was at one time thought that the commissioner should describe himself as "a commissioner to administer

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844: *Thomas* v. *Stanaway*, 2 D. & L. 111, where defects in the jurat as to the place of swearing the affidavit before a Judge were held not material.

(*l*) *Doe* v. *Roe*, 1 Chit. Rep. 228: *Wood* v. *Stephens*, 3 Moore, 236: *Blackburn* v. *Allen*, 7 M. & W. 146: *Duke of Brunswick* v. *Harmer*, 1 L., M. & P. 505. See *Hughes* v. *Browne*, 6 M. & G. 751; 2 D. & L. 788; 7 Sc. N. R. 517; 19 L. J., Q. B. 456: *Bell* v. *The Port of London Assurance Co.*, 20 L. J., Q. B. 89: *Duke of Brunswick* v. *Sloman*, 8 C. B. 617; 7 D. & L. 251.

(*m*) *Re Lloyd*, 15 Q. B. 682.

(*n*) MS., E. 1814, Q. B.: *Rex* v. *Cockshaw*, 2 N. & M. 378: *R.* v. *West Riding of Yorkshire*, 3 M. & S. 493: *Boyd* v. *Straker*, 7 Price, 662: *Cass* v. *Cass*, 1 D. & L. 698: *Thomas* v. *Stannaway*, 2 D. & L. 111. See *Symmer* v. *Wason*, 1 B. & P. 105.

(*o*) *Walker* v. *Christian*, cor. *Bosanquet*, J., at chambers, 3rd April, 1835, after consultation with other Judges.

(*p*) *Grant* v. *Fry*, 8 Dowl. 234. See *Rex* v. *Burn*, 7 Ad. & E. 190.

(*q*) *French* v. *Bellew*, 1 M. & S. 302.

(*r*) *Empey* v. *King*, 2 D. & L. 375; 13 M. & W. 519: *R.* v. *Bloxham*, 2 D. & L. 168; 6 Q. B. 528: *Graham* v. *Ingleby*, 5 D. & L. 737; 1 Ex. 651.

(*s*) *Rex* v. *Hare*, 13 East, 189: *Howard* v. *Brown*, 1 M. & P. 22; 4 Bing. 393: *Frost* v. *Hayward*, 2 Dowl., N. S. 566: *Shaw* v. *Perkins*, 1 Dowl., N. S. 306. But probably it would now be held that it was sufficient if the party before whom the affidavit was sworn was a commissioner, though the jurat does not state this. *Ex p. Johnson, Re Chapman*, 50 L. T. 214, C. A., so held on affidavit under Bills of Sale Act.

(*t*) *Burdekin* v. *Potter*, 1 Dowl., N. S. 134; 9 M. & W. 13: *Howard* v. *Brown*, 4 Bing. 394; 1 M. & P. 22: *Munden* v. *The Duke of Brunswick*, 4 C. B. 321; 4 D. & L. 807.

PART VI.

oaths in the Supreme Court of Judicature *in England*," but the words "*in England*" are only necessary when the affidavit is sworn out of this country. "Sworn before me, J. E. S., by commission" was held sufficient (*u*). But merely stating him to be "a commissioner" is not sufficient (*x*). The jurat of an affidavit sworn before a commissioner, stating it to have been received "by virtue of a commission forth," &c., omitting the word "issued," has been held sufficient (*y*). An affidavit sworn in Ireland before a commissioner of the Irish Court of Queen's Bench cannot be used (*z*).

Affidavit by illiterate or blind person.

By *R. of S. C., Ord. XXXVIII. r.* 13, "Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a Judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent" (*a*).

—By marksman.

Where the deponent made his mark, it was held that it should appear from the jurat that the mark was made (*b*). If the deponent is a marksman, it is not necessary for the party before whom the affidavit is made to make an affidavit.

Where deponent a foreigner.

Where an affidavit is made by a foreigner in the English language an interpreter must be sworn by the officer taking the affidavit to interpret it truly, and the jurat should state that the interpreter was so sworn, and did interpret the affidavit. It is not, however, necessary that any affidavit should be made by the interpreter or the officer taking the affidavit; it is sufficient that the latter certifies by the jurat that such steps were taken (*c*). If an affidavit purports to be signed by a deponent, it will be no objection that it is signed in a foreign character; and that there is no statement in the jurat to show that the deponent is a foreigner, and that the writing in question is his signature (*d*). If the affidavit be in a foreign language, there must be another affidavit by an interpreter as to its translation and meaning (*e*).

Jurat should be signed.

The jurat should be signed by the Judge or commissioner before

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(*u*) *Fairbrass* v. *Pettit*, 1 D. & L. 622; 12 M. & W. 453: *Hopkins* v. *Pledger*, 1 D. & L. 119.

(*x*) *Hill* v. *Royston*, 7 Jur. 930, B. C.

(*y*) *Daly* v. *D'Arcy Mahon*, 6 Dowl. 192: *Bell* v. *The Port of London Assurance Co.*, 20 L. J., Q. B. 89.

(*z*) *Griffin* v. *Smythe*, 8 Dowl. 490.

(*a*) See *Haynes* v. *Powell*, 3 Dowl. 599; 1 Chit. Rep. 660: *R.* v. *The Sheriff of Middlesex*, 4 Dowl. 765. See the form, Chit. Forms, p. 728. As to the mode of taking an affidavit of a person of unsound mind, see *Spittle* v. *Walton*, L. R., 11 Eq. 420; 40 L. J., Ch. 365.

(*b*) *Wilson* v. *Blakey*, 9 Dowl. 352. See *Fernyhough* v. *Naylor*, 23 W. R. 228.

(*c*) *Bosc* v. *Solliers*, 6 D. & R. 514; 4 B. & C. 358. And see *Marzetti* v. *Jouffroy*, 1 Dowl. 41.

(*d*) *Nathan* v. *Cohen*, 3 Dowl. 370.

(*e*) It is no objection to an affidavit sworn before a foreign Court, that it was taken in the foreign language, if translated, and the translation verified; and the oath may be administered in the foreign language, if it be translated by an interpreter to the deponent. *In re Eady*, 6 Dowl. 615.

whom it is sworn (*f*). He should also certify that on any exhibit that it is the document referred to in the affidavit (*g*).

When an affidavit is sworn before a notary abroad, his signature must generally be verified by affidavit, though in some cases where the amount in dispute was small this has been dispensed with (*h*).

Interlineation, &c. in jurat, &c.

By *R. of S. C., Ord. XXXVIII. r.* 12, "No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall without leave of the Court or a Judge be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the central office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are rewritten and signed or initialled in the margin of the affidavit by the officer taking it."

This rule applies to affidavits sworn in India (*i*). A line drawn through two words in the jurat, leaving them, however, perfectly legible, is an erasure within this rule, and vitiates the affidavit, though the omission or retention of the words would not vary the sense (*k*). So, striking out the date mentioned in the jurat with a pen, and introducing the right date, is an erasure within the meaning of the above rule (*l*). But if the words "before me" in the jurat are struck out, and the words "by the Court" introduced, it is not, it seems, within the rule (*m*). An erasure over the jurat does not vitiate it (*n*). Nor does the usual practice of totally erasing a jurat, and writing a fresh one underneath. Where part of the jurat of an affidavit was written on one side of the paper, and below it the words "a commissioner for taking affidavits in this Court" were erased, and the remainder of the jurat was written on the other side of the paper, it was held that the affidavit was not vitiated thereby (*o*).

Effect of defective jurat.

An affidavit which has a defective jurat cannot be read. Where a rule is obtained upon an affidavit which is so defective, the Court will sometimes discharge the rule, with costs (*p*), but there is no inflexible rule as to this (*q*).

(*f*) *Bill* (or *Bell*) v. *Bament*, 8 M. & W. 317; 9 Dowl. 810. A warrant of committal obtained upon an affidavit in which the jurat is not signed by the commissioner, is bad, and will be discharged (*Ex p. Heymann*, L. R., 7 Ch. 488); and the defect will not be cured by the commissioner signing the jurat in Court, on the hearing of the application to discharge the warrant. Id.

(*g*) *Re Allison*, 10 Ex. 561.

(*h*) *In re Davis' Trusts*, L. R., 8 Eq 98. See *Lyle* v. *Ellwood*, L. R., 15 Eq. 67: *Bell* v. *Turner*, L. R., 17 Eq. 439: *Bacon* v. *Turner*, W. N. 1876, 292. See post, p. 468.

(*i*) *Re Page*, 5 D. & L. 475: *Re Fagan*, 5 C. B. 436.

(*k*) *Williams* v. *Clough*, 1 A. & E. 376. See *Houlden* v. *Fassen*, 6 Bing. 236; 4 M. & P. 127.

(*l*) *Chambers* v. *Barnard*, 9 Dowl. 557. See *Jacob* v. *Hungate*, 3 Dowl. 456, Ex., where a 3 appeared to have been written over a 2.

(*m*) *Austin* v. *Grange*, 4 Dowl. 576.

(*n*) *Atkinson* v. *Thompson*, 2 Chit. Rep. 19. And see *Houlden* v. *Fassen*, 6 Bing. 236; 4 M. & P. 127.

(*o*) *Wills* v. *Dawson*, 2 Dowl., N. S. 465; 10 M. & W. 662.

(*p*) *Frost* v. *Hayward*, 2 Dowl., N. S. 566; 10 M. & W. 673: *Cobbett* v. *Oldfield*, 16 M. & W. 469; 4 D. & L. 492.

(*q*) *Re Lloyd*, 15 Q. B. 682: *Holmes* v. *The London and South-Western R. Co.*, 13 Q. B. 211. See post, Ch.

PART VI.

Amendment of jurat.

In many cases time has been refused to cure a defect in the jurat (*r*). Where an affidavit which was used in showing cause against a rule had been sworn before a commissioner, but omitted to state in the jurat the place at which it was sworn, leave was given to amend; and in order to enable the party to do so, the rule was enlarged upon payment of the costs of the enlargement (*s*).

Reference to jurat.

As to referring to the jurat for the purpose of fixing the date of an event mentioned in the body of the affidavit, *see ante*, p. 461.

Statement as to party filing.

Statement as to Party filing.]—The affidavit must contain a note at the end of it stating on whose behalf it is filed. By *R. of S. C., Ord. LXVI. r.* 7 (k), "It shall be stated in a note at the foot of every affidavit filed on whose behalf it is so filed, and such note shall be printed on every printed copy of an affidavit or set of affidavits, and copied on every office copy and copy furnished to a party." (*See also Ord. XXXVIII. r.* 10, *post*, p. 471, *and as to filing, see post*, p. 471.)

Printing affidavits.

Printing Affidavits.]—By *R. of S. C., Ord. LXVI. r.* 4, "Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript" (*see ante, Ch. CXXVI.*).

As to printing affidavits where there has been a consent for taking evidence at the trial by affidavit, *see post, Ch. LVI.*

By *Ord. LXVI. r.* 5, "Where any written deposition of a witness has been filed, such deposition shall be printed, unless otherwise ordered."

By *r.* 6, "The rule of Court as to printing depositions and affidavits to be used on a trial, shall not apply to the depositions and affidavits which have previously been used upon any proceeding without having been printed."

As to printing proceedings in general, and as to the paper on which they are to be printed, *see post, Ch. CXXVI.* As to furnishing the opposite party with printed copies, *see ante*, p. 279.

Before whom to be sworn: —Commissioner, &c.

Before whom to be sworn.]—By *Ord. XXXVIII. r.* 4, "Affidavits sworn in England shall be sworn before a Judge, district registrar, commissioner to administer oaths, or officer empowered under these rules to administer oaths."

—Master and first and second class clerk.

By *Ord. LXI. r.* 5, "Every master, and every first and second class clerk in the Filing and Record Department shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court."

Affidavits intended to be used in the course of any proceedings in the High Court, may be sworn either in Court, or before one of

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CXXII. See *Re Denton*, 28 L. J., C. P. 255; 6 C. B., N. S. 287, where there was an erasure in the jurat of an affidavit verifying a notarial certificate of the execution of an acknowledgment by a married woman under the Fines and Recoveries Act, and the Court allowed the affidavit to be filed.

(*r*) See *Anon.*, 2 Chit. Rep. 20: *R.* v. *Cockshaw*, 2 N. & M. 378. But see *Goodrick* v. *Turley*, 4 Dowl. 392: *R.* v. *Justices of Warwickshire*, 5 Dowl. 382.

(*s*) *Cass* v. *Cass*, 1 D. & L. 698; 13 L. J., Q. B. 52. See further as to amendment, *Bill* v. *Bament*, 8 M. & W. 317: *Ex p. Smith*, 2 Dowl. 607. See *Wilson* v. *Blakey*, 9 Dowl. 352. See 2 Tyr. 261.

the Judges of the Court, at Chambers or elsewhere (*t*), or before a commissioner of the Court authorized to take affidavits (*u*); or before a commissioner empowered to take affidavits in Scotland or Ireland, by the statute 3 & 4 *W.* 4, *c.* 42, *s.* 42, or in the Isle of Man or the Channel Islands (*ante*, p. 25).

Not party's solicitor or his clerk or partner.

By *Ord. XXXVIII. r.* 16, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself" (*x*).

By *Ord. XXXVIII. r.* 17, "Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner" (*x*).

An affidavit sworn before the clerk to a solicitor, who makes an application that his client may be admitted as a party to a cause, is not within the prohibition of this rule (*y*). The rule applies only to proceedings on the Crown side of the Queen's Bench Division (*z*).

In Scotland, Ireland, &c.

By *Ord. XXXVIII. r.* 6, "All examinations, affidavits, declarations, affirmations and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the Central Office, may be sworn and taken in Scotland or Ireland or the Channel Islands, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any Judge, Court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of her Majesty's consuls or vice-consuls in any foreign parts out of her Majesty's dominions; and the Judges and other officers of the High Court shall take judicial notice of the seal or signature, as the case may be, of any such Court, Judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to

(*t*) *Phillips* v. *Drake*, 2 Dowl. 45. As to payment of fee for oath, see post, p. 470.

(*u*) Jud. Act, 1873, ss. 82, 84. See *Rex* v. *Jones*, 2 Salk. 461: *Shaw* v. *Perkins*, 1 Dowl., N. S. 306: *Blakeley* v. *Ables*, 11 Jur., N. S. 395.

(*x*) See *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777; 47 L. J., Ch. 343: *Doe* d. *Pryme* v. *Roe*, 8 Dowl. 340. Before the Rules of Court of H. T. 1853, affidavits, except to hold to bail, could not be sworn before the solicitor of the party on whose behalf they were to be used. R. E. 15 G. 2, r. 11, Q. B. And see R. E. 13 G. 2, r. 1, C. P.; R. 6, H. 2 W. 4: *Goodtitle* d. *Pye* v. *Badtitle*, 8 T. R. 638. This rule in general applied to the partner of the solicitor on the record. See *Turner* v. *Bates*, 10 Q. B. 292: *Batt* v. *Vaisey*, 1 Price, 116. And an affidavit made before a commissioner, who acted as the solicitor of the defendant *before* an appearance was entered, could not be used: *Kidd* v. *Davis*, 5 Dowl. 568: *Ex p. Gray*, 21 L. J., Q. B. 380, where there was no action pending. But to render the affidavit inadmissible in these cases, it must have been clearly shown by affidavit (*Hodgson* v. *Walker*, Wightw. 62), or by the admission of the party (*Haddock* v. *Williams*, 7 Dowl. 327), that the solicitor acted as such at the time of taking the affidavit; and it was not sufficient to show that he was so at the time of making the objection: *Beaumont* v. *Dean*, 4 Dowl. 354. To come within this rule the commissioner must have been not merely the law adviser of the party generally, but his solicitor in that particular business: *Williams* v. *Hockin*, 8 Taunt. 435. The Chancery practice was less strict in these respects: *Foster* v. *Harvey*, 4 De G., J. & S. 59.

(*y*) *Doe* d. *Grant* v. *Roe*, 5 Dowl. 409.

(*z*) Ord. LXVIII. r. 2. It did not do so formerly. *R.* v. *Mixen*, 1 Dowl., N. S. 865, *Coleridge*, J.

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any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document."

Before magistrates, &c. abroad.

An affidavit made in a foreign country before a mayor or other magistrate or officer there, being authorized by the law of such country to administer oaths, may be used in the Courts here (*a*).

An affidavit sworn in foreign parts out of her Majesty's dominions before a notary public (*b*), and not before a consul or vice-consul, in cases where the deponent is residing at a distance from any consul or vice-consul, may be filed (*b*).

But it has been held at Chambers that an affidavit sworn before a notary public in the United States, whose signature was verified by the Secretary of State, was not admissible (*c*).

British consul may administer oaths.

By 6 *G.* 4, *c.* 87, *s.* 20, "And whereas it is expedient that every consul-general or consul appointed by his Majesty at any foreign port or place should, in all cases, have the power of administering an oath or affirmation whenever the same shall be required, and should also have power to do all such notarial acts as any public notary may do; Be it therefore enacted, That from and after the passing of this Act, it shall and may be lawful for any and every consul-general or consul appointed by his Majesty at any foreign port and place, whenever he shall be thereto required, and whenever he shall see necessary, to administer at such foreign port or place any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform at such foreign port or place all and every notarial acts or act which any notary public could or might be required, and is by law empowered to do, within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such consul-general or consul, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if any such oath, affidavit, or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature."

So may ambassadors and other British ministers abroad.

The 18 & 19 *V.* *c.* 42, after reciting the above enactment, by sect. 1, enacts, that "From and after the passing of this Act, it shall and may be lawful for every British ambassador, envoy, minister, chargé d'affaires, or secretary of embassy or of legation exercising his functions in any foreign country, and for every British vice-consul, acting consul, pro-consul, or consular agent (as well as every consul-general or consul) exercising his functions in any

(*a*) *Dalmer* v. *Barnard*, 7 T. R. 251: *O'Mealey* v. *Newall*, 8 East, 364: *Turnbull* v. *Moreton*, 1 Chit. Rep. 721: *Re Woodman*, 11 C. B., N. S. 630: *Kevan* v. *Crawford*, 45 L. J., Ch. 658.

(*b*) *Cooke* v. *Wilby*, 25 Ch. D. 769; 53 L. J., Ch. 592; 50 L. T. 152; 32 W. R. 379. See *Brecklebank* v. *Smith*, 50 L. T. 491; 32 W. R. 675, where an affidavit sworn before the clerk of a Circuit Court in the United States, many miles from any British consul, and whose authority to administer the oath was certified by a British consul, was admitted. See *Cooper* v. *Moon*, W. N. 1884, 78; Bitt. Ch. Cas. 12.

(*c*) *De Leon* v. *Hubbard*, W. N. 1883, 197; Bitt. Ch. Cas. 16. Sed quære, see cases cited in preceding note (*b*).

foreign place, whenever he shall be thereto required, and whenever he shall see necessary, to administer in such foreign country or place any oath, or to take any affidavit or affirmation from any person whomsoever, and also to do and perform in such foreign country or place all and every notarial acts or act which any notary public could or might be required and is by law empowered to do within the United Kingdom of Great Britain and Ireland; and every such oath, affidavit or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done by or before such ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, vice-consul, acting consul, pro-consul, or consular agent, shall be as good, valid, and effectual, and shall be of like force and effect to all intents and purposes, as if such oath, affidavit, or affirmation, or notarial act respectively had been administered, sworn, affirmed, had, or done before any justice of the peace or notary public in any part of the United Kingdom of Great Britain or Ireland, or before any other legal or competent authority of the like nature" (*d*).

Affidavits taken before ambassadors, &c. abroad, may be used in Courts in the United Kingdom.

By sect. 2, "Affidavits and affirmations so taken as aforesaid under the said Act of King George the Fourth, or this Act, shall and may be received, read, and made use of in and before any Court of law or equity, or other judicature whatever in any part of the United Kingdom, and the Judges and officers thereof, in or in relation to any action, suit, cause, matter, or proceeding in or before any such Court or judicature, in like manner, and shall be of the same force and effect as affidavits and affirmations taken in or before such Court or judicature, or by any person duly commissioned or authorized by such Court or judicature to take such affidavits or affirmations, and shall be filed and dealt with accordingly."

Documents to be admitted in evidence without proof of seal or signature.

By sect. 3, "Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any British ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, consul general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation, or act having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person."

In cases not within this Act, where the affidavit is sworn before some person abroad, not only his signature to the jurat, but also his authority to administer oaths and take affidavits, must be verified by an affidavit made in this country (*e*), or by the certificate

(*d*) As to swearing an affidavit before a British consul or vice-consul before this Act, see *Re Cooper*, 16 C. B. 225: *Williams* v. *Welch*, 3 D. & L. 357: *Le Veux* v. *Berkeley*, 5 Q. B. 836; 2 D. & L. 31; 13 L. J., Q. B. 244: *Picardo* v. *Machado*, 4 B. & C. 886; 7 D. & R. 478: *Ex p. Hutchinson*, 1 M. & P. 559; 4 Bing. 606: *Riddell* v. *Nash*, 8 Moore, 632: *In re Eady*, 6 Dowl. 615: *In re Barber*, 4 Dowl. 640: *Re Pickersgill*, 6 Sc. N. R. 831: *Ex p. Hutchinson*, 5 D. & L. 523; 5 C. B. 498, C. P.: *Ex p. Bayley*, 6 Sc. N. R. 523.

(*e*) See *French* v. *Bellew*, 1 M. & Sel. 302: *O'Mealey* v. *Newell*, 8 East, 364: *Dalmer* v. *Barnard*, 7 T. R. 251: *Ex p. Worsley*, 2 H. Bl. 275: *Pickardo* v. *Machado*, 4 B. & C. 886; 7 D. & R. 478.

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of a notary public (*f*), or, it would seem, of a British consul, &c. (*g*). It seems, that it must be proved that the deemster of the Isle of Man has power to take affidavits, before an affidavit sworn before him can be received here (*h*). But it is not necessary to show that an Irish or Scotch Judge has such power.

Persons swearing falsely.

Sect. 4 enacts, that persons swearing falsely shall be guilty of perjury, and directs how such parties shall be proceeded against.

Forging seal.

Sect. 5 enacts, that persons forging any such seal or signature shall be guilty of felony, and directs how they shall be proceeded against.

Affidavit in foreign language.

An affidavit may be sworn abroad in a foreign language provided there be an affidavit verifying a translation of it (*i*).

Fee for oath.

Fee for Oath.]—The fee for taking an affidavit is 1*s.* 6*d.* When the affidavit is sworn before an officer of the Court, this fee is paid by a stamp (impressed or adhesive) on the affidavit. There is also an additional fee of 1*s.* for each exhibit referred to, and required to be marked. The stamp for this 1*s.* is to be impressed or adhesive on the affidavit. (*See Order as to stamps, post, Vol.* 2, *App.*)

When to be sworn.

When to be sworn.]—As to when affidavits in support of or against a rule must be sworn, *see post, Ch. CXXII.*; on moving for a new trial, *post, Ch. LXVIII.*; to arrest defendant, *post, Ch. CXXVII.* An affidavit sworn on a Sunday cannot be used (*k*).

By *Ord. XXXVIII. r.* 19, "Except by leave of the Court or a Judge no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion."

Stamping filing stamp.

Stamping Affidavits.]—By *Ord. XXXVIII. r.* 15, "In cases in which by the present practice an original affidavit is allowed to be used, it shall, before it is used, be stamped with a proper filing stamp, and shall, at the time when it is used, be delivered to and left with the proper officer in Court or in Chambers, who shall send it to be filed. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed, and the copy duly authenticated with the seal of the office."

The Court fees on affidavits are now denoted by impressed or adhesive stamps (*see Order as to taking fees by stamps, post, Vol.* 2, *App.*).

All adhesive stamps must be put on the first page of the affidavit on the margin (*see* "*Notice*," *post*, p. 475).

The fee on filing an affidavit with exhibits, if any, is 2*s.* 6*d.* (*see Order as to Court fees, post, Vol.* 2, *App.*). As to the fee for oath, *see supra.*

(*f*) *Ex p. Worsley*, 2 H. Bl. 275. See *Cole* v. *Sherrard*, 11 Ex. 482.

(*g*) See *In re Barber*, 2 Bing. N. C. 268; 4 Dowl. 640, per *Tindal*, C. J.: and quære as to the marginal note in the report in Dowl.: *Ex p. Hutchinson*, 5 D. & L. 523. See 18 & 19 V. c. 42, supra; 6 G. 4, c. 87, s. 20, ante, p. 468.

(*h*) *Cross* v. *Cheshire*, 15 Jur. 993.

(*i*) *Re Eady*, 6 Dowl. 615.

(*k*) *Doe* d. *Williamson* v. *Roe*, 3 D. & L. 328; 15 L. J., Q. B. 39.

"No affidavit will be allowed to be read or referred to before the Judge or Master in Chambers unless the filing stamp has been affixed and cancelled by the proper officer (in chambers) prior to the parties going into the Judge's room" (*l*).

Stamp duty.

Affidavits made for the immediate purpose of being filed, read or used in any Court, or before any Judge, master, or officer of any Court, are exempt from the stamp duty, imposed by the Stamp Act, 1870 (*m*). The duty imposed by that Act on affidavits and statutory declarations made under the provisions of the stat. 5 & 6 *Will.* 4, *c.* 62, is 2*s.* 6*d.* (*m*).

Filing.

Filing.]—By *Ord. XXXVIII. r.* 10, "Every affidavit or other proof used in admiralty actions shall be filed in the Admiralty Registry: every affidavit used in probate actions shall be filed in the Probate Registry: every affidavit used on the Crown side of the Queen's Bench Division shall be filed in the Crown Office Department: every affidavit used in a cause or matter proceeding in a district registry shall be filed there: and every other affidavit used shall be filed in the Central Office. There shall be appended to every affidavit a note showing on whose behalf it is filed, and no affidavit shall be filed or used without such note, unless the Court or a Judge shall otherwise direct."

As a general rule it is not necessary that an affidavit should be filed before it is used. As to filing affidavits on motions, *see post, Vol.* 2, *Ch. CXXII.*, "*Motions.*" Affidavits used in support of an *ex parte* motion to the Court must be filed though the motion be refused. An affidavit used at chambers before the Judge or master must not be taken away except with the express leave of the Judge or master, but must be left with the doorkeeper to be filed. (*See post, Vol.* 2, *Ch. CXXIII.*, "*Summonses and Orders.*")

If a solicitor on demand (*n*) made refuses to file an affidavit which he ought to file, the Court will compel him to do so (*o*).

By *Ord. XXXVIII. r.* 18, "Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Court or a Judge."

Opposite party may use them.

Affidavits, when once filed, may be made use of by the opposite party, though the party who filed them may decline to use them (*p*).

Copy of exhibit.

Where a defendant makes an affidavit at Judge's Chambers identifying a document which is exhibited to him only, and not filed, he will be compelled to allow the plaintiff to take a copy of that document, although it is sworn to furnish a defence to the action (*q*). Where a plan has been filed in support of a motion which has been disposed of, the Court will not allow such plan to

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(*l*) Order at chambers. See "Weekly Notes," Pt. II., March 5th, 1881.

(*m*) 33 & 34 V. c. 97, sched. tit. "*Affidavit.*" See *Re Templeman and Reed*, 9 Dowl. 962: *Hill* v. *Slocombe*, 9 Dowl. 339: *R.* v. *Mayor of Lichfield*, 1 Q. B. 453.

(*n*) *Pilmore* v. *Hood*, 8 Dowl. 21.

(*o*) *Ex p. Dicas*, 2 Dowl. 92.

(*p*) *Price* v. *Hayman*, 7 Dowl. 47. As to furnishing to an opposite party copies of affidavits, &c., see ante, pp. 279, 466.

(*q*) *Tebbutt* v. *Ambler*, 7 Dowl. 672.

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be taken off the file at the instance of the party who filed it, in order to enable him to make his defence to another proceeding (*r*).

As to taking office copies of affidavits for the purpose of showing cause against a rule, *see post, Ch. CXXVI.* As to furnishing copies of affidavits to the opposite party, *see ante*, p. 279. As to using office copies, *see Ord. XXXVIII. r.* 15, *ante*, p. 470.

Taking affidavit off file.

The Court will, under particular circumstances, either make an order for taking off the file an affidavit into which matters have been introduced disclosed in professional confidence, or for preventing such portions of the affidavit from being read (*s*). When an affidavit contains scandalous matter it may be ordered to be taken off the file, or the scandalous matter may be ordered to be struck out (*t*); and this may be done on the application of a stranger to the proceedings (*u*). Before the 6 & 7 *V. c.* 85, the Court would, in some cases, order an affidavit made by a person who had been convicted of an infamous crime to be taken off the file: but they would not do so now (*x*).

Taking affidavit from Central Office.

By *Ord. LXI. r.* 28, "No affidavit or record of the Court shall be taken out of the Central Office without the order of a Judge or Master."

Search for affidavits filed.

Search for Affidavits filed.]—The file of affidavits may be searched by parties desirous of finding or having office copies of any affidavits made. A "search præcipe" stamped with a shilling stamp must be presented by the party desiring the search. *See the "Notice," post*, p. 475, which clearly points out the mode in which the search is to be made.

Office copies, use of.

Office Copies, Use of.]—An office copy of an affidavit may now in all cases be used after the original has been filed in the Central Office provided such copy is authenticated by the seal of that office (*see Ord. XXXVIII. r.* 15, *ante*, p. 470).

Office copies left to be examined and marked.

All office copies left to be marked must be stamped at the rate of 2*d.* per folio, and must have endorsed on the outside the name of the solicitor who will call for them. Where they are left after the original has been filed, the party leaving them must search the Index for the index number of the original, and the year in which it was filed, which must be endorsed on the back of the copy (*y*).

Bespeaking copies to be made in the office.

Where office copies are required to be made in the office the parties bespeaking such copy must fill up on a printed (blue) bespeak form, which may be obtained at the office, the necessary particulars, including the number of the affidavit in the index book, which he must ascertain for himself. The stamps in payment of such copies must be left pinned on the bespeak form (*z*).

Altering office copies.

No alteration, interlineation or erasure shall on any account be made on any office copy which has been issued from this office (*a*).

(*r*) *Price* v. *Seeley*, 8 Dowl. 653.
(*s*) *Bury* v. *Clench*, 1 Dowl., N. S. 848: *Fox* v. *Bearblock*, 46 L. T. 145; 30 W. R. 342, C. A. Refused where only ground that jurat insufficient. *Duke of Brunswick* v. *Sloman*, 1 L., M. & P. 247.
(*t*) *Cracknall* v. *Janson*, 11 Ch. D. 1, 13.
(*u*) Id.
(*x*) See *Re Sawyer*, 2 Q. B. 721.
(*y*) See the notice, post, p. 475.
(*z*) Id.
(*a*) Id.

Production of affidavit filed before Judge or Master.

Production of Affidavit filed before Judge or Master.]—Where it is required to produce affidavits already on the file, before a Judge or Master *in Chambers*, the party must fill up a (white) bespeak form, which may be obtained at the office, and leave it with the officer (where practicable) the day before such affidavit is required. Pursuant to *Ord. LXI. r.* 28, no original affidavit which is on the file can be produced in any *Court* without an order from a Judge or Master, but office copies may be used (*b*).

How long in force.

How long in force.]—Age is, in general, no objection to an affidavit (*c*), unless the case is one in which the lapse of time affects the matters contained in it; as in the case of an affidavit of debt, which is only good for a year, it being presumed after that period that the debt is paid (*d*).

Effect of irregularity.

Effect of Irregularity—Reception of Irregular Affidavit.]—By *Ord. XXXVIII. r.* 14, "The Court or a Judge may receive any affidavit sworn for the purpose of being used in any cause or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received."

Defects, effect of, when aided, amended, &c.

In general, clerical errors and mistakes in spelling are not considered a sufficient ground for rejecting an affidavit (*e*). Sometimes, if a rule is obtained upon an affidavit improperly intituled or defective in the jurat or the like (*f*), the Court will discharge the rule (*g*). It seems, that where a rule is discharged or refused after notice on a technical objection taken to an affidavit, without going into the merits, no costs are in general allowed (*h*). If there is a defect in intituling affidavits produced on the argument of a motion, the Court will sometimes allow the motion to be adjourned, in order that the title may be amended (*i*).

Waiver of objection.

Defects in affidavits are very rarely aided. Omitting to insert the deponent's addition is an irregularity which may be waived (*k*). A party by appearing and using affidavits in opposition to a rule *nisi*, does not waive an objection to the title of the affidavit on which the rule was moved (*l*). Several months' delay in making an objection to a defect in the jurat, was held to be no waiver of

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(*b*) Id. See r. 28, ante, p. 472.

(*c*) *Wynne* v. *Wynne*, 2 Sc. N. R. 615: *Doe* d. *Clarke* v. *Stilwell*, 8 A. & E. 645; 3 N. & P. 701. But see *Burt* v. *Owen*, 1 Dowl. 691.

(*d*) See post, Ch. CXXII.

(*e*) *Howorth* v. *Hubbersty*, 3 Dowl. 455.

(*f*) See post, Ch. CXXII.

(*g*) *Cooper* v. *Talbot*, 7 Sc. 345: *R.* v. *Warwickshire Justices*, 5 Dowl. 382: *Davies* v. *Skerlock*, 7 Dowl. 592: *Ex p. Evans*, 2 Dowl., N. S. 410. See *Phillips* v. *Hutchinson*, 3 Dowl. 20.

(*h*) *Preedy* v. *Lovell*, 4 Dowl. 671, Ex.: *Harris* v. *Matthews*, 4 Dowl. 608: *Doe* v. *Lloyd*, 2 Dowl., N. S. 330: *Houlditch* v. *Swinfen*, 5 Dowl. 36. See ante, p. 466, where the defect is in the jurat.

(*i*) *Anderson* v. *Ell*, 3 Dowl. 73: *Davies* v. *Skerlock*, 7 Dowl. 592. See ante, p. 466, as to giving time to cure a defect in the jurat.

(*k*) *Seymour* v. *Maddox*, 1 L., M. & P. 543.

(*l*) *Clothier* v. *Ess*, 3 M. & Sc. 216; 2 Dowl. 731. See *Levy* v. *Duncombe*, 3 Dowl. 447.

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it (*m*). If an affidavit be sworn before a party having no authority to receive it, it will be a nullity.

Making fresh application on amended affidavit.

It would seem that, if a party, after obtaining a rule *nisi* on an affidavit incorrectly intituled, and, before the service of it, discover the mistake, he may obtain a fresh rule *nisi* on the affidavits properly intituled (*n*). As to the Court not allowing a fresh application to be made where first discharged upon the ground that it was made upon insufficient materials, *see post, Ch. CXXII.*

Alterations, erasures, &c. in affidavits.

Alterations, &c. in.]—By *R. of S. C., Ord. XXXVIII. r.* 14, "No affidavit having in the jurat or body thereof any interlineations, alteration or erasure shall without leave of the Court or a Judge be read or made use of in any matter depending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it."

An affidavit cannot be made use of if altered after it is sworn (*o*). If any interlineation be made in the affidavit previously to its being sworn, it should be noticed by the commissioner or other officer before whom it is sworn, by placing his initials in the margin, or the affidavit cannot be read (*p*).

Examination of person who refuses to make an affidavit.

Examination of Person who refuses to make an Affidavit.]—The *Com. Law Proc. Act*, 1854, *s.* 48, enabled a party to get an order for the examination before a Master of any person who refused to make an affidavit.

This section is repealed by the *Statute Law Revision Act and Civil Proc. Repeal Act*, 1883, but the same power is now given by *Ord. XXXVII. r.* 1 (*q*), which will be found *ante*, p. 452.

Cross-examination of deponent.

Cross-examination of Deponent.]—As to this, *see Ord. XXXVIII. r.* 1, *ante*, p. 452.

A person who has filed an affidavit cannot avoid cross-examination by withdrawing it (*r*).

Official notice as to.

Official Notice as to.]—The following notice, which is frequently referred to in the preceding pages of this chapter, was issued by the

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(*m*) *R.* v. *Bloxham*, 2 D. & L. 168. This was a motion to quash a certiorari. *Sharp* v. *Johnson*, 4 Dowl. 324.

(*n*) *Doe* v. *Tollett*, 1 D. & L. 121: *Ex p. Evans*, 2 Dowl., N. S. 410.

(*o*) *Wright* v. *Skinner*, 5 Dowl. 92: *Finnerty* v. *Smith*, 1 Bing. N. C. 649: *Re Imesom*, 8 Dowl. 651. The presumption of law is that an affidavit is in the same state as when it was sworn, as to alter it after it is sworn is an act of fraud and misconduct which will not be presumed. *R.* v. *Gordon*, 25 L. J., M. C. 19.

(*p*) See *Re Worthington*, 5 C. B. 511. See ante, p. 465.

(*q*) See *Warner* v. *Mosses*, 16 Ch. D. 100; 50 L. J., Ch. 28; 29 W. R. 201.

(*r*) *In re Quartz Hill, &c. Co., Ex p. Young*, 21 Ch. D. 642. See *Ex p. Child, In re Ottaway*, 20 Ch. D. 126.

officials at the Central Office in July, 1880, and is still exhibited at Judges' Chambers. It has been thought that it would be useful to print the notice at length here.

NOTICE AS TO AFFIDAVITS.

Solicitors and others are particularly requested to assist the Officials by paying attention to the following Directions.

General directions as to searching for affidavits.

All affidavits filed in the Central Office are deposited in the affidavit room and entered in the index books under the initial letter of the suit or matter in which the affidavit is used. There are two distinct sets of index books:

(1.) Affidavits filed in this office by the parties themselves, and

(2.) Affidavits transmitted from Court or Chambers or the Master's Office which are usually received the day after they have been used;

But affidavits used on application in the common law chambers and in Court may have been filed in the first instance in this office and office copies of them used on the application, in which case the original affidavit would be in the Index Book (No. 1). An affidavit not found in the Index Book (No. 2) of affidavits transmitted should be searched for in the Index Book (No. 1). Affidavits filed in the Queen's Bench, Common Pleas and Exchequer Divisions previous to the 6th of April, 1880, have been deposited in the affidavit office.

In answer to interrogatories or of discovery of documents.

Every affidavit in answer to interrogatories shall, when tendered for filing, be plainly marked on the outside by the party filing it with the capital letter A, and every affidavit of the discovery of documents shall, in like manner, be marked with the capital letter D, and notice shall be given to the clerk receiving such affidavit that it is an affidavit in answer to interrogatories or of documents (as the case may be); unless this be done, the affidavits may be overlooked in searches made for the purpose of giving certificates.

Stamps.

All adhesive stamps must be put on the first page of the affidavit in the margin.

Exhibits.

Exhibits should be annexed, when practicable, between the leaves of the affidavit for better security.

Bills of sale affidavits.

Affidavits used on application in Court or at Chambers respecting bills of sale are filed in each case under the name of the party by whom the bill is given.

Election petition affidavits.

Affidavits used on applications under the Election Petition Act are filed under the name of the petitioner.

Office copies left to be examined and marked.

All office copies left to be marked must be stamped at the rate of 2*d.* per folio, and must have endorsed on the outside the name of the solicitor who will call for them. Where they are left after the original has been filed, the party leaving them must search the index for the index number of the original and the year in which it was filed, which must be endorsed on the back of the copy.

Bespeaking copies to be made in the office.

Where office copies are required to be made in the office the party bespeaking such copy must fill up on the printed (blue) bespeak form necessary particulars, including the number of the affidavit in the index book, which he must ascertain for himself. The stamps in payment of such copies must be left pinned on the bespeak form.

Producing affidavits from the affidavit office before a Judge or Master, and in Court.

Where it is required to produce affidavits already on the file, before a Judge or Master *in Chambers*, the party must fill up the (white) bespeak form, and leave it with the officer (where practicable) the day before such affidavit is required. Pursuant to Rule 51 of the Rules of April, 1880 [now *Ord. LXI. r.* 28, *ante*, p. 472], no original affidavit which is on the file can be produced in any *Court* without an order from a Judge or Master, but office copies may be used.

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Referring to affidavits on the file for the purpose of drawing the order.

Where an affidavit has to be referred to in an order, it will be sufficient if the parties produce at the summons and order desk a certificate of filing from the affidavit office, where forms of certificate are supplied. These must be filled up by the party, and handed to the filing clerk to be sealed.

Inspecting original affidavits.

When it is desired to inspect any original affidavit, a fee of 1*s.* (stamped on a "search præcipe") must be paid, and on no account is the affidavit to be removed from the office, or to be marked or written upon; when done with it should be returned to the officer.

Altering office copies.

No alteration, interlineation, or erasure shall on any account be made upon any office copy which has been issued from this office.

CHAPTER XLV.

ADMISSION OF FACTS.

In addition to the procedure by interrogatories and discovery the rules provide means whereby admissions of facts may be made for the purposes of the action.

Admission by pleadings or otherwise.

Admission of Facts by Pleadings or otherwise.]—By *R. of S. C., Ord. XXXII. r.* 1, "Any party to a cause or matter may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

Under this rule it is competent for any party, at any stage of the proceedings, to give a notice to his opponent that he admits any one or more of the facts material to the question to be decided.

Admission by agreement.

The parties to the action frequently, by their solicitors, agree to admit at the trial documents and other facts; and such agreement is often desirable, to save trouble and expense, where there is no real ground for disputing them (*a*).

Notice to admit facts.

Notice to admit Facts.]—By *R. of S. C., Ord. XXXII. r.* 4, "Any party may, by notice in writing, at any time *not later than nine days* before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same *within six days after service* of such notice, or within such further time as may be allowed by the Court or a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the Court or a Judge certify that the refusal to admit was reasonable, or unless the Court or a Judge shall at any time otherwise order or direct. Provided, that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: provided also, that the Court or a Judge may at any time allow any party to *amend or withdraw* any admission so made on such terms as may be just."

The notice under this rule may be given at any time before notice of trial is given; even before any defence has been delivered (*b*). If given after notice of trial it must be given not later than nine days before the day for which notice of trial is given. The notice should be delivered in the same manner as

(*a*) *Young* v. *Wright*, 1 Camp. 141: *Millward* v. *Temple*, 1 Camp. 375: *Truslove* v. *Burton*, 9 Moore, 64: *Elton* v. *Larkins*, 5 C. & P. 385.

(*b*) *Crawford* v. *Chorley*, W. N. 1883, 198.

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a pleading. There is no power to set aside the notice as embarrassing (*b*).

Form of notice, &c.

Form of Notice, &c.]—By *r.* 5, "A notice to admit facts shall be in the Form No. 12 in Appendix B., and admissions of facts shall be in the Form No. 13 in Appendix B., with such variations as circumstances may require" (*c*).

Admission.

The Admission.]—The admission, if any be made, must be delivered in the same way as a pleading, and within six days after service of the notice to admit. The time for this purpose may be extended by consent or order as in the case of a pleading. The rule, it will be observed, carefully confines the use of the admission to the particular action in which it is made (*d*), and provides that it may by leave be withdrawn or amended. Admissions between co-defendants, to which the plaintiff is not a party, cannot be entered as evidence against him or included in an order for payment of costs by him (*e*).

The provisions of the rule as to the consequence of refusal to make the admissions are very stringent. The Judge at the trial must be asked for a certificate that the neglect or refusal was reasonable.

Evidence of admissions.

Evidence of Admissions.]—By *Ord. XXXII. r.* 7, "An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof be required." This rule is similar to sect. 118 of the *Com. Law Proc. Act*, 1852. Before that enactment the admission was proved by the production of the Judge's order for it, with the notice annexed.

The rule says "sufficient" evidence, which does not mean conclusive evidence, and therefore contradictory evidence, would be admissible (*f*).

Motion for judgment on admission.

Motion for Judgment on Admissions.]—*See post, Ch. LXIX.*

(*b*) *Crawford* v. *Chorley*, W. N. 1883, 198.

(*c*) See the forms, Chit. F. p. 258.

(*d*) The form of the admission is as follows:—

"The defendant [*or* plaintiff] in this cause, for the purposes of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them as evidence in this cause. Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the defendant [*or* plaintiff] on any other occasion, or by anyone other than the plaintiff [*or* defendant, *or party requiring the admission*]."

(*e*) *Dodds* v. *Tuke*, 25 Ch. D. 617; 53 L. J., Ch. 598; 50 L. T. 320.

(*f*) See *Barraclough* v. *Greenhough*, L. R., 2 Q. B. 612.

CHAPTER XLVI.

NOTICE TO ADMIT DOCUMENTS.

Notice to admit documents.

Notice to admit Documents.]—By *R. of S. C., Ord. XXXII. r.* 2, "Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court or a Judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given (*a*), except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense." This rule corresponds with sect. 117 of *Com. Law Proc. Act*, 1852.

The object of the rule is, that every party to the action shall have an opportunity of making an admission of documentary evidence, and so saving expense (*b*). It applies to every document a party means to produce in evidence (*c*), though it is not in his possession or within his control (*d*), or is out of the kingdom (*e*), or its validity is put in issue by the pleadings (*f*), or though the solicitor on the other side has refused to make the admission, on the ground that the document is a forgery (*f*). Where, in an action by executors for money alleged to have been paid by them to the use of defendant, the latter, being advised that the probate of the will of the testatrix was essential to his defence, called upon plaintiff's solicitor for a written undertaking to produce it at the trial; but the latter refusing to give such undertaking, and defendant's solicitor procured an exemplification: it was held, under a repealed rule upon this subject, that he was not entitled, on taxation, to the expense of obtaining it; for defendant might have obtained an office copy, and then called upon plaintiff to admit it (*g*).

But, if a witness be called by a party for the purpose of proving something else beside the genuineness of the document, his expenses will be allowed, though the opposite party has not been called upon

(*a*) See *Spencer* v. *Barough*, 9 M. & W. 425.

(*b*) *Rutter* v. *Chapman*, 8 M. & W. 391, per *Alderson*, B. And see *Story* v. *Houlditch*, 1 Sc. N. R. 211, per *Bosanquet*, J.

(*c*) *Rutter* v. *Chapman*, 8 M. & W. 391, per *Parke*, B.

(*d*) *Rutter* v. *Chapman*, 8 M. & W. 391; 1 Dowl., N. S. 118, per *Parke*, B., *Alderson*, B.

(*e*) *Story* v. *Houlditch*, 1 Sc. N. R. 211, per *Bosanquet*, J.

(*f*) *Spencer* v. *Barough*, 9 M. & W. 425.

(*g*) *Goldstone* v. *Tovey*, 8 Sc. 562; 6 Bing. N. C. 274.

to admit (*h*). Therefore, where the Master, on taxation of plaintiff's costs, allowed 40*l.* for expenses to a gentleman from the office of the accountant-general of the Court of Chancery in Ireland, who was called, on the part of plaintiff, to produce an order of the Court and a power of attorney, enabling defendant's solicitor to obtain a transfer of certain stock standing in the name of the accountant-general, and also to prove the course of business in the accountant-general's office upon the subject: it was held, that the allowance was properly made, although the defendant had not been called upon to admit the documents (*i*). So, the expense of a witness called to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for and obtaining copies and translations of such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called on to admit them (*k*): and so, also, the costs of the attendance of an officer of the Court, to produce affidavits for the purpose of using them at a trial to check the testimony of the same deponents at *Nisi Prius*, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them (*l*).

Not compulsary to give notice to admit.

It is not compulsory on the party intending to produce documents in evidence, to call on the other side to admit them, by notice: and when it is considered important not to inform the opposite party of their nature and contents, he should not be called on to admit them; but in that event (except in the case mentioned in the rule) the costs of proving the documents fall on the party producing them in evidence. On the other hand, when no real objection exists to letting the adverse party know the nature of the documents proposed to be offered in evidence, it is advisable to require their admission in the manner prescribed.

Form of notice.

By *Ord. XXXII. r.* 3, "A notice to admit documents shall be in the Form No. 11 in Appendix B., with such variations as circumstances may require." *See the form, Chitty's Forms*, p. 261. This form may be deviated from as occasion may require. A notice to admit documents called on defendant to admit the authority by which the documents were written: held, that the party called on to make the admissions had a right to reject the whole, and having done so, and a verdict having been obtained by defendant, the plaintiff who proved these documents at the trial had no right to the costs of such proof under the above section (*m*).

Service of same.

The notice to admit should be served a reasonable time before the trial. As to the mode of serving notices, *see post, Ch. CXXVI.* (*n*).

Costs of unnecessary notice.

By *R. of S. C., Ord. XXXII. r.* 9, "If a notice to admit or

(*h*) *Story* v. *Houlditch*, 1 Sc. N. R. 206.

(*i*) Id.

(*k*) *Bastard* v. *Smith*, 10 A. & E. 213; 2 P. & D. 453.

(*l*) Id.

(*m*) *Oxford, Worcester and Wolverhampton R. Co.* v. *Scudamore*, 1 H. & N. 666, a case under the C. L. P. Act, 1852, s. 117.

(*n*) See *Bastard* v. *Smith*, supra. As to tendering expenses of going to inspect documents when they are not in the possession of the party giving the notice to admit, see *Smith* v. *Bird*, 3 Dowl. 641. It is submitted that it is not necessary to tender such expenses.

produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice."

Admission.

The admission may be made by the solicitor, or, it seems, by his clerk having the management of the cause. It may be indorsed on the notice or on a copy of it. It had better be signed in the presence of the solicitor of the party requiring the admission, or his clerk, so as to warrant an affidavit of the signature pursuant to the *R. of S. C., Ord. XXXII. r.* 7, *infra*. Such presence is not necessary if the solicitor or clerk making the affidavit can otherwise swear to the signature.

Effect of admission.

As regards the effect of the admission on the notice:—Where a notice to admit was as follows, "Bill of exchange for 121*l.* 10*s.* drawn by plaintiff upon and directed to the defendants as A. & Co., and accepted by B. for defendants as A. & Co.:" it was held, that an admission on this precluded defendants from denying the authority of B. to bind the firm of A. & Co. by such acceptance, and was not a mere admission that he signed an acceptance purporting to bind that firm (*o*). Where a document was described as a counterpart of a lease, and was admitted, but in fact was a lease with only a counterpart stamp, the party was held bound by his admission (*p*). Where a letter was described in the notice thus,—"Letter of F. A. G., secretary to the S. & D. Railway Company, dated the 30th of March, 1847, respecting King John's Pond field, then in possession of the plaintiff;" and defendant admitted [illegible]: it was held, that plaintiff's possession of the field was not admitted (*q*). It is to be observed, that the notice of admission contains the saving clause in it of "all just exceptions to the admissibility of all such documents as evidence in this cause." A party, therefore, by admitting the handwriting to a bill of exchange, is not precluded from disputing its admissibility in evidence, on the ground of its not being stamped (*r*). If the admission is of a document as a true copy of a letter from plaintiff to defendant, this will not authorize the giving in evidence such copy without accounting for the non-production of the original (*s*). If a document is admitted, it is not necessary to account for an interlineation (*t*), or an erasure (*u*). An admission will hold good for any subsequent trial of the cause (*x*).

If a party find he has inadvertently made an admission, he should obtain a Master's order to withdraw it, which may be granted

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(*o*) *Wilkes* v. *Hopkins*, 1 C. B. 737; 3 D. & L. 184; 14 L. J., C. P. 225.

(*p*) *Doe* d. *Wright* v. *Smith*, 3 N. & P. 335; 8 A. & E. 255.

(*q*) *Pilgrim* v. *Southampton and Dorchester R. Co.*, 18 L. J., C. P. 330.

(*r*) *Vain* v. *Whittington*, 1 Car. & M. 484; 2 Dowl., N. S. 757. See *Chaplin* v. *Levy*, 9 Ex. 531; 23 L. J., Ex. 117, where the notice to admit omitted the usual saving clause.

(*s*) *Sharpe* v. *Lamb*, 11 A. & E. 805; 3 P. & D. 454.

(*t*) *Freeman* v. *Steggel*, 14 Q. B. 202; 19 L. J., Q. B. 18.

(*u*) *Poole* v. *Palmer*, 1 Car. & M. 69.

(*x*) *Elton* v. *Larkins*, 5 Car. & P. 385. And see *Hope* v. *Beadon*, 21 L. J., Q. B. 25: *Doe* v. *Bird*, 7 Car. & P. 6.

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Proceedings at trial after admissions.

under special circumstances (*y*). It is not sufficient for him to give a notice that he withdraws the admission (*z*).

When a document has been admitted under the above rules,—*Have in Court at the trial the notice to admit, and the affidavit of the signature to the admission, which should be annexed to the affidavit* (*a*): *have also in Court the documents admitted* (*b*).

By *Ord. XXXII. r.* 7 (*c*), "An affidavit of the solicitor, or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient (*d*) evidence of such admissions, if evidence thereof be required."

New trial where admission refused.

Where plaintiff was nonsuited in consequence of a refusal by defendant's counsel at the trial to admit certain documents in evidence which had been agreed to be admitted by defendant's solicitor's agent, the Court granted a new trial, with costs to be paid by defendant (*e*).

Judge certifying that refusal to admit reasonable.

It will be seen, that, by *Ord. XXXII. r.* 2, at the hearing or trial, the Judge may certify that the refusal to admit was reasonable. In general it would be considered reasonable to refuse to admit a private instrument, to which the party called upon to admit is in no respect privy, and of which he cannot have inspection (*f*).

Costs to which rule applies, &c.

The costs to which the rule applies are the costs of proving the documents so as to identify them in the cause (*g*). The party refusing to admit a document is not liable to the cost of proof, if it was not proved at the trial (*h*).

Notice to give in evidence probate or office copy of will in actions concerning real estate.

Notice to give in Evidence Probate or Office Copy of Will in Action concerning Real Estate.]—By 20 & 21 *V. c.* 77, *s.* 64, "In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party *ten days at least before the trial* or other proceeding in which the said proof shall be intended to be adduced, *notice* that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate; and in every such case such probate, or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be *suf-*

(*y*) See *Elton* v. *Larkins*, 5 Car. & P. 385; 1 M. & R. 196: *Wilkes* v. *Hopkins*, 1 C. B. 737; 3 D. & L. 184.

(*z*) See *Doe* v. *Bird*, 7 Car. & P. 6.

(*a*) *Vain* v. *Whittington*, 1 Car. & M. 484; 2 Dowl., N. S. 757.

(*b*) See *Clay* v. *Thackrah*, 9 Car. & P. 47: *Bittleston* v. *Cooper*, 14 M. & W. 399: *Moilliett* v. *Powell*, 6 Car. & P. 233.

(*c*) See C. L. P. Act, 1852, s. 118, the former enactment on this subject.

(*d*) But not conclusive: *Barraclough* v. *Greenhough*, L. R., 2 Q. B. 612; 36 L. J., Q. B. 251.

(*e*) *Doe* d. *Tindal* v. *Roe*, 5 Dowl. 420.

(*f*) *Rutter* v. *Chapman*, 8 M. & W. 391, per *Parke*, B., and *Alderson*, B.

(*g*) *Rutter* v. *Chapman*, 8 M. & W. 391, per *Rolfe*, B. See *Doe* d. *Davies* v. *Davies*, 12 A. & E. 21; 4 P. & D. 141, a case under a repealed rule of Court.

(*h*) *Doe* d. *Peters* v. *Peters*, 1 C. & K. 279: *Freeman* v. *Rosher*, 6 D. & L. 517; 18 L. J., Q. B. 105.

cient (*i*) evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, *within four days after such receipt*, give notice that he disputes the validity of such devise or other testamentary disposition."

Notice to dispute validity.

By *s.* 65, "In every case in which in any such action or suit the original will shall be produced and proved, it shall be lawful for the Court or Judge, before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

As to costs of proof of will.

(*i*) Not *conclusive*, the parties may contest the validity of the devise. *Barraclough* v. *Greenhalgh*, L. R., 2 Q. B. 1, 612; 36 L. J., Q. B. 251. The notice should be served upon the solicitor or agent, not upon the opposite party. Ib.

CHAPTER XLVII.

NOTICE TO PRODUCE DOCUMENTS AT TRIAL.

PART VI.

When necessary, &c.

When necessary, &c.]—If the adverse party, or some one on his behalf (*a*), be in possession of any written instrument, which would be evidence for you if produced, you may serve either him or his solicitor or agent (*b*) with a notice to produce it at the trial; and then, if he does not produce it, you may upon proof of the service of such notice, and that the document is in his possession, give secondary evidence of it (*c*). A notice to the plaintiff is necessary although he sues on an instrument which is referred to in his statement of claim, unless it be necessary for him to produce it as part of his own case (*d*). If the document be in the hands of a third party, and his possession of it cannot be deemed the possession of the opposite party, then the only course is to *subpœna* that third party (*duces tecum*) to produce it. If one of several defendants require the production of a document in the hands of another defendant, the proper course to pursue is to *subpœna* him (*duces tecum*) to produce it (*e*).

When not necessary.

Notice is not necessary when, from the nature of the proceedings, the party to the action in possession of the document has notice that he is charged with the possession of it. Thus, in trover for a bond, plaintiff will be allowed to give parol evidence of it, to support the general description of the instrument in the statement of claim, without giving notice to produce it (*f*). A counterpart executed by defendant may be read in evidence by plaintiff without notice to produce the original (*g*). And in some cases a notice to produce a

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(*a*) See *Whitford* v. *Tutin*, 10 Bing. 395: *Robinson* v. *Brown*, 3 C. B. 754; 16 L. J., C. P. 46, where the possession of one surety was held not to be the possession of the other.

(*b*) See *Cates* v. *Winter*, 3 T. R. 306: *Houseman* v. *Roberts*, 5 Car. & P. 394: *Hughes* v. *Budd*, 8 Dowl. 315.

(*c*) Peake, Ev. 109: *Attorney-General* v. *Le Merchant*, 2 T. R. 201, n. See *Baldney* v. *Ritchie*, 1 Stark. 338: *Harvey* v. *Morgan*, 2 Stark. 17: *Graham* v. *Dyster*, Id. 21; 6 M. & S. 1: *Sideways* v. *Dyson*, 2 Stark. 49: *Doe* v. *Whitehead*, 8 A. & E. 576, per *Littledale*, J., and see form of notice, Chit. Forms, p. 266. Since 14 & 15 V. c. 99, parties to the suit may be subpœnaed to produce documents in their possession.

(*d*) *Read* v. *Gamble*, 10 A. & E. 597, n.: *Lawrence* v. *Clark*, 3 D. & L. 87; 14 M. & W. 250: *Goodered* v. *Armour*, 12 L. J., Q. B. 56; 3 Q. B. 956.

(*e*) *Colley* v. *Smith*, 4 Bing. N. C. 285.

(*f*) *How* v. *Hall*, 14 East, 274: *Scott* v. *Jones*, 4 Taunt. 865. See *Cowan* v. *Abrahams*, 1 Esp. 50: *Colling* v. *Treweek*, 6 B. & C. 398: *Read* v. *Gamble*, 10 A. & E. 597, n., per *Denman*, C. J.: *Whitehead* v. *Scott*, 1 M. & R. 2: *Bucher* v. *Jarratt*, 3 B. & P. 143. See Russ. on Crimes, by Prentice, 343.

(*g*) *Burleigh* v. *Stibbs*, 5 T. R. 465.

notice is not necessary (*h*). Thus, it is not necessary to give a notice to produce a notice to produce given in the action; so in an action on a bill of exchange a notice of dishonour of the bill given to the defendant, may be proved by a copy, being a duplicate, although no notice to produce has been given (*i*); so in an action for the recovery of land by landlord against tenant, a notice to quit given to the defendant may be proved by a copy, without any notice to produce (*k*); but this rule, dispensing with a notice in these cases, according to some decisions, seems applicable only where the notice desired to be proved is served on a party to the action, and the question of service is raised therein (*l*). Where it is necessary to prove the service of a written notice (not being a notice to produce given in the action), it is better to give a notice to produce it, as the decisions on this subject are somewhat conflicting.

In one case it was held, that the demand in writing for the copy of a warrant, in an action against a constable, might be proved by a copy, which was a duplicate original, without giving notice to produce the original (*m*). The copy of a solicitor's bill has also been held to be sufficient evidence in a suit by the solicitor for the amount of it, without notice to produce the original delivered (*n*); but the bill in such a case can be proved only by such copy or counterpart, and not from the solicitor's books (*o*). In an action for shooting a dog, brought against the owner of a plantation and his gamekeepers, it appeared, that, in the plantation in which the dog was shot, there was fixed on a pole a board, on which was painted "All dogs found trespassing in this plantation will be shot:" it was held that a copy of that which was painted on the board might be given in evidence, without notice to produce the original board (*p*). So, where a seditious meeting came to certain resolutions, and defendant, who was chairman, gave a copy of these resolutions to another person; it was holden that this copy might be given in evidence without notice to produce the original (*q*). In the same case it was also holden that it was not necessary to produce or account for banners bearing certain inscriptions, &c., exhibited at such meeting, but that parol evidence of such matters, by eye-witnesses, was properly admissible to show the general character and intention of the assembly. The notice is not necessary where the opposite party has procured the possession of the document by fraud after the action commenced from a witness called for the purpose of producing it under a *subpœna* (*r*). A Master's order on

(*h*) *Colling* v. *Treweek*, 6 B. & C. 394: *Gotlieb* v. *Danvers*, 2 Esp. 455: *Surtees* v. *Hubbard*, 4 Esp. 203.

(*i*) *Swain* v. *Lewis*, 2 C. M. & R. 261: *Ackland* v. *Pearce*, 2 Camp. 599: *Roberts* v. *Bradshaw*, 1 Stark. 28: *Kine* v. *Beaumont*, 3 B. & B. 288; 7 Moo. 112.

(*k*) *Doe* d. *Fleming* v. *Somerton*, 7 Q. B. 58: *Colling* v. *Treweek*, supra, per *Bayley*, J.

(*l*) *Lanauze* v. *Palmer*, M. & M. 31: *Robinson* v. *Brown*, 3 C. B. 754; 16 L. J., C. P. 46.

(*m*) *Jory* v. *Orchard*, 2 B. & P. 39.

(*n*) *Colling* v. *Treweek*, 6 B. &. C. 394: *Anderson* v. *May*, 2 B. & P. 237; 3 Esp. 167.

(*o*) *Philipson* v. *Chase*, 2 Camp. 110. It is always advisable to give notice to produce the bill.

(*p*) *Bartholomew* v. *Stevens*, 8 Car. & P. 728, per *Patteson*, J. See *Jones* v. *Tarleton*, 9 M. & W. 675; 1 Dowl., N. S. 625.

(*q*) *R.* v. *Hunt*, 3 B. & Ald. 566. In this case the defendants were indicted for unlawfully meeting together for certain purposes.

(*r*) *Leeds* v. *Cook*, 4 Esp. 256.

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the plaintiff to admit a document to be a true copy of a letter written by plaintiff to defendant will not dispense with the necessity for a notice to produce the original, nor will proof that plaintiff has it in his possession (*s*).

By the Merchant Shipping Act, 1854 (17 & 18 *V.* c. 104), *s.* 165, "Any seaman (*t*) may bring forward evidence to prove the contents of any agreement or otherwise, to support his case, without producing or giving notice to produce the agreement, or any copy thereof."

As to the costs occasioned by giving notice to produce documents which are not necessary, *see Ord. XXXII. r.* 9, *ante*, p. 480.

What a possession of original.

What a Possession of Original.]—To entitle a party to the benefit of a notice to produce a document served on the opposite party, he must be able to establish at the trial that the latter, or some one on his behalf, was in possession of the original at the time of the service of the notice (*u*). Slight evidence is sufficient to prove possession where the exclusive ownership in the document is in the opposite party (*x*). Thus, where a solicitor proved that he had been employed by defendant to solicit his certificate, and that, looking at the entry of charges, he had no doubt the certificate was allowed, this was held to be sufficient proof of the certificate having come to defendant's hands (*y*). Questions frequently arise as to what is sufficient evidence of this possession, where the party is not in actual possession of the document. The production of a cheque drawn by the opposite party, and cashed, may be called for by notice, though it be in the banker's hands (*z*). And where defendant, a shipowner, had given an order to the captain to deliver some goods to plaintiff, it was held, that notice to defendant to produce such order was sufficient to let in secondary evidence of it, because the captain was his agent, although the latter was entitled to hold the order as his authority (*a*). In an action against the sheriff, a notice to his solicitor to produce a warrant which was returned to the under-sheriff while defendant was in office is sufficient (*b*). But if a third party hold the document, as a stakeholder, then a notice to produce it will not suffice, and he must be *subpœnaed* to produce it (*c*). Where a paper had been delivered to a third person, under whom defendant justified in an action of trespass, and by whose directions he acted, a notice to produce served upon defen-

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(*s*) *Sharpe* v. *Lamb*, 11 A. & E. 805. And see ante, p. 481, n. (*s*).

(*t*) By sect. 2, "seaman" includes "every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship;" and "ship" includes "every description of vessel used in navigation not propelled by oars."

(*u*) See *Lloyd* v. *Mostyn*, 10 M. & W. 478; 2 Dowl., N. S. 476.

(*x*) Rosc. on Evid. 10.

(*y*) *Harvey* v. *Leigh*, 3 Camp. 502.

(*z*) *Partridge* v. *Coates*, 1 R. & M. 156: *Burton* v. *Payne*, 2 Car. & P. 520.

(*a*) *Baldney* v. *Ritchie*, 1 Stark. 338. And see *Martin* v. *Bell*, 1 Stark. 413: and see *Sinclair* v. *Stevenson*, 1 Car. & P. 582.

(*b*) *Taplin* v. *Atty*, 3 Bing. 164; 10 Moo. 564: *Suter* v. *Burrell*, 2 H. & N. 867; 27 L. J., Ex. 193.

(*c*) *Parry* v. *May*, 1 M. & R. 279. And see *Evans* v. *Sweet*, R. & M. 83.

dant was held not sufficient to authorize the admission of secondary evidence (*d*).

If the document was in the possession of the opposite party at the time of the service of the notice, he cannot afterwards voluntarily part with it, so as to get rid of the effect of such notice. But where plaintiff was nonsuited in a cause in which he had given defendant notice to produce a lease, and afterwards defendant assigned the lease, and on a second trial plaintiff again gave defendant's solicitor notice to produce it, and was then told by him of the assignment; it was held, that secondary evidence was inadmissible (*e*).

Whether there is sufficient proof of possession by the opposite party, or not, is a question solely for the Judge (*f*).

Form of.

Form of.]—By *R. of S. C., Ord. XXXII. r.* 8, "Notice to produce documents shall be in the Form No. 14 in Appendix B., with such variations as circumstances may require (*g*). An affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served." The notice must be in writing (*h*). It should be intituled correctly in the action. It must specify the document with a particularity sufficient to inform the opposite party what document he is called on to produce (*i*). A notice to produce a particular letter should specify the letter intended: to produce all letters is, as a rule, too general. A notice to produce "all and every letters written by the plaintiff to the defendant relating to the matters in dispute in the action," was in one case held to be sufficient to let in secondary evidence of a particular letter, although it did not specify the date of such letter (*k*). And a notice to produce "all letters written to and received by you between the years 1837 and 1841, both inclusive, by and from the said defendants, or either of them, during the time aforesaid, or by or to any person on their or your behalf respectively," was held good, and not too general, although it did not specify the date of each particular letter (*l*). And it has been ruled, that, in an action for work and labour, a notice to produce "all accounts relating to the matters in question in this cause," is sufficient to let in secondary evidence of an account of work done, given by plaintiff to defendant, without specifying it by date or otherwise (*m*).

Service of.

Service of.]—It will in general suffice to serve the notice on the solicitor or agent of the opposite party (*n*). It may be served on

(*d*) *Evans* v. *Sweet*, R. & M. 83. But see *Pritchard* v. *Symonds*, B. N. P. 254.

(*e*) *Knight* v. *Martin*, Gow, Rep. 103.

(*f*) See *Harvey* v. *Mitchell*, 2 M. & Rob. 366.

(*g*) See Chit. F. p. 266.

(*h*) Ord. LXVI. r. 1. Formerly it might be verbal. *Smith* v. *Young*, 1 Camp. 440: *Harvey* v. *Morgan*, 2 Stark. 19: *Lawrence* v. *Clark*, 3 D. & L. 87; 14 M. & W. 250.

(*i*) See *France* v. *Lucy*, R. & M. 341: *Jones* v. *Edwards*, M'Clel. & Y. 139; 4 Phil. Ev. 9th edit. 218.

(*k*) *Jacob* v. *Lee*, 2 M. & R. 33.

(*l*) *Morris* v. *Hannen* or *Hauser*, 1 Car. & M. 29; 2 M. & R. 392.

(*m*) *Rogers* v. *Custance*, 2 M. & R. 179.

(*n*) *Cates* v. *Winter*, 3 T. R. 306; 2 T. R. 203, n.: *Houseman* v. *Roberts*, 5 Car. & P. 394.

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the party himself (*o*). In some cases it may be desirable to serve both solicitor and party.

It must in general be served a reasonable time before the trial, so as to enable the party served to make an effectual search for and procure the document required, and to produce the same at the trial (*p*). What is such reasonable time must of course depend upon circumstances (*q*). In a town cause service of notice on the opposite solicitor even on the evening previous to the trial is in general sufficient, if the document to be produced is then in his hands (*r*). Where it was served at 8 p.m. on the evening before the trial at the opposite solicitor's office, on one of his clerks who had the management of the cause, the service was held to be in time (*s*). So in a town cause, where defendant and his solicitor lived in town, notice to produce a letter from plaintiff to defendant, served at the office of defendant's solicitor at 7 p.m. on the evening of the day before that on which the cause was tried, was held in sufficient time (*t*). But where it was merely put into a letter-box of the solicitor's chambers at half-past eight in the evening before the trial, it was held too late (*u*). And it has been held, that notice to produce served on the wife of defendant's solicitor at his lodgings, on the evening of the day before the trial is too late (*x*), and at the assizes a notice to produce served in the assize town is in general too late (*y*). And where, in a country cause, notice to produce was served on defendant's solicitor at his residence, twenty miles from the place of trial, at eight in the evening before the trial, and, although defendant resided in the same town, he was absent at the time, and did not return until twelve at night, the service was held too late (*z*); and notice served upon defendant's solicitor at five o'clock on the commission-day of the assizes was held too late, the solicitor having left home for the assize town, which was nine miles distant from his office, and the opposite party refusing to furnish him with a conveyance (*a*). Where plaintiff, three days before the trial, gave defendant notice to produce certain letters written by defendant to his partner, who was resident in New South Wales, the Court, as there had been proceedings in Chancery between the same parties on the subject of the action six years before the trial

(*o*) *Hughes* v. *Budd*, 8 Dowl. 315.

(*p*) *Lloyd* v. *Mostyn*, 10 M. & W. 478; 2 Dowl., N. S. 476: *Firkin* v. *Edwards*, 9 Car. & P. 478.

(*q*) See *R.* v. *Hankins*, 2 C. & K. 823: *Bryan* v. *Waystaff*, 2 Car. & P. 125. And see *Ehrensperger* v. *Anderson*, 3 Ex. 148; 18 L. J., Ex. 132, where the party resided at Bombay.

(*r*) See per *Gurney*, B., in *Atkins* v. *Meredith*, 4 Dowl. 659: *Byrne* v. *Harvey*, 2 M. & R. 89: *Hughes* v. *Budd*, 8 Dowl. 315: *Leaf* v. *Butt*, 1 C. & M. 451: *Meyrick* v. *Woods*, Id. 452.

(*s*) *Gibbons* v. *Powell*, 9 Car. & P. 634.

(*t*) *Leaf* v. *Butt*, 1 C. & M. 451: *Meyrick* v. *Woods*, Id. 452. And see *Sturge* v. *Buchanan*, 10 A. & E. 598; 2 P. & D. 573.

(*u*) *Lawrence* v. *Clark*, 14 M. & W. 250; 3 D. & L. 87. And see *Holt* v. *Miers*, 9 Car. & P. 191.

(*x*) *Doe* v. *Grey*, 1 Stark. 283: *Sims* v. *Kitchen*, 5 Esp. 46. And see *Houseman* v. *Roberts*, 5 Car. & P. 394: *Byrne* v. *Harvey*, 2 M. & R. 89.

(*y*) *Bryan* v. *Waystaff*, 2 Car. & P. 125; 5 B. & C. 314: *R.* v. *Ellicombe*, [illegible] R. 260: *Hargest* v. *Fothergill*, [illegible] 303, n.: *Hughes* v. *Budd*, [illegible] 315: *Foster* v. *Pointer*, 9 [illegible] & P. 718.

(*z*) *Howard* v. *Williams*, 5 M. & W. 725; 1 Dowl., N. S. 877. And see *George* v. *Thompson*, 4 Dowl. 656.

(*a*) *George* v. *Thompson*, 4 Dowl. 656.

in the course of which the letters had been referred to, presumed that they had been remitted to and remained in England, and held the notice sufficient (*b*). In one case where the notice was served after the cause was part heard, it was held, under the circumstances, to be served in time (*c*). It must not be served on a Sunday (*d*). If a party has not the document he is called upon to produce at the time of the service of the notice to produce it, but afterwards obtains possession of it a reasonable time before the trial, he is bound to produce it (*e*). It is for the judge at the trial to determine whether the notice has been served in sufficient time (*f*).

The notice will apply not only to the first, but to the second and all other trials, if more than one, of the cause (*g*).

Affidavit of service.

By *Ord. XXXII. r.* 8 (*ante* p. 487), an affidavit of the solicitor, or his clerk, of the service of the notice, and of the time when it was served, with a copy of the notice annexed to such affidavit, is sufficient evidence of the service of the notice, and of the time when it was served. This rule reproduces the *Com. Law Proc. Act*, 1852, *s.* 119, before which enactment, unless the opposite party would admit the service of the notice to produce, it was necessary to have the server in Court as a witness to prove the service. The expense of this can now be saved by an affidavit of the service under the above rule. When the notice to produce is mentioned in the notice to admit as one of the documents required to be admitted, and admitted, an affidavit of the admission will suffice.

Consequences of want of.

Consequences of Want of Notice.]—Secondary evidence of an instrument in the possession of an adverse party cannot be given unless a notice to produce it has been given as above in cases where a notice is necessary (*h*). Where in ejectment the defendant claimed under a will, and plaintiff proved on cross-examination that another will had subsequently been made, and that after the testator's death it came to the possession of defendant, he was not allowed to ask any question concerning such latter will, not having given defendant notice to produce it (*i*): but where the person to whom a letter had been written by plaintiff, being called by a *spa. duc. tec.* to produce it, stated, that she had since the action was commenced given it up to plaintiff, Lord *Ellenborough*, C. J., allowed secondary evidence of it to be given, although no notice to produce the letter had been served (*k*).

Proceeding at the trial after.

Proceedings at Trial after.]—The time for producing documents, &c., pursuant to this notice, is after the party requiring their production has entered on his case (*l*). If a party refuses to pro-

(*b*) *Sturge* v. *Buchanan*, 10 A. & E. 598; 2 P. & D. 573.

(*c*) *Sturm* v. *Jeffree*, 2 C. & K. 442. And see *Dwyer* v. *Collins*, 7 Ex. 639; 21 L. J., Ex. 225, where the notice was served while the trial was proceeding, and it was held sufficient, the document being in Court.

(*d*) *Hughes* v. *Budd*, 8 Dowl. 317.

(*e*) See *Lloyd* v. *Mostyn*, 10 M. & W. 478; 2 Dowl., N. S. 476, per *Abinger*, C. B.

(*f*) *Lloyd* v. *Mostyn*, 10 M. & W. 479, per *Parke*, B.

(*g*) *Hope* v. *Beadon*, 2 L., M. & P. 593; 21 L. J., Q. B. 25.

(*h*) Ros. on Ev. 5, &c.: *Jones* v. *Tarleton*, 9 M. & W. 675; 1 Dowl., N. S. 625: *Cook* v. *Hearn*, 1 M. & R. 201: *Roe* v. *Harvey*, 4 Burr. 2484: *Bate* v. *Kinsey*, 1 C., M. & R. 38; 4 Tyr. 662: *Sugg* v. *Bray*, 51 L. T. 194.

(*i*) *Doe* v. *Morris*, 3 A. & E. 46; 4 N. & M. 594.

(*k*) *Leeds* v. *Cook*, 4 Esp. 256.

(*l*) *Graham* v. *Dyster*, 2 Stark. 22; 6 M. & S. 1: *Sideways* v. *Dyson*, 2 Stark. 49.

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duce a document after notice to do so, and secondary evidence is in consequence given, he cannot afterwards put in the document as part of his own case (*m*). It is optional with the party upon whom the notice has been served to produce the instrument required, or not (*n*). If he do not, then, upon proving, by affidavit (*o*), or otherwise, to the satisfaction of the Judge (*p*), the service of the notice, and that the instrument is in such party's possession, or in the possession of some person in privity with him (*q*), you will be permitted to prove the contents by a copy (*r*) or other secondary evidence, in the same manner as if it had been destroyed or lost (*s*). The party called on to produce may interpose with evidence to disprove possession (*t*). If the instrument be produced, it must be proved in the regular way (*u*): (except where the party producing it claims a beneficial interest under it (*x*),) and a Master, upon summons, will in some cases grant you an order previous to the trial for an inspection, in order that you may be aware of the evidence necessary to prove the execution (*y*). The refusal to produce documents after notice may be matter for observation to the jury (*z*). If the party giving the notice declines to use the documents when produced, this, though matter of observation, will not make them evidence for the opposite party (*a*), unless they are inspected (*b*).

Documents required by the Merchant Shipping Act, 1854, to be executed in the presence of witnesses may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witnesses (*c*).

(*m*) *Doe* d. *Thompson* v. *Hodgson*, 2 M. & R. 283; 12 A. & E. 135: *Collins* v. *Gashon*, 2 F. & F. 47.

(*n*) See post, Ch. LXV.

(*o*) See Ord. XXXII. r. 8, as to when the service can be proved by affidavit.

(*p*) See *Smith* v. *Sleap*, 1 C. & K. 48: *Harvey* v. *Mitchell*, 2 M. & R. 366, per *Parke*, B.

(*q*) Taylor on Ev. 313; Rosc. 10.

(*r*) When a witness is called, who proves that he compared the copy with the original deed, such copy may be read in evidence without being stamped, for it is only used in point of law to refresh the witness's memory as to the contents of the deed. *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 2 Dowl., N. S. 444.

(*s*) See *Graham* v. *Dyster*, 2 Stark. 21; 6 M. & S. 1: *Sideways* v. *Dyson*, 2 Stark. 49: *Grove* v. *Ware*, Id. 174: *Gorton* v. *Dyson*, 1 B. & B. 219; 3 Moo. 558. There are no degrees in secondary evidence; therefore where a party is entitled to give it at all, he may give any species of it within his power. *Doe* d. *Gilbert* v. [illegible] & W. 102; 8 Dowl. 389: *He* [illegible] 3 Sc. N. R. 577; 3 M. & G. [illegible]

(*t*) *Harvey* v. *Mitchell*, 2 M. [illegible] P. 366. See *Boyle* v. *Wiseman*, 11 Ex. [illegible] 360; 24 L. J., Ex. 284, where it was held, that if it is disputed whether the document produced is the original or not, the judge should hear evidence and decide the question himself. See *Stowe* v. *Querner*, 39 L. J., Ex. 60.

(*u*) *Wetherstone* v. *Edgington*, 2 Camp. 94: *Gordon* v. *Secretan*, 8 East, 548, 549: *Johnson* v. *Lowden*, 6 Esp. 101: *Reardon* v. *Minter*, 12 L. J., C. P. 139. But see *Pierce* v. *Hooper*, 3 Taunt. 60: *R.* v. *Inhab. of Middlezoy*, 2 T. R. 41: *Collins* v. *Baynton*, 1 Q. B. 117.

(*x*) *Carr* v. *Burdiss*, 1 C., M. & R. 782. See *Doe* v. *Wainwright*, 5 A. & E. 520; 1 N. & P. 8. See Rosc. Ev. p. 131, as to when proof of a deed, &c. is dispensed with.

(*y*) See *King* v. *King*, 4 Taunt. 666.

(*z*) See per *Lyndhurst*, C. B., in *Bute* v. *Kinsey*, 1 C., M. & R. 41. But see *Doe* v. *Whitehead*, 8 A. & E. 671.

(*a*) *Sayer* v. *Kitchen*, 1 Esp. 210.

(*b*) *Wilson* v. *Bowie*, 1 Car. & P. 10; Rosc. 12.

(*c*) 17 & 18 V. c. 104, s. 526. See the old law, *Johnson* v. *Lewellin*, 6 Esp. 101: *Bowman* v. *Manzelman*, 2 Camp. 315: and see ante, p. 484, as to when notice to produce is unnecessary.

CHAPTER XLVIII.

DISCOVERY OF DOCUMENTS (*a*).

ANY party to an action may by an application at Chambers for that purpose obtain an order that any other party do make an affidavit stating what documents the latter has or has had in his possession relating to the matters in issue.

The application.

The Application.]—The application for discovery should be made to a Master at Chambers by summons (*b*). As a general rule, it should be included in the summons for directions (*c*), but subject to the liability to pay costs, a special summons may be taken out for the purpose (*c*). Before the application is made the deposit required by *Ord. XXXI. rr.* 25 *and* 26 (*post*, p. 494), must be made.

By *R. of S. C., Ord. XXXI. r.* 12, "Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit."

Time for applying.

Time for Application.]—The above rule does not expressly limit any time within or at which the application for discovery is to be made, and it may therefore be made at any time (*d*). But, as a general rule the order will not be made until it appears on the pleadings what the issues are. It will not, therefore, generally be made until after the defendant has delivered his defence, whether the application be made by the plaintiff (*e*) or by the defendant (*f*). It

(*a*) As to the action of discovery, see *Orr* v. *Diaper*, 4 Ch. D. 92: *Reiner* v. *Marquis of Salisbury*, 2 Ch. D. 378: *Ainsworth* v. *Starkie*, W. N. 1876, 8.

(*b*) *Anon.*, Bitt. iii.

(*c*) Ante, p. 335.

(*d*) *Mellor* v. *Thompson* (C. A.), 49 L. T. 222: *Ley* v. *Marshall*, W. N. 1876, 23: *Union Bank of London* v. *Manby*, 13 Ch. D. 239; 41 L. T. 393: *Harbord* v. *Monk*, 9 Ch. D. 616: *In re Sutcliffe, Alison* v. *Alison*, 50 L. J., Ch. 574.

(*e*) *British and Foreign Contract Co.* v. *Wright*, 32 W. R. 413: *Hancock* v. *Guerin*, 4 Ex. D. 3; as to which see *Union Bank of London* v. *Manby*, 13 Ch. D. 239; 41 L. T. 393: *Harbord* v. *Monk*, 9 Ch. D. 616; see also *Phillips* v. *Phillips*, W. N. 1879, 96: *Anon.*, W. N. 1876, 53: *Anon.*, Id. 55; cp. *Repub. of Costa Rica* v. *Strousberg*, 11 Ch. D. 323; 40 L. T. 401: *Davies* v. *Williams*, 13 Ch. D. 550; 42 L. T. 469: *Philipps* v. *Philipps*, 40 L. T. 815.

(*f*) *Anon.*, Bitt., No. lxxv: *Anon.*, W. N. 1876, 55: *Mercantile Mutual Insurance Co.* v. *Shoesmith*, Id. 64: *Plum* v. *Normanton Iron and Steel Co.*, Id. 73: *Egremont Burial Board* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158.

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may in some cases be ordered before the plaintiff has given particulars of fraud on which he bases his claim (*g*). It may, and often will, be granted after issue joined (*h*). It will not generally, and possibly cannot, be made after the action and all matters in difference have been referred to arbitration (*i*). It has been refused after interlocutory judgment has been signed (*k*).

Postponement until trial of issue.

By *R. of S. C., Ord. XXXI. r.* 20, "If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection" (*l*).

Affidavit in support.

—*Affidavit in Support.*]—Rule 12 (*supra*), it will be observed, expressly provides that no affidavit in support of the application shall be *necessary*. In this respect it differs from the 50th section of the *Com. Law Proc. Act*, 1854, which required an affidavit to be made in support of the application (*m*). The Master may, however, in his discretion, demand from the party applying an affidavit of his belief that the party from whom discovery is sought has documents in his possession to the discovery of which he is entitled (*n*). The affidavit might possibly be required in cases where the nature of the action makes it improbable that there should be any documents, and when none are mentioned in the pleadings or otherwise admitted (*o*). Under the Com. Law Proc. Act, it was necessary that the affidavit should state or show reasonable grounds for the belief that some specific document relating to the matters in dispute, and which the applicant had a right to inspect, was in the possession or power of the opposite party (*p*). A mere affidavit of belief that he had "some" documents in his possession or power relating to the matters in dispute, to the production of which the applicant was entitled, was not sufficient (*q*).

In what cases.

In what Cases.]—The order will be made in all cases where there is any probability of its being of any use. The fact that the documents when discovered will be privileged from inspection is no

(*g*) *Whyte* v. *Ahrens* (C. A.), 26 Ch. D. 717; 50 L. T. 344; 32 W. R. 649.

(*h*) *Anon.*, W. N. 1876, 11.

(*i*) *Penrice* v. *Williams*, 23 Ch. D. 353.

(*k*) *Ladds* v. *Walthew*, 30 W. R. 1000.

(*l*) See *Wood* v. *Anglo-Italian Bank*, 34 L. T. 255: *In re Leigh's Estate*, 6 Ch. D. 256: *Saunders* v. *Jones*, 7 Ch. D. 435: *Verminck* v. *Edwards*, 29 W. R. 189, M. R.: *Hounston* v. *Marquis of Sligo* (C. A.), W. N. 1884, 51, reversing *S. C.*, Id. 29.

(*m*) Cp. *Rochdale Canal Co.* v. *King*, 15 Beav. 11.

(*n*) *Johnson* v. *Smith*, 36 L. T. 741, seduction.

(*o*) Cp. *Hancock* v. *Guerin*, 4 Ex. D. 3.

(*p*) *Evans* v. *Louis*, L. R., 1 C. P. 656.

(*q*) See *Woolley* v. *Pole*, 14 C. B., N. S. 538: *Hewett* v. *Webb*, 2 Jur., N. S. 1189; 28 L. J., Q. B. 121. And see per *Bramwell*, B., in *Bray* v. *Finch*, 1 H. & N. 468. See also *Thompson* v. *Robson*, 2 H. & N. 412. See form of affidavit, Chit. F., p. 270.

ground for refusing the order for discovery (*r*). If they be so privileged the privilege must be sworn to in the affidavit filed in obedience to the order as an excuse for not producing them (*r*). But in cases where discovery could not have been obtained in equity before the Judicature Acts, as in the case of an action for penalties, an order for discovery of documents will not now be made (*s*). And see as to what documents are privileged from production, *post*, p. 497.

Against whom.

Against whom the Order will be made.]—The rule is confined to parties to the action, and the order for discovery will only be made against persons who are such parties.

Company.

A Master has power to order the officer of a *company* to give discovery (*t*), and to stay proceedings until some person is named by a plaintiff *corporation* to give discovery (*u*). It is no longer necessary or proper to join an officer of the corporation as a party for the purposes of discovery (*x*).

Sheriff.

By *R. of S. C., Ord. XXXI. r.* 28, "In any action against or by a sheriff in respect of any matters connected with the execution of his office, the Court or a Judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned."

Third party.

An order for discovery may be made on the plaintiff's application against third parties brought in under *Ord. XVI. r.* 48, who have obtained leave to defend (*y*).

Next friend.

Where a plaintiff of *unsound mind* sues by a next friend, the defendant is entitled to an affidavit of documents by the next friend (*z*); but it has been held that a defendant is not entitled to such an affidavit by the next friend of an infant plaintiff (*a*).

Nominal parties.

Where an action is brought in the names of persons who are nominal plaintiffs only, their names being used by those parties, the defendant is nevertheless entitled to an affidavit of documents by

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(*r*) *Swanston* v. *Lishman*, 45 L. T. 360; see per *Jessel*, M. R., at p. 361: *New British Mutual Investment Co. (Limited)* v. *Peed*, 3 C. P. D. 196, action for recovery of land: *Fortescue* v. *Fortescue*, 34 L. T. 847, Id.: *Lyell* v. *Kennedy*, 8 App. Cas. 217, H. L., recovery of land: *Rumbold* v. *Forteath*, 3 K. & J. 44: *Nicholl* v. *Jones*, 13 W. R. 451: *Lazarus* v. *Mozley*, 5 Jur., N. S. 1119: *Wrentmore* v. *Hagley*, 46 L. T. 741; cp. *Daniel* v. *Ford*, 47 L. T. 575, which, however, was founded on *Lyell* v. *Kennedy*, before it had been reversed by the House of Lords.

(*s*) *Hunnings* v. *Williamson*, 10 Q. B. D. 450, 463; 52 L. J., Q. B. 406; 49 L. T. 392: *Daniel* v. *Ford*, supra.

(*t*) *Cooke* v. *Oceanic Steam Co.*, W. N. 1875, 220. See a case where a director was ordered to give inspection, *Lacharme* v. *Quartz, &c. Co.*, 1 H. & C. 134. As to the affidavit, see *Clinch* v. *Financial Corporation*, L. R., 2 Eq. 271. As to the case of the official liquidator of a company, see *Re Mutual Society*, 48 L. T. 651.

(*u*) *Republic of Costa Rica* v. *Erlanger*, 1 Ch. D. 171; 33 L. T. 632.

(*x*) *Wilson* v. *Church*, 9 Ch. D. 552; 39 L. T. 413.

(*y*) *MacAllister* v. *Bishop of Rochester*, 5 C. P. D. 194. See ante, p. 423.

(*z*) *Higginson* v. *Hall*, 10 Ch. D. 235; 39 L. T. 603; but see next case: cp. *Vivian* v. *Little*, 11 Q. B. D. 370; 52 L. J., Q. B. 771; 48 L. T. 793.

(*a*) *Re Corsellis, Lawton* v. *Elwes*, 48 L. T. 425, where *Higginson* v. *Hall*, supra, was not cited. See *Ingram* v. *Little*, W. N. 1883, 124.

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Foreign government.

them (*b*). As to obtaining discovery from a *foreign government*, see *Republic of Costa Rica* v. *Erlanger*, 1 Ch. D. 171: *Republic of Peru* v. *Weguelin*, L. R., 20 Eq. 140: *United States of America* v. *Wagner*, L. R., 2 Ch. 582: *Republic of Liberia* v. *Imperial Bank*, L. R., 16 Eq. 179.

Person not party.

The Court will not, except in insurance cases, stay an action until the plaintiff ... es an affidavit of documents from a person who is not a party to the action or resident within the jurisdiction, even though the plaintiff derives his title through such person (*c*).

Security for costs of discovery, &c. by payment into Court.

Security for Costs of Discovery, &c. by Payment of Money into Court.]—By *R. of S. C., Ord. XXXI. r.* 25, "In every cause or matter, the costs of discovery, by interrogatories or otherwise, shall, *unless otherwise ordered by the Court or a Judge*, be secured in the first instance as provided by Rule 26 of this Order by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the Judge at the trial, or, if there is no trial, to the Court or a Judge, or shall appear to the taxing officer to have been reasonably asked for."

The rule gives power to the Master or Judge to dispense with the security, but this will only be done in special cases, as, for instance, where the party applying is a poor man (*d*). The fact that both parties consent to the security being dispensed with is not a sufficient ground for dispensing with it (*e*). Nor is the fact that the applicant has already given security for the costs of the action (*f*).

When an application for discovery is made against several co-plaintiffs or co-defendants at the same time, only one deposit of 5*l.* is necessary (*g*). But when interrogatories are delivered to several parties, the prescribed deposit must be made in respect of each (*h*).

This rule does not apply to the case of an order for an affidavit of a ship's papers (*i*).

Payment, how made.

By *r.* 26, "Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into Court to a separate account in the action, to be called 'Security for Costs Account,' to abide further order, the sum of 5*l.*, and, if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery (otherwise than by interrogatories)

(*b*) *Wilson* v. *Raffalovich*, 7 Q. B. D. 553.

(*c*) *Fraser* v. *Burrows*, 2 Q. B. D. 624: cp. *Wilson* v. *Raffalovich*, 7 Q. B. D. 553, C. A.: *China Steamship Co.* v. *Commercial Assurance Co.*, 8 Q. B. D. 142; 45 L. T. 647, C. A.: *West of England Bank* v. *Canton Insurance Co.*, Ex. D. 472, ship's papers. See ... p. 508, n. (*n*). See *Central News Co.* v. *Eastern Telegraph Co.*, 53 L. J., Q. B. 236; 50 L. T. 235; 32 W. R. 493.

(*d*) *Burr* v. *Hubbard*, W. N. 1884, 198; Bitt. Ch. Cas. 83: *In re Smith, Smith* v. *Went*, 50 L. T. 332; 32 W. R. 512. But where the plaintiffs, though paupers, were being supported by subscriptions, the Judge refused to dispense with the deposit. *Henderson* v. *Ripley*, W. N. 1884, 55; Bitt. Ch. Cas. 84: cp. *Compagnie, &c. du Pacifique* v. *Guano Co.*, W. N. 1883, 166; Bitt. Ch. Cas. 81.

(*e*) *Aste* v. *Stumore* (C. A.), 13 Q. B. D. 326; 53 L. J., Q. B. 82; 49 L. T. 742; 32 W. R. 219: *J. & E. Hall* v. *Limekiln*, W. N. 1884, 175, 176.

(*f*) *Compagnie, &c. du Pacifique* v. *Guano Co.*, supra.

(*g*) *Campbell* v. *Lord Poulett*, W. N. 1884, 48.

(*h*) *Smith* v. *Reed*, W. N. 1884, 196.

(*i*) *Law* v. *Lindsay*, W. N. 1884, 166; Bitt. Ch. Cas. 85.

shall, before making application for discovery, pay into Court to a like account, to abide further order, the sum of 5*l.*, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or a Judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into Court, and the time for answering or making discovery shall in all cases commence from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made."

It will be observed that in the case of discovery of documents the money must be paid into Court before the application is made, but that in the case of interrogatories it is sufficient to make it before the interrogatories are delivered. The time for answering or making discovery only runs from the time when the receipt is served even though the non-service of it arose from inadvertence (*k*).

In order to pay the money into Court a request in the form No. 8 in the Appendix to the Supreme Court Funds Rules, 1884, stating that the amount is "paid in to Security for Costs Account" must be presented at the Bank of England, Law Courts Branch, at the north-east corner of the Royal Courts (*l*). The money must be paid to the cashier, who will give a receipt for the amount. In the case of discovery this receipt must be produced at the hearing of the application. In all cases a copy of it must be served on the other side before the order for discovery or interrogatories need be complied with.

Getting money out of Court.

By *r.* 27, "Unless the Court or a Judge shall at or before the trial otherwise order, the amount standing to the credit of the 'Security for Costs Account' in any cause or matter, shall, after the cause or matter has been finally disposed of, be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but in the event of the Court or Judge ordering him to pay the costs of the cause or matter, the amount in Court shall be subject to a lien for the costs ordered to be paid to any other party."

The deposit, if once made, must remain in Court as security for costs even though the application for discovery be refused (*m*).

If the party making the deposit gets the costs of the action he must get a certificate from the taxing officer that he is entitled to have the money paid out to him, and, on production of the certificate at the pay office with a request in the Form No. 44 (c) in the Appendix to the Supreme Court Funds Rules, 1884, the money will be paid out to him (*n*). If the opposite party is entitled to the money he must get an order that it be paid out to him (*n*).

When no taxation required.

By *r.* 27 (a) (*R. of S. C., October*, 1884, *r.* 1), "If after a cause or matter has been finally disposed of, by consent or otherwise, no taxation of costs shall be required, the taxing officer, master or chief clerk (as the case may be) may, either by consent of the parties, or on being satisfied that any party who has lodged any money to the 'Security for Costs Account' in such cause or matter

(*k*) *Jones* v. *Jones*, W. N. 1884, 17.
(*l*) S. C. Funds Rules, 1884, r. 32, ante, p. 355.
(*m*) *Jubb* v. *Bibbs*, W. N. 1883, 208.
(*n*) S. C. Funds Rules, 1884, r. 44 (c), ante, p. 358.

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has become entitled to have the same paid out to him, give a certificate to that effect, which certificate shall be acted on and have effect in all respects as if the same had been an order made in the said cause or matter."

The affidavit of documents.

Affidavit of Documents in obedience to Order.]—By *R. of S. C., Ord. XXXI. r.* 13, "The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule (*o*) has been made, shall specify which, if any, of the documents therein mentioned he objects to produce, and it *shall* be in the Form No. 8 in Appendix B., with such variations as circumstances may require."

The form given in the Appendix referred to in the rule is exhaustive and *must* be used (*p*). The documents which have been in the party's possession, as well as those which are, must be disclosed and their present custody stated (*q*). The omission of the words "never have had" is fatal (*r*).

Claim of privilege.

As to what documents are privileged from production, *see post*, p. 497. The objection and the grounds and facts on which it is based should be clearly and distinctly stated; it is not sufficient to state "that the documents are privileged" (*s*). When the party objects on the ground that the documents are in the joint possession of himself and a third party as joint owners, he must state the nature of such joint ownership (*t*) or joint possession (*u*).

The affidavit is conclusive with regard to the relevancy of the documents and the claim of privilege if properly raised (*x*), unless it can be shown from the answer itself or the description of the documents that the deponent has misrepresented or misconceived their nature (*y*).

Description of documents.

Such a description of the documents must be given as will enable the Court to identify them, and to make an order for their production (*z*). In the case of documents of a similar nature, it is sufficient to give a general description of them, as "letters from A. to B.," and to refer to them as "numbered 1 to 20, and tied up in a bundle marked 'A,' and initialed by me" (*a*). In the case of privileged documents the opposite party is not entitled to such a description as will enable him indirectly to discover their contents (*b*). When an affidavit set out a large number of letters instead of referring to them as tied up in bundles properly identified, the affidavit was ordered to be taken off the file, and the costs paid by the party filing it (*c*).

(*o*) R. 12, ante, p. 491.

(*p*) *Wagstaffe* v. *Anderson*, 30 L. T. 332; W. N. 1876, 39, per *Lindley*, J.; W. N. 1875, 240, per *Quain*, J. See the form, Chit. F. p. 272.

(*q*) W. N. 1876, 38, per *Lindley*, J.

(*r*) *Wagstaffe* v. *Anderson*, supra.

(*s*) *Gardner* v. *Irvin* (C. A.), 4 Ex. D. 49; 48 L. J., Ex. 223; 40 L. T. 357: *Webb* v. *East*, 5 Ex. D. 108.

(*t*) *Bovill* v. *Cowan*, L. R., 5 Ch. 495.

(*u*) *Lazarus* v. *Mozley*, 5 Jur., N. S. 1119.

(*x*) *Bewicke* v. *Graham*, 7 Q. B. D. 400; 50 L. J., Q. B. 396; 44 L. T. 371.

(*y*) *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.* (C. A.), 11 Q. B. D. 55; 52 L. J., Q. B. 181: *Att.-Gen.* v. *Emerson*, 10 Q. B. D. 191; 52 L. J., Q. B. 67.

(*z*) *Taylor* v. *Batten* (C. A.), 4 Q. B. D. 85; 39 L. T. 408.

(*a*) Id. *Bewicke* v. *Graham*, 7 Q. B. D. 400; 50 L. J., Q. B. 396; 44 L. T. 371.

(*b*) Per *Cotton*, L. J., *Gardner* v. *Irvin*, 4 Ex. D. 53.

(*c*) *Walker* v. *Poole*, 21 Ch. D. 835; 51 L. J., Ch. 840.

Office copies unnecessary.

By *Ord. LXV. r.* 27, *sub-r.* 54, "It shall not be necessary to take an office copy of an affidavit of discovery of documents, and the copy delivered by the party filing it may be used as against such party."

Further affidavit.

Further Affidavit.]—If the affidavit be informal or otherwise insufficient, an application may be made for a further affidavit (*d*).

The affidavit is conclusive both as to what documents are in the possession of the party making it (*e*), and as to their relevancy, and as to the facts sworn to as rendering them privileged (*f*). No affidavit by the opposite party will be admitted to contravert the one filed on these matters (*g*). Unless, in the case of documents alleged to have been omitted, their existence can be shown or may be reasonably suspected (*h*), either from an admission in the pleadings of the party from whom discovery is sought, or from the affidavit itself, or from the documents therein referred to (*i*), no further affidavit will be ordered (*k*).

In the case of documents claimed to be privileged or irrelevant, the Court will not order their production unless from the whole answer or the description of the documents the Court is of opinion or suspects (*h*) that the party has erroneously represented or misconceived their nature (*l*). An interrogatory as to specific documents not disclosed in the affidavit is admissible (*m*).

When a plaintiff amends by introducing new matter, he is entitled to a further affidavit of documents (*n*).

What documents are privileged from production.

What Documents are privileged from Production.]—The general rule is, that a party is bound to produce all the documents in his possession or control, which are *material* to the case of his opponent (*o*).

To this rule there are some well-recognized exceptions, which are noticed below.

Privileged communications with solicitors, &c.

Privileged Communications with Solicitors, &c.]—Communications relating to the matter in question between a party and his solicitor

(*d*) *Fortescue* v. *Fortescue*, 34 L. T. 847: *Taylor* v. *Oliver*, Id. 902.

(*e*) *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; 42 L. T. 639: *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. 55.

(*f*) *Bewicke* v. *Graham*, 7 Q. B. D. 400, 406, 408; 44 L. T. 371: *Bulman* v. *Young*, 49 L. T. 736: 31 W. R. 766.

(*g*) *Jones* v. *Monte Video Gas Co.*, supra.

(*h*) Id.: *Lyell* v. *Kennedy*, 27 Ch. D. 1, per *Cotton*, L. J., at p. 21; 50 L. T. 730.

(*i*) Id.

(*k*) Id.: *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. 55; 52 L. J., Q. B. 181; 48 L. T. 22; 31 W. R. 395 (C. A.): *Welsh Steam Coal Collieries, Limited* v. *Gaskell*, 36 L. T. 352, C. A.: *Saull* v. *Browne*, L. R., 17 Eq. 402: *Wright* v. *Pitt*, L. R., 3 Ch. 809, explaining *Noel* v. *Noel*, 1 De G., J. & S. 668; 32 L. J., Ch. 676.

(*l*) *Bewicke* v. *Graham*, supra: *Att.-Gen.* v. *Emerson*, 10 Q. B. D. 191; 52 L. J. Q. B. 67; 48 L. T. 18 (C. A.): *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, supra, n. (*k*): *Bulman* v. *Young*, 49 L. T. 736; 31 W. R. 766: *Roberts* v. *Oppenheim* (C. A.), 26 Ch. D. 724; 50 L. T. 729; 32 W. R. 654.

(*m*) *Catt* v. *Tourle*, 22 L. T. 775; 18 W. R. 996.

(*n*) *Warden* v. *Peddington*, 32 Beav. 639.

(*o*) See *Wilson* v. *Thornbury*, L. R., 17 Eq. 517: *Smith* v. *Dowling*, 10 Jur. 63: *M'Hardy* v. *Hitchcock*, 11 Beav. 73: *Flight* v. *Robinson*, 8 Beav. 22, 33.

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or counsel, made confidentially and in his professional capacity (*p*), whether made personally (*q*), or through an agent employed by the solicitor (*r*), or employed by the client for the purpose of conveying information to his solicitor (*s*), and communications between a solicitor, as such, and his agent (*t*), are privileged (*u*), even though no litigation existed (*x*), or was contemplated (*y*), at the time when they were made. As between a trustee and his *cestui que trust*, the former must disclose all communications between himself and his solicitors relating to the trust (*z*).

Communications made by a non-professional agent in answer to inquiries made by a party's solicitor (*a*) or his agent, or in answer to inquiries made by a party himself at the instance or request of his solicitor (*b*), relating to the matter in question, for the purposes of anticipated or existing litigation (*c*), are also privileged (*d*), as well in the anticipated or existing as in any subsequent (*e*) litigation. So are communications from a non-professional agent, obtained for the purpose of being submitted to a solicitor or counsel for his advice (*f*), or from an agent employed by the party or his solicitor for the purpose of the action, or of getting up evidence for the

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(*p*) Per *Cotton*, L. J., *Gardner* v. *Irvin*, 4 Ex. D. at p. 53: *Thomas* v. *Rawlings*, 27 Beav. 140: *Beadon* v. *King*, 17 Sim. 34: *Smith* v. *Daniell*, L. R., 18 Eq. 649: *Bullock* v. *Corry*, 3 Q. B. D. 356; 38 L. T. 102. See generally *Wheeler* v. *Le Marchant* (C. A.), 17 Ch. D. 675; 50 L. J., Ch. 793; 44 L. T. 632.

(*q*) *Greenhough* v. *Gaskell*, 1 My. & K. 98: *Pearse* v. *Pearse*, 1 De G. & Sm. 12.

(*r*) *Steele* v. *Stewart*, 13 Sim. 533: *Lafone* v. *Falkland Islands Co.*, 4 K. & J. 34: *Simpson* v. *Brown*, 33 Beav. 482.

(*s*) *Reid* v. *Langlois*, 1 Mac. & Gord. 627, 636: *Bunbury* v. *Bunbury*, 2 Beav. 173: *Carpmael* v. *Powis*, 9 Id. 16: *Hooper* v. *Gumm*, 2 John. & H. 602: *Macfarlan* v. *Rolt*, L. R., 14 Eq. 580.

(*t*) *Hampson* v. *Hampson*, 26 L. J., Ch. 612: *Hughes* v. *Biddulph*, 4 Russ. 190: *The Palermo*, 9 P. D. 6; 53 L. J., P. 6; 32 W. R. 403.

(*u*) *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; 35 L. T. 76: *Bustros* v. *White*, 1 Q. B. D. 423; 34 L. T. 835: *Bacon* v. *Bacon*, 34 L. T. 349: *Eadie* v. *Addison*, 31 W. R. 320.

(*x*) *Macfarlan* v. *Rolt*, L. R., 14 Eq. 580.

(*y*) *Carpmael* v. *Powis*, 9 Beav. 16: *Minet* v. *Morgan*, L. R., 8 Ch. 361: *Wilson* v. *Northampton R. Co.*, L. R., 14 Eq. 477: *Turton* v. *Barber*, L. R., 17 Eq. 329: *Mostyn* v. *West Mostyn Coal, &c. Co.*, 34 L. T. 531.

(*z*) *In re Mason*, *Mason* v. *Cattley*, 22 Ch. D. 609; 50 L. J., Ch. 478; 48 L. T. 631.

(*a*) *Curling* v. *Perring*, 2 M. & K. 380.

(*b*) *Friend* v. *L. C. and D. R. Co.*, 2 Ex. D. 437; 36 L. T. 729, reports of doctors as to injuries by railway accidents: *Pacey* v. *London Tramways Co.*, 2 Ex. D. 440, n., S. P. See also *Steele* v. *Stewart*, 1 Ph. 471: *Lafone* v. *Falkland Islands Co.*, 4 K. & J. 34: *Ross* v. *Gibbs*, L. R., 8 Eq. 552, as explained in *Anderson* v. *Bank of British Columbia*, supra.

(*c*) But not otherwise. *Paddon* v. *Winch*, L. R., 9 Eq. 666: *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; 50 L. J., Ch. 793; 44 L. T. 632: *Westinghouse* v. *Midland R. Co.*, 48 L. T. 98.

(*d*) *Anderson* v. *Bank of British Columbia*, supra, per *Jessel*, M. R.: *Bustros* v. *White*, supra: *McCorquodale* v. *Bell*, 1 C. P. D. 471; 35 L. T. 261.

(*e*) *Bullock* v. *Corry*, 3 Q. B. D. 356; 38 L. T. 102: *Hughes* v. *Garnons*, 6 Beav. 352.

(*f*) *Southwark Water Co.* v. *Quick*, 3 Q. B. D. 315; 38 L. T. 28: *The Theodor Körner*, 3 P. D. 162; 38 L. T. 818: *Anderson* v. *Bank of British Columbia*, supra, per *Jessel*, M. R., at p. 648: *Fenner* v. *London & S. E. R. Co.*, L. R., 7 Q. B. 767: cp. *Westinghouse* v. *Midland R. Co.*, 48 L. T. 462, C. A.

trial (*g*), even though the documents are not actually submitted to the solicitor (*h*).

But communications, *other than those above mentioned*, between a party and his non-professional agent, though made with a view to and in contemplation of litigation (*i*), and though made after litigation has actually commenced (*k*), are not privileged. Nor are letters written by third persons to a party's solicitor, expressed to be "in confidence," and under a pledge not to disclose their contents to any one but the party and his legal advisers (*l*).

Communications between co-defendants are not privileged (*m*), unless, indeed, one defendant is acting as agent for the solicitor (*n*), or they are made with an express direction to forward them to the joint solicitor (*o*).

Instructions to counsel, drafts of pleadings, briefs and observations, and notes of counsel thereon, except so far as they consist of matters—such as the indorsement of the order of the Court—which are *publici juris* (*p*), are privileged (*q*). So are cases submitted to counsel anterior to litigation, and documents accompanying them, and counsel's opinion thereon (*r*). And this privilege extends to subsequent litigation involving the same question (*s*).

Copies of a document made since action brought for the purposes of the action are not privileged unless the original would have been so (*t*), but copies of public records, of inscriptions on tombstones, photographs of houses, and similar documents procured by solicitors for the purpose of getting up their clients' cases, are privileged (*u*).

Communications between a party and his medical adviser, or a clergyman, are not privileged (*x*), nor are communications with a pursuivant of the Herald's College (*y*).

(*g*) *The Theodor Körner*, supra: *Walsham* v. *Stainton*, 2 H. & M. 1: *Friend* v. *L. C. & D. R. Co.*, 36 L. T. 729, C. A.: cf. *Martin* v. *Butchard*, Id. 732, C. A.

(*h*) *Southwark Water Co.* v. *Quick*, supra.

(*i*) *Bustros* v. *White*, and *Anderson* v. *Bank of British Columbia*, supra, n. (*u*): *Martin* v. *Butchard*, supra: *English* v. *Tottie*, 1 Q. B. D. 141; 33 L. T. 724: *Westinghouse* v. *Midland R. Co.* (C. A.), 48 L. T. 462; affirming *S. C.*, Id. 98.

(*k*) *Kerr* v. *Gillespie*, 7 Beav. 572.

(*l*) *McCorquodale* v. *Bell*, supra: *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; 50 L. J., Ch. 793; 44 L. T. 632.

(*m*) *Hamilton* v. *Nott*, L. R., 16 Eq. 112: *Betts* v. *Menzies*, 26 L. J., Ch. 528: *Goodall* v. *Little*, 1 Sim., N. S. 155; 20 L. J., Ch. 132.

(*n*) Id.

(*o*) *Jenkyns* v. *Bushby*, L. R., 2 Eq. 547.

(*p*) *Walsham* v. *Stainton*, 2 H. & M. 1: *Nicholl* v. *Jones*, Id. 588.

(*q*) *Nias* v. *Northern and Eastern R. Co.*, 3 M. & Cr. 355: *Pearse* v. *Pearse*, 1 De G. & Sm. 12: *Bunbury* v. *Bunbury*, 2 Beav. 173: *Wynne* v. *Humberston*, 27 Id. 421: *Mostyn* v. *West Mostyn Coal, &c. Co.*, 34 L. T. 531: *Re Brown, Tyas* v. *Brown*, 42 L. T. 501: *Bristol (Mayor, &c.)* v. *Cox*, 26 Ch. D. 678; 50 L. T. 719.

(*r*) *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88: *Manser* v. *Dix*, 1 K. & J. 451: *Reece* v. *Trye*, 9 Beav. 316: *Brown* v. *Oakshott*, 12 Id. 252: *Jenkyns* v. *Bushby*, L. R., 2 Eq. 547.

(*s*) *Holmes* v. *Baddeley*, 1 Phil. 476, reversing 6 Beav. 521.

(*t*) *Land Corporation of Canada* v. *Puleston*, W. N. 1884, 1. See *The Palermo*, 9 P. D. 6. See *Lyell* v. *Kennedy*, infra, where under circumstances copies were held privileged.

(*u*) *Lyell* v. *Kennedy* (C. A.), 27 Ch. D. 1; 50 L. T. 730.

(*x*) *Anderson* v. *Bank of British Columbia*, supra, p. 498, n. (*u*), per *Jessel*, M. R., at p. 650: *Wheeler* v. *Le Marchant*, 17 Ch. D. 675, 681.

(*y*) *Slade* v. *Tucker*, 14 Ch. D. 824; 43 L. T. 49.

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The reports and minutes of the proceedings of committees of a corporation have been held to be privileged (*z*).

Documents relating exclusively to case of party.

Documents relating exclusively to Case of Party.]—A party will not be compelled to produce for the inspection of his opponent documents which relate exclusively to his own case, and contain nothing impeaching his case or supporting or tending to support his opponent's case (*a*). The rule on this subject is well stated by the Vice-Chancellor Knight-Bruce, in the following words (*b*):—

"To protect a defendant from the production or discovery of a document relating to the subject of dispute, it is not sufficient that it should be evidence of his title or contain evidence that he intends and is entitled to use in support of his case. It may also be of a similar character with regard to the plaintiff's case, either in a directly affirmative manner or by exhibiting matter at variance with the defence or tending to impeach it. . . . . If it be with distinctness and positiveness stated in an answer, that a document forms or supports the defendant's title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case, that document is, I conceive, protected from production, unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature. But when it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend, the document is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness" (*b*).

This rule is not confined to muniments of title, but extends to all documents whether relating to the title to land or otherwise (*c*). In order to bring the documents within the rule, it is sufficient for the party to swear that the documents relate solely to his case, and not to the case of his opponent, and do not tend to support the case of his opponent, and do not, to the best of the deponent's knowledge, information and belief, contain anything impeaching his case, wherefor he objects to produce them, and says they are privileged (*d*). It is not sufficient merely to state that the documents relate exclusively to the deponent's case without adding that they do not impeach it or support that of his opponent (*e*).

(*z*) *Bristol* (*Mayor, &c.*) v. *Cox*, 26 Ch. D. 678; 50 L. T. 719.

(*a*) *Att.-Gen.* v. *Emerson*, 10 Q. B. D. 191; 52 L. J., Q. B. 67: *Bewicke* v. *Graham*, 7 Q. B. D. 400; 50 L. J., Ch. 396: *Minet* v. *Morgan*, L. R., 8 Ch. 361: *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. 55; 52 L. J., Q. B. 181, and cases cited in following notes.

(*b*) In *Coombe* v. *Corporation of London*, 1 Y. & C. Ch. 631, at p. 660, 661; 6 Jur. 572; affirmed, 10 Jur. 57. Approved of by the Court of Appeal in *Att.-Gen.* v. *Emerson*, supra.

(*c*) Per *Kindersley*, V.-C., *Jenkyns* v. *Bushby*, 35 L. J., Ch. 401; 14 L. T. 431, 432. See *Bewicke* v. *Graham*, 7 Q. B. D. 400, per *Pollock*, B., at pp. 406, 407; per *Denman*, J., at p. 409.

(*d*) *Bewicke* v. *Graham*, supra: *Minet* v. *Morgan*, supra: *Att.-Gen.* v. *Emerson*, supra: *Roberts* v. *Oppenheim* (C. A.), 26 Ch. D. 724; 50 L. T. 729; 32 W. R. 654.

(*e*) *Jenkyns* v. *Bushby*, supra: *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88: *Corporation of*

Nor is it sufficient merely to swear that the documents although relevant to the matters at issue do not tend to prove the plaintiff's case (*f*). If, however, the Court can see with reasonable certainty from the pleadings, or the affidavit, or from the description of the documents themselves contained in the affidavit, that the party has misrepresented or misconceived their nature, production will be ordered (*g*).

Muniments of title.

Muniments of Title.]—A party will not be compelled to produce muniments of title which he swears do not to the best of his knowledge, information and belief contain anything impeaching his case, or supporting or material to the case of his opponent (*h*). Nor will the defendant be compelled to produce documents which he swears evidence or relate to his own title only, and do not evidence or tend to make out the title claimed by the plaintiff, or any link therein (*i*). But it is not sufficient to state simply that the documents relate to the title of the defendant (*j*). Documents relating to the case of both parties must be produced (*k*). In an action by a tenant of a manor as such against the lord, to establish rights of common which the defendant denies, the plaintiff is entitled to production of the court rolls (*l*), and that without payment of the customary fees (*m*). But when the plaintiffs allege that they are owners in fee of the land, and the defendant alleged that they were only entitled to customary rights over it, they are not so entitled (*n*).

Public policy.

Public Policy.]—Documents, the production of which would be contrary to public policy, are protected; but the grounds and reasons for the privilege must be stated in the affidavit (*o*).

Tendency to criminate or expose to penalty.

Tendency to criminate or expose to Penalty or Forfeiture.]—It appears doubtful whether a party can protect himself from producing a document on the ground that its production would

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Hastings v. *Ivall*, L. R., 8 Ch. 1017: per Lord *Selborne*, L. C., *Minet* v. *Morgan*, L. R., 8 Ch. at p. 365: *Roberts* v. *Oppenheim*, supra.

(*f*) *Marshall* v. *Feeney*, 2 John. & H. 320, per *Page-Wood*, V.-C.

(*g*) *Coombe* v. *Corporation of London*, supra: *Att.-Gen.* v. *Emerson*, supra. There must be "that degree of certainty on which a man of reasonable care would, under the circumstances, act as a certainty." Per *Brett*, L. J., 10 Q. B. D. at p. 204; 52 L. J., Q. B. at p. 73: *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. 55; 52 L. J., Q. B. 181; *Bulman* v. *Young*, 49 L. T. 736; 31 W. R. 766.

(*h*) *Minet* v. *Morgan*, L. R., 8 Ch. 361: *Corporation of Hastings* v. *Ivall*, Id. 1017: *Bewicke* v. *Graham*, supra.

(*i*) *Owen* v. *Wynn*, 9 Ch. D. 29; 38 L. T. 445, 623: *Kettlewell* v. *Barstow*, L. R., 7 Ch. 686. See *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88: *Peile* v. *Stoddart*, 1 Mac. & Gord. 193: *Combe* v. *Corporation of London*, 1 Y. & C. Ch. C. 631: *Egremont Burial Board* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158; 42 L. T. 179.

(*j*) *Lyell* v. *Kennedy*, 8 App. Cas. 217: *Ponsonby* v. *Hartley* (C. A.), W. N. 1883, 44: *Roberts* v. *Oppenheim*, W. N. 1884, 52.

(*k*) See *Ponsonby* v. *Hartley*, supra: *Smith* v. *Duke of Beaufort*, 1 Hare, 507, 522; affirmed, 1 Ph. 209: *Burrell* v. *Nicholson*, 1 M. & K. 680: *Hunt* v. *Elmes*, 27 Beav. 62: *Gandee* v. *Stansfield*, 4 De G. & J. 1; and cases cited 2 Daul. Ch. Pr. 5th ed. 1690, n. (*s*).

(*l*) *Warrick* v. *Queen's College, Oxford*, L. R., 3 Eq. 683. See *Minet* v. *Morgan*, L. R., 11 Eq. 284.

(*m*) *Hoare* v. *Wilson*, L. R., 4 Eq. 1. See post, p. 511.

(*n*) *Owen* v. *Wynn*, 9 Ch. D. 29.

(*o*) See *Kain* v. *Farrer*, 37 L. T. 469.

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tend to criminate him, even though he pledges his oath that its production would have that effect (*l*). In any case the objection must now be taken on oath and by the party himself (*m*), though this was not formerly necessary (*n*). Documents tending to criminate a party do not come within the rule laid down in *Bustros* v. *White*, 1 Q. B. D. 423, viz., that no document other than a document of title is privileged from production, except a communication from a party's solicitor or from an agent employed by or at the instance of the solicitor.

It is submitted, however, that inasmuch as a party may object to answer interrogatories by stating on oath that the answer might tend to criminate him (*o*), and "the principle of our law, right or wrong, is that a man shall not be compelled to say anything which criminates him" (*p*), a party cannot be compelled to produce documents which he swears might tend to criminate him (*q*).

Penalties and forfeiture.

In an action for penalties discovery will not be ordered at all (*r*), nor in the case of forfeiture (*s*).

Joint possession.

Joint Possession.]—Although a party is bound to disclose in his affidavit of documents all the documents in the possession or control of himself, or of some other person as agent for him (*t*), he is not bound to produce for inspection any document which is not in his exclusive possession, but is only in his possession jointly with another person, who is not a party to the litigation (*u*). Thus, when a defendant justified an alleged trespass under a power of distress in a mortgage deed, but stated in his affidavit of documents that he had in his possession documents which were in his possession jointly with B., and were the muniments of title of himself and B., who was not a party to the action, he was held not bound to produce them (*x*). So the committee of a lunatic, whose title deeds are in the custody of the Court, will not be ordered to give inspection (*y*). And, although a party is bound to disclose and produce all documents not other-

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(*l*) *Webb* v. *East* (C. A.), 5 Ex. D. 108; 41 L. T. 715.

(*m*) Id.

(*n*) *Hill* v. *Campbell*, L. R., 10 C. P. 222.

(*o*) *Lamb* v. *Munster*, 10 Q. B. D. 110.

(*p*) Id., per *Field*, J., at p. 111. As to the effect of "might" and "would," see per *Stephen*, J., at p. 112.

(*q*) See *Hill* v. *Campbell*, L. R., 10 C. P. 222: *Waters* v. *Earl of Shaftesbury*, 14 W. R. 259: *Howe* v. *McKernan*, 30 Beav. 547: *Bullock* v. *Richardson*, 11 Ves. 373: *Robinson* v. *Kitchin*, 8 De G., M. & G. 88.

(*r*) *Hunnings* v. *Williamson*, 10 Q. B. D. 459; 48 L. T. 392.

(*s*) *United States of America* v. *Macrae*, L. R., 3 Ch. 79: and see post.

(*t*) *Turner* v. *Rundell*, 1 Cr. & Ph. 104, 111: *Lazarus* v. *Mozley*, 5 Jur., N. S. 1119: *Swanston* v. *Lishman*, 45 L. T. 360. Cp. *Fraser* v. *Burrows*, 2 Q. B. D. 624.

(*u*) *Reid* v. *Langlois*, 1 Mac. & Gord. 627, 636: *Hadley* v. *McDougall*, L. R., 7 Ch. 312; 41 L. J., Ch. 504, partners: *Kearsley* v. *Philips* (C. A.), 10 Q. B. D. 465; 51 L. J., Q. B. 269: *Robertson* v. *Shewell*, 15 Beav. 277, deceased co-defendant: *Morrell* v. *Wootten*, 13 Beav. 105; 20 L. J., Ch. 81, co-executors: *Taylor* v. *Rundell*, 1 Cr. & Ph. at p. 111: *Warrick* v. *Queen's College, Oxford* (No. 2), L. R., 4 Eq. 254, compromise. As to the cases of *Walburn* v. *Ingilby*, 1 My. & K. 61, and *Hutchinson* v. *Glover*, 1 Q. B. D. 138, see *Kearsley* v. *Philips*, supra.

(*x*) *Kearsley* v. *Philips*, supra.

(*y*) *Vivian* v. *Little*, 11 Q. B. D. 370; 52 L. J., Q. B. 771; 48 L. T. 793.

wise privileged in the possession of any other person as agent for himself (*z*), he is not bound to produce for inspection those of which such agent only holds possession for him jointly with another person who is not a party to the litigation (*a*). In all these cases the nature of the joint possession should be stated in the affidavit of documents (*b*), and stated to be the ground on which the party relies as exempting the document from production. But it is not necessary to show that any application has been made to the person jointly entitled for his consent to the production (*c*).

Jus tertii.

Jus Tertii.]—Where a material document, although it is in the possession of a party to an action, does not belong to him or is held by him on behalf of another, who is not a party to the action, he will not be compelled to produce it (*d*). Thus, an agent will not be compelled to produce a document belonging to his principal (*e*), nor a trustee one which he holds on behalf of the *cestui que trust* (*f*), nor a solicitor one belonging to his client (*g*), nor a mortgagee the title deeds of the mortgagor (*h*). But the mere fact that a person who is not a party to an action has an interest in preventing the production of a document will not protect it (*i*). A party, therefore, cannot refuse to produce private and confidential letters from a stranger on the ground that the writer forbids their production (*k*).

Solicitor's lien.

Where documents are in the possession of a party's solicitor, the fact that the solicitor has a lien on them, and declines to produce them, is no ground for not producing them, the party being bound to pay off the lien, and so obtain possession of the documents (*l*). And, in making any order for production, the Court will give him time for this purpose (*l*).

(*z*) Per *Cottenham*, L. C., *Murray* v. *Walter*, 1 Cr. & Ph. at p. 125: *Mertens* v. *Haigh*, 3 De G., J. & Smith, 528.

(*a*) *Murray* v. *Walter*, 1 Cr. & Ph. 114, treasurer on behalf of shareholders: *Morrell* v. *Wootten*, 13 Beav. 105; 20 L. J., Ch. 81, co-executors: *Lopez* v. *Deacon*, 6 Beav. 254: *Edmunds* v. *Lord Foley*, 30 Beav. 282; 31 L. J., Ch. 284, solicitors for tenants in common.

(*b*) *Lazarus* v. *Mozley*, 5 Jur., N. S. 1119: *Borill* v. *Cowan*, L. R., 5 Ch. 495; 22 L. T. 503.

(*c*) *Kearsley* v. *Philips*, 10 Q. B. D. 36; (C. A.), Id. 465; 51 L. J., Q. B. 269.

(*d*) Id.

(*e*) Cp. *King of the Two Sicilies* v. *Wilcox*, 1 Sim., N. S. 320; 20 L. J., Ch. 417.

(*f*) *Few* v. *Guppy*, 13 Beav. 457.

(*g*) Id.

(*h*) *Lambert* v. *Rogers*, 2 Mer. 490.

(*i*) *Kettlewell* v. *Barstow*, L. R., 7 Ch. 686; 27 L. T. 258: *Plant* v. *Kendrick*, L. R., 10 C. P. 602.

(*k*) *Hopkinson* v. *Lord Burghley*, L. R., 2 Ch. 447: *Richardson* v. *Hastings*, 7 Beav. 354. The party seeking production will be put to an undertaking not to use the documents for any collateral purpose. Id. See *Williams* v. *Prince of Wales Life, &c. Co.*, 23 Beav. 338; 3 Jur., N. S. 55.

(*l*) *Goodchap* v. *Weaving*, 16 Jur. 583: *Rodick* v. *Gandell*, 10 Beav. 270. See *Newington L. B.* v. *Eldridge*, 12 Ch. D. 349; 49 L. J., Ch. 231. If a solicitor be called on a *subpœna duces tecum* to produce a document, he cannot, as against a person who is not his client, refuse to do so, simply on the ground that he has a lien on it in respect of unpaid charges. *Hope* v. *Liddell*, 7 D., M. & G. 338; 24 L. J., Ch. 691. See *Doe* v. *Ross*, 7 M. & W. 102: *Re Cameron's Coalbrook R. Co.*, 25 Beav. 1: *Lockett* v. *Cary*, 10 Jur., N. S. 144. But, as against the person from whom the charges are due, the lien protects the solicitor from producing the document. *Re Gregson*, 26 Beav. 87: *Palmer* v. *Wright*, 10 Beav. 234: *Rodick* v. *Gandell*, 10 Beav. 270. A

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Other exceptions.

Other Exceptions.]—Other grounds upon which the refusal to produce documents may be based will be found *post*, p. 520.

The mere fact that a document would not be evidence will not exempt it from production (*m*).

Shorthand notes of a case taken for the purpose of the case of a party in another action are privileged (*n*).

As to the production of a compromise of a former action, *see Hutchinson* v. *Glover*, 1 *Q. B. D.* 138; 33 *L. T.* 605; *C. A.*, *Id.* 834; *Warrick* v. *Queen's College, Oxford* (*No.* 2), *L. R.*, 4 *Eq.* 254.

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lien against a bankrupt does not protect documents from production to his trustee. *In re Toleman and England, Ex p. Bramble*, 13 Ch. D. 885; 42 L. T. 413; 28 W. R. 676.

(*m*) *Nicholl* v. *Jones*, 2 H. & M., per *Wood*, V.-C., at p. 593. See also per *Jessel*, M. R., in *Bustros* v. *White*, 1 Q. B. D., at p. 425: and per *Blackburn*, J., *Hutchinson* v. *Glover*, Id., at p. 141.

(*n*) *Nordon* v. *Defries*, 8 Q. B. D. 508; 51 L. J., Q. B. 415; 30 W. R. 612.

CHAPTER XLIX.

PRODUCTION AND INSPECTION OF DOCUMENTS.

Production and inspection of documents.

WHERE documents relevant to the question in issue are in the possession of a party to an action, any other party may obtain inspection of them unless they are documents which are privileged from such production. In the case of documents which are referred to by a party in his pleadings or affidavits, his opponent can obtain an inspection of them by giving a notice for that purpose, and an order to inspect is only necessary when the party served with such notice refuses to give the inspection. In all other cases an order is necessary in the first instance.

Notice to party to produce for inspection documents referred to in his pleadings or affidavits.

Notice to Party to produce for Inspection Documents referred to in his Pleadings or Affidavits.]—By *R. of S. C., Ord. XXXI. r.* 15, "Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a Judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or Judge shall deem sufficient for not complying with such notice: in which case the Court or Judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or Judge shall think fit." The notice may be given at any time (*a*). There is no necessity for a defendant to wait until he has delivered his defence before he gives the notice with regard to documents disclosed in the statement of claim (*b*). The rule applies to documents referred to in the pleadings in a general manner, and is not confined to documents specifically described (*c*). It extends to documents referred to in particulars delivered in an action (*d*).

Documents in respect of which privilege is claimed cannot be ordered to be produced merely because they are referred to in the pleadings (*e*).

(*a*) *Smith* v. *Harris*, 48 L. T. 869.

(*b*) *Quilter* v. *Heatly* (C. A.), 23 Ch. D. 42; 48 L. T. 373; 31 W. R. 331, where some *dicta* in *Webster* v. *Whewell*, 13 Ch. D. 120, are disapproved of.

(*c*) *Smith* v. *Harris*, 48 L. T. 869.

(*d*) *Cass* v. *Fitzgerald*, W. N. 1884, 18.

(*e*) *Roberts* v. *Oppenheim* (C. A.), 26 Ch. D. 724; 50 L. T. 729; 32 W. R. 654.

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Form of notice.

Form of Notice.]—By *Ord. XXXI. r.* 16, "Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 9 in Appendix B., with such variations as circumstances may require." The form here referred to will be found in *Chitty's Forms*, p. 275.

—Notice to inspect.

Notice to Inspect.]—By *Ord. XXXI. r.* 17, "The party to whom such notice is given shall, within *two* days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 13(*d*), or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within *four* days from the receipt of such notice, deliver to the party giving the same a notice stating a time within *three* days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in the Form No. 10 in Appendix B., with such variations as circumstances may require." This form will be found in *Chitty's Forms*, p. 276.

Application for order for inspection.

Application for Order for Inspection.]—By *R. of S. C., Ord. XXXI. r.* 18, "If the party served with notice under Rule 17 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party."

It will be observed that in the case of documents referred to in the party's pleadings or affidavits, an order is only necessary when the party, after having been served with a notice to inspect, omits to name a time for the inspection or objects to give the inspection, or offers it elsewhere than at the office of the solicitor. In other cases an order must be obtained on an application supported by affidavit, which latter is not required in the former case. A master may make the order.

Affidavit in support.

Affidavit in Support.]—See as to when this affidavit is necessary, *Ord. XXXI. r.* 18, *supra*.

The affidavit must show:—

1. Of what documents inspection is sought.
2. That the party applying is entitled to inspect them.
3. That they are in the possession or power of the other party (*e*).

Order for inspection.

Order for Inspection.]—A form of order is given by the *R. of S. C., Appendix K., No.* 18 (*f*).

(*d*) See ante, p. 496.
(*e*) See form, Chit. F.
(*f*) Chit. F., p. 280.

The Master has no discretion to refuse an order for inspection except in the case of privileged documents (*g*). The application may be made at any time (*h*). As to what documents are privileged, *see ante*, p. 497 *et seq.*

—Place for inspection.

The order to inspect gives directions as to the time and place for the inspection (*i*). The Judge has a discretion as to the place for inspection, and the Court of Appeal will not generally interfere with the exercise of this discretion (*j*). The place usually named for the inspection is the office of the solicitor or agent of the party who has to produce them. Where documents were in constant use, an order was made for their inspection at the place where they were used (*k*); and generally the order will be so made as to put the party who has to give the inspection to as little trouble and inconvenience as the case will admit of (*l*). The documents of a corporation have been ordered to be inspected at the muniment office of the corporation (*l*).

—Time for.

The plaintiff will not generally be allowed to obtain production from the defendant until he has delivered his statement of claim (*m*); but there is no absolute rule to this effect (*n*).

The principles applicable in the case of production of documents are the same as those with regard to discovery in answer to interrogatories (*o*), and the latter may be consulted accordingly (*see post*, p. 520).

Production.

Production.]—By *R. of S. C., Ord. XXXI. r.* 14, "It shall be lawful for the Court or a Judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just." This rule is taken from *stat.* 15 & 16 *V. c.* 86, *s.* 18, and must be construed according to the interpretation put upon that section (*p*); the rules of equity prevailing over those at law (*q*).

Thus defined, the power of the Court or a Judge to refuse an order for the production of a document is limited to documents which fall within some known rule of protection or privilege formerly acted upon by the Court of Chancery, such as that of professional

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(*g*) *Bustros* v. *White* (C. A.), 1 Q. B. D. 423; 34 L. T. 835: *Martin* v. *Butchard*, 38 L. T. 732.

(*h*) *Smith* v. *Harris*, 48 L. T. 869.

(*i*) *Rogers* v. *Turner*, 21 L. J., Ex. 8.

(*j*) *Bustros* v. *Bustros*, 30 W. R. 374.

(*k*) *Gardner* v. *Dangerfield*, 5 Beav. 389: *Skey* v. *Bennett*, 6 Jur. 981: *Mertens* v. *Haigh*, 1 Johns. 735.

(*l*) *Prestney* v. *Corporation of Colchester* (C. A.), 24 Ch. D. 376; 52 L. J., Ch. 877; 48 L. T. 749; 31 W. R. 757.

(*m*) *Cashin* v. *Craddock*, 2 Ch. D. 140; 34 L. T. 52.

(*n*) *Republic of Costa Rica* v. *Strousberg*, 11 Ch. D. 323; 4 L. T. 401, C. A.

(*o*) *Swinborne* v. *Nelson*, 16 Beav. 416: *Clegg* v. *Edmondson*, 22 Id. 125: 2 Dan. Ch. Pr. 5th ed. 1674.

(*p*) *Bustros* v. *White* (C. A.), 1 Q. B. D. 423; 34 L. T. 835: *Welsh, &c. Collieries* v. *Gaskell*, 36 L. T. 352, C. A.: cp. *Ex p. Campbell*, L. R., 5 Ch. 703.

(*q*) *Anderson* v. *Bank of British Columbia* (C. A.), 2 Ch. D. 644; 35 L. T. 76: *Atherley* v. *Harvey*, 2 Q. B. D. 524; 36 L. T. 551.

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privilege. Where the parties by consent submit the documents themselves to the Judge at Chambers, the decision at which the Judge arrives on such inspection will be final (*r*).

Inspection by witnesses, &c.

Inspection by Witnesses, &c.]—The common order giving a party, "his solicitor or agent" liberty to inspect documents does not authorize inspection by a non-professional witness (*s*); nor does it authorize a plaintiff, who has obtained the order, to take a co-defendant to assist him (*t*). The Master may, however, in special cases, on an application made on special grounds, allow inspection by witnesses (*u*). In such cases inspection by an accountant (*x*), or by a surveyor (*y*), has been ordered.

Copies.

Copies.]—A party having the right to inspect is entitled to take copies (*z*).

Sealing up parts of documents.

Sealing up Parts of Documents.]—Where only certain parts of any document relate to the matters in question, or where parts of a document otherwise liable to production are privileged from production by reason of their falling within any of the rules above discussed, the party producing the document may seal up those parts of it which are irrelevant or privileged (*a*). He must not in any way mutilate the document, but must produce it intact with those parts which are not liable to inspection, sealed or covered up, so as to be concealed from the view of the party inspecting (*b*). *Primâ facie* the whole of every document disclosed in the schedule to the affidavit of discovery is subject to inspection; and, in order to be entitled to seal up any portion, the affidavit must distinctly claim the right to do so, and show that the part sealed up is irrelevant or privileged, and the grounds on which it is so (*c*). If the party has not claimed the right in his original affidavit, he may do so subsequently by a separate affidavit, either on a summons for leave to seal up (*d*) or on any application made by his opponent for

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(*r*) *Bustros* v. *White*, 1 Q. B. D. 422; 45 L. J., Q. B. 642: *English* v. *Tottie*, 1 Q. B. D. 141; 45 L. J., Q. B. 138: *M'Corquodale* v. *Bell*, L. R., 1 C. P. D. 471; 45 L. J., C. P. 329: *Dickson* v. *Harrison*, 47 L. J., Ch. 686: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644.

(*s*) *Summerfield* v. *Pritchard*, 17 Beav. 9: cp. *Draper* v. *Manchester, &c. R. Co.*, 30 L. J., Ch. 236, reversing *S. C.*, Id. 96.

(*t*) *Bartley* v. *Bartley*, 1 Drew. 233; 22 L. J., Ch. 47: *Draper* v. *Manchester, &c. R. Co.*, 3 De G., F. & J. 23: *Bonnardet* v. *Taylor*, 30 L. J., Ch. 523.

(*u*) *Boyd* v. *Petrie*, L. R., 3 Ch. 818, reversing *S. C.*, L. R., 5 Eq. 290.

(*x*) *Bonnardet* v. *Taylor*, 1 J. & H. 383: *Lindsay* v. *Gladstone*, L. R., 9 Eq. 132.

(*y*) *Swansea Vale R. Co.* v. *Budd*, L. R., 2 Eq. 274.

(*z*) *Pratt* v. *Pratt*, 51 L. J., Ch. 838; 47 L. T. 249; 30 W. R. 837, affirmed W. N. 1882, 151; cf. 74 L. T. Jour. 37: *Coleman* v. *West Hartlepool, &c. Co.*, 5 L. T. 266.

(*a*) This has been held to apply to a map, *Fazakerly* v. *Gallibrand*, 8 L. J., Ch. 248: a pedigree, *Kettlewell* v. *Barstow*, L. R., 7 Ch. 686. As to partnership documents, see *In re Pickering, Pickering* v. *Pickering* (C. A.), 25 Ch. D. 247; 53 L. J., Ch. 550; 32 W. R. 511.

(*b*) *Ayres* v. *Levy*, 19 L. T. 8.

(*c*) *In re Pickering*, W. N. 1883, 169.

(*d*) *Talbot* v. *Marshfield*, L. R., 1 Eq. 6; 11 Jur., N. S. 901, without payment of costs.

inspection (*e*), or it may be made part of the order for inspection that he should be at liberty to do so (*f*).

The statement in the affidavit showing that the parts of the documents sealed up are privileged is *prima facie* conclusive, and cannot be controverted by a contradictory affidavit of the opposite party (*g*). But if it can be shown from the affidavit itself or from the parts of the document disclosed that the statement is untrue or made under a misapprehension, discovery of the concealed parts might be ordered (*h*), or, in some cases, the Court would uncover the sealed parts and examine them to see whether they ought to be disclosed (*i*). Where those parts of the document which it is desired to seal up are so placed that they cannot be concealed without covering up parts which are liable to production, production will not be ordered (*k*), unless there has been some breach of duty in mixing up the different parts (*l*), as in the case where a party who ought to keep separate accounts of certain matters has mixed them up with others (*l*).

Costs of Inspection.]—The costs of inspection must in the absence of a special order to the contrary, be borne by the party inspecting, and he cannot get them from his adversary (*m*). Costs of inspection.

By *Ord. LXV. r.* 27, *sub-r.* 17, "As to inspection of documents under *Ord. XXXI. r.* 15, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection."

By *sub-r.* 18, "As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4*d.* per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof."

Inspection in Actions on Policies of Marine Insurance.]—The former practice with regard to inspection in actions on policies of marine insurance is still in force (*n*). Before the 14 & 15 *V. c.* 99, Inspection in actions on policies of marine insurance.

(*e*) *Curd* v. *Curd*, 1 Hare, 274; 6 Jur. 307: *Nicholl* v. *Jones*, 2 H. & M. 590, 596: *Jenkins* v. *Bushby*, 35 L. J., Ch. 400, 402; 14 W. R. 531, 532.

(*f*) *Gerard* v. *Painswick*, 1 Swanst. 534: *Earp* v. *Lloyd*, 3 K. & J. 549, 553. In this case if the party omit to get the direction inserted he will have to pay the costs of any subsequent application for leave to seal up. *Talbot* v. *Marshfield*, supra, per *Kindersley*, V.-C.

(*g*) *Bowes* v. *Fernie*, 3 M. & C. 632: *Sheffield Canal Co.* v. *Sheffield, &c. R. Co.*, 1 Phil. 484: *Luscombe* v. *Steer*, 37 L. J., Ch. 119.

(*h*) *Bowes* v. *Fernie*, supra: *Kettlewell* v. *Barstow*, L. R., 7 Ch. App. 686, 694: cp. *Att.-Gen.* v. *Emerson*, ante, p. 496, n. (*y*).

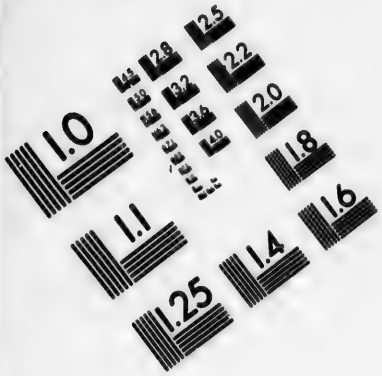
(*i*) *Caton* v. *Lewis*, 22 L. J., Ch. 946: *Lafone* v. *Falkland Islands Co.*, 27 L. J., Ch. 25.

(*k*) *Churton* v. *Frewen*, 2 Dr. & Sm. 393.

(*l*) *Carew* v. *White*, 5 Beav. 172.

(*m*) *Brown* v. *Sewell*, 16 Ch. D. 517; 41 L. T. 412: *Republic of Peru* v. *Weguelin*, L. R., 7 C. P. 352; 41 L. J., C. P. 141: *Hill* v. *Philp*, 21 L. J., Ex. 82.

(*n*) *China Steamship Co.* v. *Commercial Ass. Co.*, 8 Q. B. D. 144; 51



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s. 6, in policy causes against underwriters, where the plaintiff, on the defendant's application, consented to enter into a consolidation rule, terms were generally imposed on the defendant to produce all books and papers material to the point in issue (*i*). But it would seem, from what fell from Mr. Justice *Maule*, in a case before the Act (*k*), that an order for such production could not be made where the defendants had not obtained such consolidation rule, or in a case not against underwriters, and that the power to make it was derived from the defendant having obtained the benefit of the consolidation.

A form of order for inspection in an action on a policy of insurance is given in the *R. of S. C., App. K., No.* 19, and will be found in *Chitty's Forms*, p. 281.

Inspection of public books, &c.

Inspection of Public Books and Documents in general.]—Any one may inspect the records of the Courts of law; therefore, when a writ is returned and filed, it may be inspected. Where a *habeas* was lodged with the marshal, an inspection was ordered to be given of it, and of the *committitur* indorsed upon it, to the plaintiff's solicitor, although the object of the application was to enable the plaintiff to bring an action against the marshal for an escape (*l*). Any person has a right to inspect the books of the sessions of the peace (*m*). Where the question in a cause did not concern any transaction in the Post Office, the Court refused to grant an inspection of the books of the Post Office (*n*); and the Court refused to allow the Custom House books to be inspected, the question in the cause not touching any subject matter contained in such books (*o*). A parishioner has a right to inspect the parish books if he require it for parochial purposes, but not otherwise (*p*). Where the contents of a deed, which was a public document, were set forth in an inquisition *post mortem*, taken in the reign of James the First, which was duly filed at the Rolls Chapel, the Court refused to compel the production of the original deed (*q*). In an action for a malicious prosecution, where it appeared to be necessary, for the maintenance of the action, that the plaintiff should be put in possession of the contents of the examinations taken before the justices, and of the warrant on which he was apprehended, a rule was granted for their inspection, and that copies might be taken, and the originals produced at the trial (*r*).

L. J., Q. B. 132; 45 L. T. 647 (C. A.). See *West of England Bank* v. *Canton Insurance Co.*, 2 Ex. D. 472: *Wilson* v. *Raffalovich*, 7 Q. B. D. 553 (C. A.).

(*i*) Park, Ins., 6th ed., Introduction, xliv: *Goldschmidt* v. *Marryatt*, 1 Camp. 562: and *Clifford* v. *Taylor*, 1 Taunt. 167; 1 Camp. 563, n.

(*k*) *Twizell* v. *Allen*, 5 M. & W. 337.

(*l*) *Fox* v. *Jones*, 7 B. & C. 732.

(*m*) *Herbert* v. *Ashburner*, 1 Wils. 297.

(*n*) *Crew* v. *Blackburn*, 1 Wils. 240: *Crew* v. *Saunders*, Str. 1005.

(*o*) *Benson* v. *Port*, 1 Wils. 240. See *Atherford* v. *Beard*, 2 T. R. 616, per *Buller*, J.: *R.* v. *Worsenham*, 1 Ld. Raym. 705.

(*p*) *Anon.*, 2 Chit. 296: *May* v. *Gwynne*, 4 B. & A. 301: *R.* v. *Smallpiece*, 2 Chit. Rep. 288: *R.* v. *Lee*, 1 Wils. 240: *Newel* v. *Simpkin*, 4 M. & P. 394; 6 Bing. 565: *R.* v. *Great Farringdon*, 9 B. & C. 541: *Edwards* v. *Bennett*, 3 M. & P. 49; 6 Bing. 230; 3 Y. & J. 458: *R.* v. *Justices of Buckinghamshire*, 8 B. & C. 375.

(*q*) *Wood* v. *Morewood*, 9 Dowl. 669.

(*r*) MSS.: *Rex* v. *Smith*, 1 Str. 126; *Barnes*, 468. But see *Re Justices of Bedford*, 1 Chit. Rep. 627. As to the right to inspect records, indictments,

Rolls of manor, &c.

Rolls of Manor, &c.]—The rolls of a manor are open to the inspection of the lord and the copyholders (*s*), but not of strangers. Even a person who has a *primâ facie* title to a copyhold is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, although at the time no cause be depending respecting it (*t*). Any of the persons interested in copyhold property are entitled to inspect the rolls of the manor, without the others joining in the application (*u*). But a freehold tenant of a manor has no right to inspect them (*x*); at least, not unless some cause be depending relative to the manor, &c. in which his right as tenant may be involved (*y*). And the Court will in no case grant such an inspection to a prosecutor in a criminal proceeding against the lord (*z*).

By *R. of S. C., Ord. XXXI. r*, 19, "An order upon the lord of a manor to allow limited inspection of the court rolls may be made on the application of a copyhold tenant supported by an affidavit that he has applied for inspection, and that the same has been refused" (*a*). It seems, however, that this rule applies only to cases where an action is pending (*b*). The demand to inspect the rolls cannot be made by the agent of a person authorized by warrant of attorney to make the demand on behalf of the tenant, although the agent's authority is in writing, so as to obtain a *mandamus* in case of refusal (*c*). In an action by a tenant of a manor as such against the lord to establish rights of common which the defendant denies, the plaintiff is entitled to production of the court rolls (*d*), and that without payment of the customary fees (*e*). But when the plaintiffs allege that they are owners in fee of the land, and the defendant alleges that they are entitled to customary rights only over it, they are not so entitled (*f*).

Corporation books, &c.

Corporation Books, &c.]—A party interested in entries in corporation books and the books of public companies, relating to things public and general, has a right to inspect them and have copies of them; and if this be refused, the Court upon motion, grounded upon an affidavit showing that the evidence likely to be contained in these books is directly material in the cause, or otherwise showing satisfactorily the interest the party has in them, will order that he be

depositions, &c., see 3 Russ. on Crimes, by Prentice, pp. 427—433.

(*s*) *Warrick* v. *Queen's College, Oxford*, L. R., 3 Eq. 683. See *Minet* v. *Morgan*, L. R., 12 Eq. 284: *Hoare* v. *Wilson*, L. R., 4 Eq. 1.

(*t*) *R.* v. *Lucas*, 10 East, 235. See *Addington* v. *Clode*, 2 W. Bl. 1030: *Falkard* v. *Hemmet*, Id. 1061: *Rogers* v. *Jones*, 5 D. & R. 484. See *Ex p. Cook*, 5 D. & L. 413, as to the form of affidavit.

(*u*) *Ex p. Hutt*, 7 Dowl. 690: *Ex p. Barnes*, 2 Dowl., N. S. 20.

(*x*) *Smith* v. *Davies*, 1 Wils. 104. But see cases cited in n. (*s*), supra; and see *Owen* v. *Wynn*, infra, n. (*f*).

(*y*) *R.* v. *Shelley*, 3 T. R. 141: *R.* v. *Allgood*, 7 T. R. 746: *Warrick* v. *Queen's College*, 36 L. J., Ch. 505.

(*z*) *R.* v. *Earl of Cadogan*, 5 B. & A. 902; 1 D. & L. 559.

(*a*) Cp. R. H. T. 1853, r. 31. See *Ex p. Hutt*, 7 Dowl. 690: *Ex p. Barnes*, 2 Dowl., N. S. 20.

(*b*) *Ex p. Best*, 3 Dowl. 38.

(*c*) *Ex p. Hutt*, supra.

(*d*) *Warrick* v. *Queen's College, Oxford*, L. R., 3 Eq. 683. See *Minet* v. *Morgan*, L. R., 11 Eq. 284.

(*e*) *Hoare* v. *Wilson*, L. R., 4 Eq. 1.

(*f*) *Owen* v. *Wynn*, 9 Ch. D. 29; 38 L. T. 623; 26 W. R. 644.

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at liberty to inspect them and have copies (*g*). Thus, in a dispute between corporators, an inspection of the corporation documents relating to the matter in dispute will be granted to either of them (*h*). But the mere circumstance of a party being a member of a corporation will not give him a right to inspect the corporation books, respecting matters of private concern, having no reference to his rights as a burgess (*i*). In an action by a corporation, for toll, the defendant, if he is a member of the corporation, but not otherwise (*k*), has a right to inspect all charters, &c. in the possession of the corporation relating to such toll (*l*). In an action for the breach of a bye-law, the Court compelled the corporation to allow the defendant to inspect the bye-law in the corporation books, though he was not a member of the corporation (*m*). In an action against the Bank of England for refusing to pay dividends, where the defence was that the stock had been transferred before the dividends became due, the Court allowed the plaintiff to inspect the entry in the bank book as to the alleged transfer, but not any other part of the book (*n*). A member of one of the universities may inspect its statutes and archives, if it become requisite in any matter affecting him in his relation of member (*o*). So, a prebendary may have inspection of the charters, &c. of the chapter, in any matter relating to his prebend (*p*). So, a member of the College of Physicians (but not a stranger) may inspect the books of the college (*q*). Where an information was filed against an officer of the East India Company, on charges of delinquency in India forwarded upon the report of a board of inquiry there, the Court refused to grant the defendant an inspection of that report, saying, that they had no power to grant it (*r*). In an action against a shareholder of a company for calls, it was held, that the defendant could not claim to inspect the minute books

(*g*) 2 Phil. Ev. 9th ed. 181; 5 Bac. Abr. Ev. (F.); 12 Vin. Ab. 101; 2 T. R. 284; Peake, Ev. 94, 95: *May* v. *Gwynne*, 4 B. & Ald. 301: *Mayor of Lynn* v. *Denton*, 1 T. R. 689, and n.: *Atherford* v. *Beard*, 2 Id. 616: *Corporation of Barnstaple* v. *Lathey*, 3 Id. 303: *R.* v. *Holland*, 4 Id. 691; 2 East, 70: *Mayor of Southampton* v. *Graves*, 8 Id. 590: *Imperial Gas Co.* v. *Clarke*, 4 M. & P. 727; 7 Bing. 95: *R.* v. *Hostmen in Newcastle-upon-Tyne*, 2 Str. 1223. See *Burrell* v. *Nicholson*, 1 Myl. & K. 680: *R.* v. *Saddlers' Co.*, 10 W. R. 87.

(*h*) *Mayor of Southampton* v. *Graves*, 8 T. R. 592, per Ld. *Kenyon*, C. J. See *R.* v. *Babb*, 3 T. R. 579.

(*i*) See *Stevens* v. *Mayor of Berwick*, 4 Dowl. 277.

(*k*) *Mayor of Southampton* v. *Graves*, 8 T. R. 590. See *Hodges* v. *Atkiss*, 2 W. Bl. 877; 3 Wils. 398.

(*l*) *Barnstaple* v. *Lathey*, 3 T. R. 303: *Mayor of Lynn* v. *Denton*, 1 T. R. 689.

(*m*) *Harrison* v. *Williams*, 3 B. & C. 162; 4 D. & R. 820.

(*n*) *Foster* v. *The Bank of England*, 8 Q. B. 689.

(*o*) See *R.* v. *Purnell*, 1 Wils. 239; 1 W. Bl. 37.

(*p*) *Young* v. *Lynch*, 1 W. Bl. 27. See further as to the inspection of charters of a chapter, *Murray* v. *Tornhill*, 1 Wils. 717: *R.* v. *Worsenham*, 1 Ld. Raym. 705: *Cox* v. *Copping*, Id. 337; 5 Mod. 395: *Allen* v. *Tap*, 2 W. Bl. 850.

(*q*) *West* v. *College of Physicians*, 1 Wils. 240.

(*r*) *R.* v. *Holland*, 4 T. R. 691. See further as to inspection of reports of East India Company, *Rex* v. *Shelley*, 3 T. R. 141: *R.* v. *Lucas*, 10 East, 235: *R.* v. *Tower*, 5 M. & S. 162: *Warriner* v. *Giles*, 2 Str. 951: *Wilson* v. *Rogers*, Id. 1242: *Reg.* v. *Mead*, 2 Ld. Raym. 927.

of the company and of the directors' meetings, "especially with respect to the calls" sued upon for the purpose of framing his plea (*s*). The minutes of the proceedings of a committee of a corporation have been held to be privileged (*t*). In quasi-criminal proceedings against corporations, the Court will not compel them to grant inspection of their books to the prosecutor (*u*).

Where a party applies for a *mandamus* to compel the directors of an incorporated company to allow him to inspect their accounts according to the directions of 8 *V.* c. 16, *ss.* 115, 119 (the Companies Clauses Act), he must state what his object is, and what the scope of his demand is, that the company and the Court may see that his demand is a reasonable one (*x*).

Production for purpose of being stamped.

Production of Document for Purpose of being stamped.]—The 14 & 15 *V.* c. 99, *s.* 6, enables the Court or a Judge in certain cases to compel the production of a document for the purpose of its being stamped. Before this Act, when a document, required to be produced in evidence, was in the possession or control of the opposite party, and unstamped, and it was expedient to get it stamped, the course was to apply to a Judge, by summons, on an affidavit of the facts, and obtain an order for the opposite party to produce it at a time to be named in the order, before the Commissioners of Stamps at the Stamp Office, to be stamped (*y*). The order, however, would not be granted unless the applicant was a party to the instrument (*z*), or had some interest in it (*a*). Nor would it be granted where the production and stamping would materially interfere with, or injuriously affect, the interest and right of a third party (*b*). The order might be made in cases where an order for inspection or for a copy could not; for the application to produce a document, for the purpose of being stamped, stands on a very different ground from an application to inspect and take a copy (*c*). Where two parts of an agreement were interchangeably executed between a landlord and tenant; in an action upon the agreement by a purchaser of the premises, the Court refused to compel the tenant to produce his part to be stamped, unless such purchaser had applied to the vendor, or used every endeavour without success, to find him (*d*). The appli-

(*s*) *Birmingham Bristol and Thames Junction R. Co.* v. *White*, 1 Q. B. 282; 4 P. & D. 949. A shareholder in a joint stock company is not entitled to an inspection of their books for the purpose of proving a plea of justification in an action against him for libel, imputing insolvency to the company. *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 146; 5 Jur., N. S. 201. See Ch. XCII.

(*t*) *Bristol (Mayor of)* v. *Cox*, 26 Ch. D. 678; 50 L. T. 719.

(*u*) *R.* v. *Purnell*, 1 W. Bl. 37; 1 Wils. 239: *R.* v. *Haydon*, 1 W. Bl. 351: *R.* v. *Cornelius and another*, 2 Str. 1210.

(*x*) *R.* v. *The Directors of London and St. Katharine's Dock Co.*, 44 L. J., Q. B. 4.

(*y*) *Cooke* v. *Stocks*, Tidd, 9th ed. 487: *Bateman* v. *Phillips*, 4 Taunt. 157: *Gigner* v. *Bayly*, 5 Moore, 71: *Threlfall* v. *Webster*, 1 Bing. 161; 7 Moore, 559, *S. C.*: *Munn* v. *Godbold*, 3 Bing. 292; 11 Moore, 49.

(*z*) *Taylor* v. *Osborne*, 4 Taunt. 159.

(*a*) *Hall* v. *Bainbridge*, 3 D. & L. 92; 14 L. J., Q. B. 289.

(*b*) *Lawrence* v. *Hooker*, 2 M. & P. 9; 5 Bing. 6.

(*c*) *Neale* v. *Swind*, 2 C. & J. 278; 2 Tyr. 318; 1 Dowl. 314; and per *Wightman*, J., in *Hall* v. *Bainbridge*, supra.

(*d*) *Travis* v. *Collins*, 2 C. & J. 625.

cant was not generally made to pay the costs of the application, and especially if the opposite party had before refused to produce the instrument for stamping; but he was ordered to pay the expenses of the production and stamping. It may be added that if one party has possession of a document in which the other has an interest, and the former alleges that he has lost it, a Judge cannot order that, if such party does not produce the document to be stamped, a copy duly stamped shall be read in evidence at the trial, and that the original shall not then be produced, nor objection taken to the want of a stamp on the original (*e*).

(*e*) *Rankin* v. *Hamilton*, 15 Q. B. 187: see *Bousfield* v. *Godfrey*, 5 Bing. 418; 2 Moo. & P. 771: *Goodliff* v. *Fuller*, 14 M. & W. 4: *Travis* v. *Collins*, supra: *Att.-Gen.* v. *Fishmongers' Co.*, 4 Myl. & Cr. 1.

CHAPTER L.

INTERROGATORIES.

Interrogatories.

WITH a view to getting information or admissions relating to the matters in issue in an action, either party may, subject to the rules hereinafter referred to, deliver interrogatories to his opponent to be answered by the latter. In actions where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, this may be done without any leave, but in all other cases leave is necessary.

By *R. of S. C., Ord. XXXI. r.* 1, "In any action where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, the plaintiff may at any time after delivering his statement of claim, and a defendant may at or after the time of delivering his defence, without any order for that purpose, and in every other cause or matter the plaintiff or defendant may by leave of the Court or a Judge, deliver *interrogatories in writing* for the examination of the *opposite* parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: provided that no party shall deliver more than *one set* of interrogatories to the same party without an order for that purpose: provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness."

Leave to deliver.

Leave to deliver Interrogatories.]—In all actions other than those where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, interrogatories cannot be delivered without leave (*r.* 1, *supra*). Even in these excepted cases leave is necessary for the delivery of a second set of interrogatories to the same party (*r.* 1, *supra*).

—Application.

The application for leave to deliver interrogatories is made by a summons returnable before a Master. It may, and generally should, be included in the summons for directions (*see ante*, p. 335).

On the hearing of the application for leave to deliver interrogatories it is only necessary to satisfy the Master that the case is one in which interrogatories should be allowed, and that the general character of the proposed interrogatories is not improper (*a*). The proposed interrogatories need not even be produced at the hearing of the application; a statement of the general nature of the proposed questions is sufficient (*a*). The Master will not look at the interrogatories themselves, still less will he consider the propriety of each particular question (*a*).

(*a*) *Hall* v. *Liardet*, W. N. 1883, 165: *S. C.*, W. N. 1883, 175. Cor. *Field*, J., at chambers.

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—Offer of particulars, &c. to be considered.

By *Ord. XXXI. r.* 2, "In deciding upon any application for leave to exhibit interrogatories, the Court or Judge shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matter in question, or any of them."

Time for delivering.

Time for delivering.]—As a general rule the plaintiff should not deliver interrogatories until the defence has been delivered; he *may* do so, however (*b*), but if he does they may be objected to under *Ord. XXXI. r.* 6 (*post*, p. 520), unless sufficient reason be given why they should be allowed at that stage of the action (*c*). Leave will not ordinarily be given to the defendant to deliver interrogatories until he has delivered his defence (*d*). Where a party applies for leave to deliver interrogatories after the close of the pleadings, he is required to explain his delay; but the fact that the interrogatories have been advised by counsel in his opinion on evidence is generally considered sufficient. In one case where the plaintiff having himself closed the pleadings applied for leave to deliver interrogatories without offering any explanation, the Judge refused to give the leave, and the Court upheld his order (*e*). In another case, however, leave was given to the defendant, after considerable delay (*f*).

As to the postponement of interrogatories until after the trial of particular issues in the action, *see Ord. XXXI. r.* 20, *ante*, p. 492.

In what cases.

In what Cases allowed.]—Interrogatories may, subject to the provisions of *r.* 1 (*ante*, p. 515), be put in all cases where discovery could formerly have been obtained in Chancery. They may be put notwithstanding the party interrogated is a foreigner residing abroad (*g*). They may be allowed in an interpleader issue (*h*), or in an action for recovery of land (*i*), or a petition to revoke letters patent (*k*). They will not be allowed in an action to recover a penalty (*l*). In a patent action interrogatories as to prior user may be allowed, notwithstanding the *stat.* 15 & 16 *V. c.* 83, *s.* 41, as to particulars (*m*).

(*b*) *Ochsley* v. *Redfern*, Q. B. D., Times, 6th June, 1876: *Harbord* v. *Monk*, 9 Ch. D. 616.

(*c*) *Mercier* v. *Cotton* (C. A.), 1 Q. B. D. 442; 35 L. T. 79: *Strong* v. *Tappin*, W. N. 1876, 22: *Fenwick* v. *Johnston*, W. N. 1876, 54: *Cotching* v. *Hancock*, W. N. 1876, 55. This does not appear to be followed in the Chancery Division. *Harbord* v. *Monk*, supra.

(*d*) *Disney* v. *Longbourne*, 2 Ch. D. 704; 35 L. T. 301, M. R., where the defendants, executors, supported their application by an affidavit that they had no means of framing their defence without them. See, however, *Hawley* v. *Reade*, W. N. 1876, 64: cp. *Gourlay* v. *Plimsoll*, L. R., 8 C. P. 362: *Harbord* v. *Monk*, supra.

(*e*) *Ellis* v. *Ambler*, 36 L. T. 410.

(*f*) *London and Provincial Mar. Ins. Co.* v. *Davies*, 5 Ch. D. 775; 37 L. T. 67.

(*g*) *Pohl* v. *Young*, 25 L. J., Q. B. 28: *Von Hoff* v. *Hoerster*, 27 L. J., Ex. 299.

(*h*) *White* v. *Watts*, 12 C. B., N. S. 267; 31 L. J., C. P. 381; 6 L. T. 387.

(*i*) *Lyell* v. *Kennedy*, H. L., 8 App. Cas. 217; 52 L. J., Ch. 385; 48 L. T. 585.

(*k*) *Re Hadden's Patent*, 51 L. T. 190.

(*l*) *Hunnings* v. *Williamson*, 10 Q. B. D. 459; 52 L. J., Q. B. 273; 48 L. T. 581; 31 W. R. 336.

(*m*) *Birch* v. *Mather*, 22 Ch. D. 629; 52 L. J., Ch. 292.

Where the writ is to be served out of the jurisdiction, leave to deliver interrogatories with it may be obtained (*n*).

A guardian *ad litem* to an infant cannot be compelled to answer interrogatories (*o*).

Interrogatories to company or corporation.

Interrogatories to Company or Corporation.]—By *Ord. XXXI. r. 5*, "If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company or body, and an order may be made accordingly" (*p*). In these cases the Master is not bound to consider the propriety of the proposed interrogatories, but only to be satisfied that some member or officer is named to answer who is likely to be able to give the discovery sought (*q*). When a corporation answers by their town clerk, he cannot object to give the information on the ground that it was derived from privileged communications between himself and the corporation (*r*). Where an order is made giving the plaintiff leave to deliver interrogatories to a *member* of a defendant company, the latter cannot refuse to file the affidavit until he has been paid his costs (*s*).

—To sheriff's officer.

Interrogatories to Sheriff's Officer.]—An order may be made that interrogatories delivered to a sheriff shall be answered by the officer actually concerned. (*See Ord. XXXI. r. 28, ante*, p. 493.)

What interrogatories allowed.

What Interrogatories allowed.]—Any information which, prior to the passing of the Judicature Acts, could have been obtained by a bill for discovery in the Court of Chancery, may now be obtained by interrogatories (*t*).

"The old common law rule is at an end, and it is not the practice for a party to obtain liberty to administer such interrogatories as a Judge shall think fit. But everyone has a right (subject to objection, as mentioned in the rules) to ask of the opposite party any questions he chooses. But the onus in all cases lies on the party objecting to the interrogatories. *Primâ facie*, any question may be put, as in the old form of Chancery practice" (*u*).

One of the objects of interrogatories is to obtain admissions, and interrogatories as to the truth of statements in the pleadings may be put for that purpose (*x*).

(*n*) *Young* v. *Brassey*, 1 Ch. D. 277.

(*o*) *Ingram* v. *Little*, 11 Q. B. D. 251; 31 W. R. 858.

(*p*) See per *Lush*, J., Bitt., No. xxvi.

(*q*) *Berkeley* v. *Standard Discount Co.*, 9 Ch. D. 643, V.-C. *Malins*: cp. per *Jessel*, M. R., *Wilson* v. *Church*, Id. 552, 557: *In re The Alexandra Palace Co., Limited*, 16 Ch. D. 58; 50 L. J., Ch. 7; 43 L. T. 406. But see per *Lush*, J., *Hewetson* v. *Whittington Life Insurance Society*, W. N. 1875, 219: *Anon.*, Bitt. No. ix.

(*r*) *Mayor of Swansea* v. *Quirk*, 5 C. P. D. 106.

(*s*) *Berkeley* v. *Standard Discount Co.*, 13 Ch. D. 97; 49 L. J., Ch. 1; 41 L. T. 374, C. A.; reversing *S. C.*, 12 Ch. D. 295.

(*t*) *Ramsden* v. *Brearley*, 33 L. T. 322: *Bustros* v. *White*, ante, p. 498: *Anderson* v. *Bank of British Columbia*, Id.: *Atherley* v. *Harvey*, 2 Q. B. D. 524; 36 L. T. 551: *Att.-Gen.* v. *Gaskell*, 20 Ch. D. 519; 51 L. J., Ch. 870; 46 L. T. 180, C. A.

(*u*) *Eade* v. *Jacobs*, 3 Ex. D. 335; 47 L. J., Ex. 74, C. A., *Cotton*, L. J.

(*x*) *Att.-Gen.* v. *Gaskell* (C. A.),

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In an action for recovery of land, the plaintiff may interrogate the defendant as to the facts supporting or relating to the plaintiff's alleged title (*y*); but not as to facts relating exclusively to the defendant's title (*z*).

In an action to recover damages for personal injuries occasioned by negligence, interrogatories to the plaintiff as to the circumstances under which the injuries were sustained were allowed (*a*); but in another similar case interrogatories as to what the negligence and injuries were was disallowed, on the ground that all the information required could be obtained by particulars (*b*). Interrogatories to a plaintiff in support of a defence of payment have been allowed (*c*).

As to damages.

Interrogatories as to the amount of damages are, in general, only admissible where the defendant does not traverse the plaintiff's claim, but pays money into Court (*d*).

As to documents.

A general interrogatory as to the documents in the possession of a party is not admissible, and if put may be objected to in the answer (*e*). But an interrogatory as to a particular document which a party has not scheduled in his affidavit of documents may be put (*f*).

Security for costs by deposit.

Security for Costs by Deposit.]—The party delivering the interrogatories must, unless otherwise ordered, pay into Court 5*l.*, and if the number of folios exceeds five an additional 10*s.* for every additional folio above five. This payment need not be made before applying for leave to interrogate, but a copy of the receipt for the payment must be served with the interrogatories, and the time for answering them runs from the time of such service only. *See* fully as to this payment, *ante*, pp. 494 *et seq.*

Form of interrogatories.

Form of Interrogatories.]—By *Ord. XXXI. r.* 4, "Interrogatories shall be in the Form No. 6 in Appendix B., with such variations as circumstances may require" (*g*).

Setting aside interrogatories.

Setting aside Interrogatories.]—By *R. of S. C., Ord. XXXI. r.* 7, "Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories." This mode of objecting to the interrogatories is applicable where they are, as a whole, unreasonably or vexatiously exhibited, or where any one or more of them is or are scandalous (*h*). In other cases, the objec-

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20 Ch. D. 519, 51 L. J., Ch. 870; 46 L. T. 180: *Hellier* v. *Ellis*, W. N. 1884, 9: cp. *Johns* v. *James*, 13 Ch. D. 370.

(*y*) *Lyell* v. *Kennedy*, 8 App. Cas. 217; 52 L. J., Ch. 385; 48 L. T. 585.

(*z*) Id.: *Horton* v. *Bott*, 2 H. & N. 249.

(*a*) *Jones* v. *London Road Car Co.*, W. N. 1883, 196.

(*b*) *O'Meara* v. *Stone*, W. N. 1884, 72.

(*c*) *Hellier* v. *Ellis*, W. N. 1884, 9.

(*d*) *Clarke* v. *Bennett*, 32 W. R. 550.

(*e*) *Jacobs* v. *Great Western R. Co.*, W. N. 1884, 33: *Robinson* v. *Budgett*, Id. 94.

(*f*) See ante, p. 497, n. (*m*).

(*g*) See form, Chit. F., p. 285.

(*h*) *Grumbrecht* v. *Parry*, 49 L. T. 570; 32 W. R. 203; affirmed in C. A., 32 W. R. 558: *Cawley* v. *Burton*, 32 W. R. 33.

tion should be taken in the affidavit in answer (*i*). But the present rule does not make this compulsory as the former one did (*k*). The Court will not compel discovery which they think unreasonable or vexatious (*l*); but the mere fact that it will involve great expense and trouble to answer the interrogatories is not in itself a sufficient reason for disallowing them (*m*).

The affidavit in answer. —Time.

Affidavit in Answer to Interrogatories.]—By *R. of S. C., Ord. XXXI. r.* 8, "Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a Judge may allow."

—Contents.

The affidavit in answer to the interrogatories must answer each question clearly and specifically, or must state that the deponent declines to answer and the grounds on which he does so (*n*). The party interrogated is bound to answer either positively or to the best of his knowledge, information and belief (*o*). It is not sufficient for him to state simply that he has no knowledge on the subject (*p*). If he has the means of obtaining information, he must seek for and obtain it, and give the result in the answer, or show that he cannot obtain it, or that it is not reasonable to ask him to do so (*q*). Where a party has acted through servants or agents he is bound to make inquiries of them for the purpose of answering, and to give all such information as would be known or acquired by them in the ordinary course of business (*r*). He may, however, excuse himself from doing this by showing that the servants or agents are no longer in his employ or under his control, or that they are in such a position that it would be unreasonable to compel him to communicate with them (*s*). But it has been held that, unless the acts have obviously been done by servants, the party is not bound to answer as to his servants' acts unless expressly interrogated as to them (*t*).

It is no reason for not answering that the information has already been obtained for the purpose of laying it before the party's solicitors (*u*), unless it was obtained at their request for the purposes of the action (*x*). A party is not bound to disclose information derived from privileged communications, such as communications made to him by his solicitors or their agents (*y*).

(*i*) *The Radnorshire*, 29 W. R. 476: *McIlroy* v. *Duncan*, W. N. 1884, 48.

(*k*) *Gay* v. *Labouchere*, 4 Q. B. D. 206.

(*l*) *Elmer* v. *Creasy*, L. R., 9 Ch. 69, 73: *Saull* v. *Brown*, Id. 364: *G. W. Colliery Co.* v. *Tucker*, Id. 376.

(*m*) *Hall* v. *L. & N. W. R. Co.*, 35 L. T. 848: *Mackintosh* v. *G. W. R. Co.*, 22 L. J., Ch. 72.

(*n*) *Hoffman* v. *Postill*, L. R., 4 Ch. 673.

(*o*) Id.

(*p*) Id., and n. (*q*), infra.

(*q*) *Mackintosh* v. *Great Western R. Co.*, 4 De G. & Sm. 544: *Att.-Gen.* v. *Rees*, 12 Beav. 50.

(*r*) *Bolckow* v. *Fisher* (C. A.), 10 Q. B. D. 161; 52 L. J., Q. B. 12; 47 L. T. 724; 31 W. R. 336.

(*s*) Id. See per *Brett*, L. J., 10 Q. B. D., at p. 169: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, at p. 657: *Pavitt* v. *North Metrop. Tramways Co.*, 43 L. T. 730.

(*t*) *Rasbotham* v. *Shropshire, &c. Canal Co.*, 24 Ch. D. 110; 53 L. J., Ch. 327; 48 L. T. 902; 32 W. R. 117, *North*, J.

(*u*) *Pavitt* v. *North Metrop. Tramways Co.*, 43 L. T. 730.

(*x*) *Lyell* v. *Kennedy*, 27 Ch. D. 1; 53 L. J., Ch. 937; 50 L. T. 730: and see cases cited ante, p. 498.

(*y*) *Lyell* v. *Kennedy*, D. P., 9 App. Cas. 81; 53 L. J., Ch. 449; 50 L. T. 277; 32 W. R. 497.

PART VI.

The rule is, that, if the party answer at all, he must do so fully (*s*).

When a person was interrogated as to whether she had written a letter containing certain statements or other statements to the like effect, it was held sufficient for her to answer that so far as she recollected and believed she never wrote any letter containing those statements, and that she had no copy of the letter, and did not recollect its contents (*a*).

—Printing answer.

By *r.* 9, "An affidavit in answer to interrogatories shall, unless otherwise ordered by a Judge, if exceeding *ten* folios, be printed, and shall be in the Form No. 7 in Appendix B., with such variations as circumstances may require" (*b*). In reckoning the ten folios a schedule is included, but not an exhibit (*c*).

—Use of answer at trial.

By *r.* 24, "Any party may, at the trial of a cause, matter or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

Objection to answer.

Objecting to answer.]—By *R. of S. C., Ord. XXXI. r.* 6, "Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer."

—Mode of stating, &c.

The objection should be distinctly raised and the grounds of it clearly stated in the affidavit (*d*). It would seem, however, that where the objection is a question of law, and no new facts are required to support it, the interrogatory may be left unanswered (*d*); but this, it is submitted, is an inconvenient course, and should not be adopted.

Grounds of objection.

Grounds of Objection.]—Under the present system the rules as to discovery formerly in force in the Court of Chancery prevail in all Divisions of the High Court (*e*). To the general rule, which practically now prevails, that any questions may be put and must be answered, there are some well-recognized exceptions, thus:—

—Scandal.

The party interrogated may object to answer any interrogatory which are *scandalous* (*f*), but nothing that is relevant is scandalous.

—Irrelevancy.

So he may object to answer questions which are *irrelevant* to the

(*z*) *Swinborne* v. *Nelson*, 16 Beav. 416: *The Great Luxembourg R. Co.* v. *Magnay*, 23 Id. 646: *Reade* v. *Woodruffe*, 24 Id. 421: *Robson* v. *Flight*, 33 Id. 268: *Hoffman* v. *Postill*, L. R., 4 Ch. 673.

(*a*) *Dalrymple* v. *Leslie*, 8 Q. B. D. 5; 51 L. J., Q. B. 61; 45 L. T. 478; 30 W. R. 105.

(*b*) See the form, Chit. F., p. 293.

(*c*) *Webb* v. *Bomford*, W. N. 1877, 5, where the Court gave leave to file the affidavit without its being printed.

(*d*) *Church* v. *Perry*, 36 L. T. 513: *Smith* v. *Berg*, 36 L. T. 471.

(*e*) *Bustros* v. *White*, 1 Q. B. D. 423; 45 L. J., Q. B. 642: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; 45 L. J., Ch. 449: *Ramsden* v. *Brearley*, 33 L. T. 323.

(*f*) *Fisher* v. *Owen*, 8 Ch. D. 645; 38 L. T. 252, 577. See ante, p. 318, n. (*a*).

matters in question in the action as appearing on the pleadings (*g*); but interrogatories are not irrelevant if they relate to a matter which is pertinent and may be material to the case made by the pleadings, or are founded on general allegations in the pleadings (*h*), provided that the questions themselves are not too general (*i*), and are relevant to the relief prayed (*k*); and though a party will not be compelled to answer interrogatories as to the conditions of prior transactions between the same parties not connected with the contract sued upon (*l*), or the terms of any contract between the party interrogated and other persons (*m*), yet they must be answered when they seek to establish a general course of dealing (*n*) as distinct from showing a single isolated transaction (*o*); they will not be allowed to disprove a custom on which it is supposed the party interrogated will rely (*p*). But, as a rule, the irrelevancy must be obvious (*q*), as, for instance, questions respecting proceedings in a foreign court relating to infringements of a patent (*r*); and although the Court having regard to the nature of the case made in the statement of claim, will not weigh with great accuracy the irrelevancy of any interrogatory which bears upon it (*s*), yet, where the discovery might be used for purposes prejudicial to the party interrogated irrespective of the suit, the Court will look more closely into the question of its relevancy (*t*), and whilst it takes care that the party interrogating obtains all the discovery which can be of use to him it will protect the party interrogated against undue inquisition into his affairs (*u*); and where a defendant's answering an interrogatory cannot help the plaintiff to obtain a decree and will only be of use to him if he obtains a decree, the Court has a discretion whether to oblige the defendant to answer it before trial, and will not do so where compelling such discovery would be oppressive (*x*). The Court will look at the whole action and consider for what purposes the interrogatories are put (*y*); thus, in an action for specific performance by trustees, interrogatories by the defendant for the purpose of establishing that the proposed investment was a breach of trust, were ordered to be struck out as irrelevant (*z*).

In an action for goods sold and delivered where the defendant denied the reasonableness of the prices charged, interrogatories to

(*g*) W. N. 1876, 39, per *Lindley*, J.
(*h*) *M'Garel* v. *Moon*, L. R., 10 Eq. 22: *Girdlestone* v. *North British Insurance Co.*, L. R., 11 Eq. 197.
(*i*) *Robson* v. *Crawley*, 2 H. & N. 766: *Parker* v. *Wells*, 18 Ch. D. 477.
(*k*) *Wier* v. *Tucker*, L. R., 14 Eq. 25.
(*l*) *Rew* v. *Hutchins*, 10 C. B., N. S. 829.
(*m*) Id.
(*n*) *Girdlestone* v. *North British Insurance Co.*, L. R., 11 Eq. 197.
(*o*) *Morris* v. *Bethell*, L. R., 4 C. P. 763.
(*p*) *Rew* v. *Hutchins*, supra.
(*q*) *Hoffman* v. *Postill*, L. R., 4 Ch. 673: *McGarel* v. *Moon*, L. R., 10 Eq. 22: *Morris* v. *Bethell*, supra: *Chesterfield, &c. Co.* v. *Black*, W. N. 1876, 204: *Sutherland* v. *Sutherland*, 17 Beav. 209.
(*r*) *Hoffman* v. *Postill*, supra.
(*s*) *Chesterfield, &c. Co.* v. *Black*, W. N. 1876, 204.
(*t*) *Carver* v. *Pinto Leite*, L. R., 7 Ch. 90: *Moore* v. *Craven*, Id. 94 (n): *Republic of Costa Rica* v. *Erlanger*, L. R., 19 Eq. 33: *Parker* v. *Wells*, 18 Ch. D. 477; 45 L. T. 517: *Mansfield* v. *Childerhouse*, 4 Ch. D. 82: *Smith* v. *Berg*, 36 L. T. 471.
(*u*) *Moore* v. *Craven*, supra.
(*x*) *Parker* v. *Wells*, supra. See r. 20, ante, p. 492.
(*y*) *Smith* v. *Berg*, supra.
(*z*) *Mansfield* v. *Childerhouse*, supra.

the plaintiff inquiring when and at what price he bought the goods were held relevant and proper (*a*).

But in an action on a charterparty for nondelivery of goods when the defence relied on was damage by excepted perils, interrogatories as to the particulars of any insurance effected on the goods were held irrelevant (*b*).

Rule 1 of *Ord. XXXI.* (*ante*, p. 515) provides that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

—Not *bonâ fide.*

So questions which are *not put bonâ fide for the purposes of the action* may be objected to. This objection, like that of irrelevancy, may be raised to interrogatories for the purpose of shaking a party's character or credit (*c*).

—Not material at stage of action.

Again, if the *matters inquired into are not sufficiently material at the stage of the action* at which the questions are put, they may be objected to. This objection may be raised when the interrogatories are delivered before defence (*d*), or when they cannot be of any use until after the trial (*e*). *See Bechervaise* v. *G. W. Rail. Co.*, L. R., 6 C. P. 36; *Lyon* v. *Tweddell*, 13 Ch. D. 375. *See also Ord. XXXI. r.* 7, *ante*, p. 518.

—Crimination.

So no person can be compelled to disclose the principal fact, or any one of a series of facts which *might* contribute to establish a *criminal charge* against him, or expose him to a *penalty or forfeiture* (*f*). And interrogatories, the answers to which would disclose such facts, may be objected to in the affidavit on this ground (*g*). It is sufficient to state in the answer that the answer *might* tend to criminate the deponent (*h*). This objection may be raised to questions inquiring into the publication of a libel (*i*). The penalty or forfeiture must be one strictly so called; the loss of a possession to which a party never was entitled (*k*), or of an estate on the happening of an event by which a party's right is determined by reason of a conditional limitation (*l*), is not sufficient. If the objectionable matter is so mixed up with what is unobjectionable that the answer to the latter would lead to a disclosure tending to criminate the party, he may decline to answer at all (*m*); though where it is separable, the unobjectionable matter must be answered (*n*). The mere fact that the answer would expose illegal transactions (*o*), or would injure the character of the party answering (*p*), or would

(*a*) *Sheward* v. *Lonsdale*, 5 C. P. D. 47; affirmed in C. A., 42 L. T. 172.
(*b*) *Bolckow, Vaughan & Co.* v. *Young*, 42 L. T. 690.
(*c*) *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; 39 L. T. 207: *Baker* v. *Newton*, W. N. 1876, 8. See *Baker* v. *Lane*, 3 H. & C. 544, as explained in *Bickford* v. *Darcey*, L. R., 1 Ex. 374.
(*d*) *Mercier* v. *Cotton*, 1 Q. B. D. 442; 46 L. J., Ch. 184.
(*e*) *Parker* v. *Wells*, 18 Ch. D. 477.
(*f*) *Lee* v. *Read*, 5 Beav. 381: *United States of America* v. *McRae*, L. R., 3 Ch. 79.
(*g*) *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; 39 L. T. 207: *Fisher* v. *Owen*, 8 Ch. D. 645; 38 L. T. 252, 577: *Atherley* v. *Harvey*, 2 Q. B. D. 524; 36 L. T. 551.
(*h*) *Lamb* v. *Munster*, 10 Q. B. D. 110; 52 L. J., Q. B. 46; 47 L. T. 442.
(*i*) Id.: *Hill* v. *Campbell*, L. R. 10 C. P. 222.
(*k*) *Hambrook* v. *Smith*, 17 Sim. 209.
(*l*) *Chauncey* v. *Tahourden*, 2 Atk. 302: *Lucas* v. *Evans*, 3 Atk. 260.
(*m*) *Earl of Lichfield* v. *Bond*, 6 Beav. 88.
(*n*) *Fisher* v. *Price*, 11 Beav. 194.
(*o*) *Williams* v. *Trye*, 18 Beav. 366.
(*p*) *Parkhurst* v. *Lowten*, 1 Mer. 391, 400.

expose other persons to actions (*q*), or prosecutions (*r*), except in the case of husband and wife (*s*), is not a sufficient objection. Interrogatories will not be allowed in an action for penalties (*t*). As to interrogatories in an action of ejectment for a forfeiture, *see May* v. *Hawkins*, 11 Exch. 210: *Chester* v. *Wortley*, 17 C. B. 410: *Pye* v. *Butterfield*, 5 B. & S. 837; 34 L. J., Q. B. 17; 11 L. T. 448: *Lyell* v. *Kennedy*, *ante*, p. 519, n. (*y*).

—Evidence, &c.

Neither party is bound to disclose *the evidence* (*u*) *or the names of the witnesses* by which and by whom he intends to supports his case (*x*), or the manner in which he intends to frame or argue it (*y*); but either party is entitled to a discovery of all the facts on which his opponent relies, so that he may know what case he has to meet at the trial (*z*); and it is no objection that the information sought could conveniently be given by particulars (*a*).

The mere fact that the discovery will involve *great trouble and expense* is not a sufficient objection (*b*).

—Privileged communications.

As to *privileged communications*, the rules as to which are the same in the case of interrogatories as in that of discovery of documents (*c*), the privilege extends to information not being as to simple matters of fact patent to the senses derived from privileged communications (*d*). A corporation by answering by their town clerk, who was also their solicitor, was held to have waived the privilege (*e*).

—Public policy.

As to the objection on the ground of *public policy*, *see Beatson* v. *Skene*, 8 W. R. 544; and *see ante*, p. 501.

Proceedings where party omits to answers, or answers insufficiently.

Proceedings where Party omits to answer or answers insufficiently.]—By *R. of S. C., Ord. XXXI. r.* 10, "No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Judge on motion or summons." Possibly a summons to consider the sufficiency of the affidavit might be taken out under this rule, but this is an inconvenient mode of proceeding (*f*), and it is better to apply for a further answer.

(*q*) *Tetley* v. *Easton*, 18 C. B. 643.

(*r*) *King of Two Sicilies* v. *Wilcox*, 1 Sim., N. S. 329.

(*s*) *Cartwright* v. *Green*, 8 Ves. 405, 410.

(*t*) *Hunnings* v. *Williamson*, 10 Q. B. D. 459; 48 L. T. 393; 52 L. J., Q. B. 273; 31 W. R. 336.

(*u*) *Benbow* v. *Low* (C. A.), 16 Ch. D. 93; 50 L. J., Ch. 35; 44 L. T. 119 (C. A.).

(*x*) *Eade* v. *Jacobs*, 3 Ex. D. 335; 37 L. T. 621: *Saunders* v. *Jones*, 7 Ch. D. 435; 38 L. T. 395, 769: *Johns* v. *James*, 13 Ch. D. 370: *Lyon* v. *Tweddell*, 13 Ch. D. 375: *Daw* v. *Eley*, 2 H. & M. 725: *Commissioners of Sewers* v. *Glasse*, L. R., 15 Eq. 362: as to *Eade* v. *Jacobs*, see per *Cotton*, L. J., 20 Ch. D. at p. 529.

(*y*) *Ingilby* v. *Shafto*, 33 Beav. 31.

(*z*) *Eade* v. *Jacobs*, supra: *Ashley* v. *Taylor*, 37 L. T. 522; 38 Id. 44: *Saunders* v. *Jones*, supra: *In re Blunt*, *Burrell* v. *Burrell*, W. N. 1880, 193, particulars of contract: *Kuhliger* v. *Bailey*, W. N. 1881, 165, names and addresses of persons making prior user: *Birch* v. *Mather*, 22 Ch. D. 629, prior user.

(*a*) *Kuhliger* v. *Bailey*, supra: *Birch* v. *Mather*, supra.

(*b*) *Hall* v. *L. & N. W. R. Co.*, 35 L. T. 848: *Mackintosh* v. *G. W. R. Co.*, 22 L. J., Ch. 72.

(*c*) *Swinborne* v. *Nelson*, 16 Beav. 416: *Clegg* v. *Edmonston*, 22 Beav. 125. See fully, ante, p. 497.

(*d*) *Kennedy* v. *Lyell*, D. P., 9 App. Cas. 81; 53 L. J., Ch. 449; 50 L. T. 277; 32 W. R. 497.

(*e*) *Mayor, &c. of Swansea* v. *Quirk*, 5 C. P. D. 106.

(*f*) *Nicholl* v. *Jones*, 2 H. & M. 588.

By *r.* 11, "If any person interrogated omits to answer or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit, or by *viva voce* examination, as the Judge may direct."

The summons should specify the particular interrogatories, or parts of interrogatories, to which a further answer is required (*g*), unless they are all objected to (*h*). An answer containing impertinent or embarrassing matter may be insufficient within the rule (*i*), but reasonable explanations are admissible (*k*). The Court will not order a further answer merely on the ground that the answers are untrue, nor will they do so on a suspicion that privilege is claimed on untrue grounds, unless this is clearly shown by the answer itself or other documents, or from the nature of the thing (*l*).

Where a *viva voce* examination is ordered, the Master may order that the costs of it shall be paid by the party interrogated in any event (*m*).

As to striking out the claim or defence, where a party refuses or neglects to answer, *see post*, p. 525.

Costs of unnecessary interrogatories.

Costs of unnecessary Interrogatories.]—By *Ord. XXXI. r.* 3, "In adjusting the costs of the cause or matter inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court or Judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault."

(*g*) *Anstey* v. *N. & S. Woolwich Subway Co.*, 11 Ch. D. 439; 40 L. T. 393, *Fry*, J.: *Chesterfield Colliery Co.* v. *Black*, 24 W. R. 783.

(*h*) *Furber* v. *King*, 50 L. J., Ch. 496; 29 W. R. 536.

(*i*) *Peyton* v. *Harting*, L. R., 9 C. P. 9; 29 L. T. 478: *Lyell* v. *Kennedy*, 27 Ch. D. 1; 53 L. J., Ch. 937; 50 L. T. 730. *Lyell* v. *Kennedy*, 33 W. R. 44.

(*k*) *Lyell* v. *Kennedy*, supra.

(*l*) *Lyell* v. *Kennedy*, supra. See cases cited ante, p. 496.

(*m*) *Vicary* v. *G. N. R. Co.*, 9 Q. B. D. 168.

CHAPTER LI.

Proceedings in Case of Failure to comply with Order to answer Interrogatories or for Discovery or Inspection of Documents.

Dismissal of action, &c.

By *R. of S. C., Ord. XXXI. r.* 21, "If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly."

The power of dismissal or striking out given by this rule is discretionary (*a*). As a rule, it will not be exercised when the party really intends to comply with the order, without giving him a further opportunity of doing so (*b*), but only when it appears that the party is wilfully endeavouring to avoid giving discovery (*c*).

As to the effect of an order that the action be dismissed unless an answer be filed within a certain time, *see Carter* v. *Stubbs*, and other cases cited *ante*, p. 326.

Attachment.

Attachment.]—Disobedience to an order for discovery or to answer interrogatories may be punished by attachment (*d*). *See as to the proceedings, post, Ch. LXXXIII., "Attachment."*

—Service of order.

By *r.* 22, "Service of an order for interrogatories or discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order" (*d*).

Ord. LII. r. 2 (*post, Ch. CXXII.*) applies to an application to attach for disobedience to an order for discovery, and consequently a copy of any affidavit intended to be used in support of the appli-

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(*a*) *Hartley* v. *Owen*, 34 L. T. 752; *Kennedy* v. *Lyell* (C. A.), W. N. 1882, 137.

(*b*) *Twycross* v. *Grant*, W. N. 1875, 201; Id. 229; *Anon.*, Id. 202; *Anon.*, Id. 204, per *Lush*, J. See *Republic of Liberia* v. *Roye*, 1 App. Cas. 139; L. R., 9 Ch. 569.

(*c*) *Danvillier* v. *Myers* (C. A.), W. N. 1883, 58.

(*d*) *Joy* v. *Hadley*, 22 Ch. D. 571; 47 L. T. 615.

PART VI.

—Solicitor neglecting to give notice of order to client.

cation must be served with the notice of motion (*e*). The order must be indorsed with the notice required by *Ord. XLI. r. 5* (*f*).

By *r.* 23, "A solicitor, upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment."

(*e*) *Litchfield* v. *Jones*, 25 Ch. D. 64; 32 W. R. 288.

(*f*) *Hampden* v. *Wallis* (C. A.), 26 Ch. D. 746; 50 L. T. 515; 32 W. R. 808. See Ord. XLI. r. 5, post, Ch. LXX.

CHAPTER LII.

INSPECTION, ETC. OF PROPERTY OR PERSONS.

Order for Inspection of Property, &c., taking of Samples, or making of Observations or Experiments.]—By *R. of S. C., Ord. L. r.* 3, "It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or *inspection* of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid, to authorize any *samples to be taken*, or any *observation to be made or experiment to be tried*, which may be necessary or expedient for the purpose of obtaining full information or evidence."

The application under this rule should be made, in the first instance, to a Judge at Chambers (*a*). A Master has no jurisdiction to make the order (*b*). It may be made *ex parte* (*c*), but should generally be made by summons (*a*), and should be supported by an affidavit setting out the facts on which it is founded, unless these sufficiently appear on the pleadings or other proceedings. The application should not generally be made before the defence is delivered. The Judge may order the party applying for the inspection to pay the costs of it in any event, and there is no appeal against such an order (*d*).

An order for inspection of mines is frequently made under this rule (*e*). In an action to restrain the discharge of sewage into a drain, an order was made authorizing the plaintiff to enter upon and dig up part of a street, the soil of which belonged to the defendant, for the purpose of making experiments and ascertaining the position of a pipe (*f*). The order will not be made when the pro-

(*a*) By R. of S. C., Ord. L. r. 6, "An application for an order under section 25, sub-section 8 of the principal Act, or under Rules 2 or 3 of this order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said sub-section 8 it may be made either ex parte or with notice, and if for an order under Rules 2 or 3 of this order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

(*b*) R. of S. C., Ord. LIV. r. 12, post.

(*c*) *Hennessy* v. *Rohmann*, 36 L. T. 51, V.-C. *Malins*.

(*d*) *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457.

(*e*) See *Cooper* v. *Ince Hall Co.*, W. N. 1876, 24.

(*f*) *Lumb* v. *Beaumont*, 27 Ch. D. 356; 51 L. T. 197; 32 W. R. 985.

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perty is in the possession or control of a party who is not before the Court (*g*).

As to inspection in actions for infringement of patent, *see infra.*

Inspection by judge.

Inspection by Judge.]—By *R. of S. C., Ord. L. r.* 4, "It shall be lawful for any Judge, by whom any cause or matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to inspect any property or thing concerning which any question may arise therein."

Inspection by jury.

Inspection by Jury.]—By *r.* 5, "The provisions of rule 3 of this Order (*h*), shall apply to inspection by a jury, and in such case the Court or a Judge may make all such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury at such time and place, and in such manner as they or he may think fit." *See as to inspection by a jury, post, Ch. LXIII.*

Inspection in actions for infringement of patent.

Inspection in Actions for Infringement of Patent.]—By the Patents, Designs and Trade Marks Act, 1883 (which came into force on the 1st January, 1884), *s.* 30, "In an action for infringement of a patent, the Court or a Judge may, on the application of either party, make such order for an injunction, inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the Court or a Judge may see fit."

This enactment is similar to the 15 & 16 *V. c.* 83, *s.* 42 (repealed), which gave the same power to the common law Courts as was previously possessed by the Courts of equity (*i*). It did not warrant an application for an inspection of books (*k*), and an order for this should in general be obtained under *Ord. XXXI. r.* 12, *ante*, p. 491, and *Ord. LII. r.* 3, *ante*, pp. 438 and 527. The application may be made by the plaintiff before delivery of the statement of claim (*l*).

The affidavit, on an application by the plaintiff, should show that there is such property or machinery as is required to be inspected, and that he has reason to believe it to be an infringement of the patent, and that the inspection is necessary for the purpose of the cause (*m*). It should also show what the patent is for, that the Court or Judge may see whether there is necessity for the inspection. The order will not be granted on the plaintiff's application, unless the Court is satisfied that it is essential to enable him to prove his case (*n*). It is not sufficient to allege "that the machinery used by the defendant

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(*g*) *Reid* v. *Powers*, 28 Sol. Journ. 653.

(*h*) See ante, pp. 438 and 527.

(*i*) See *Holland* v. *Fox*, 3 El. & Bl. 977, 983; 23 L. J., Q. B. 357.

(*k*) See *Vidi* v. *Smith*, 3 El. & Bl. 969; 23 L. J., Q. B. 342.

(*l*) *Amies* v. *Kelsey*, 22 L. J., Q. B. 84.

(*m*) Id.: *Shaw* v. *Bank of England*, 22 L. J., Exch. 26: *Patent Type Founding Co.* v. *Lloyd*, 5 H. & N. 192; 29 L. J., Exch. 207.

(*n*) *Batley* v. *Kynock*, L. R., 19 Eq. 90: *Meadows* v. *Kirkman*, 29 L. J., Exch. 205.

is the same as that for which the plaintiff has obtained a patent" (*o*). In the case of *The Patent Type Founding Co.* v. *Lloyd* (*p*), which was an action for infringement of a patent relating to type, the Court of Exchequer refused inspection and delivery for the purpose of analysis of a sample or portion of the type used by the defendant, the affidavits being insufficient to warrant it; and although the Court doubted its jurisdiction to make such order, they did not refuse one on that ground. An order for such inspection and delivery was afterwards made by the Court of Chancery in the same case (*q*); and so the Court of Chancery have ordered machinery to be put in motion (*r*); and now the Court or a Judge has power to do this under the above rules. In *Vidi* v. *Smith* (*s*), in an action for the infringement of a patent, the Court refused to grant an order before final judgment for a retrospective account of the defendant's sales and profits of the patented article, and held that the former enactment did not give power to order an inspection of the defendant's books containing entries relating to such sales, but that, upon evidence of the existence of a valid patent, and of its having been infringed by the defendant, and of the defendant's making a profit by such infringement, the defendant would be ordered to keep an account of all sales to be made of the article alleged to be an infringement of the patent, and of the profits thereon, until the further order of the Court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favour of the defendant, to pay to the defendant the expense of keeping such account. In *Holland* v. *Fox* (*t*), it was held, that the enactment vested in the Courts of common law the powers before exercised exclusively by Courts of equity, and enabled them to grant, either by interlocutory order an account of all patent articles sold during the suit, or after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action, and after notice that an account would be required. But it was held that the Court had no power where damages, nominal or substantial, have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the suit, the damages assessed by the jury being considered as the compensation for the loss of such profits (*t*). In *The Singer Manufacturing Co.* v. *Wilson* (*u*), the Court refused in a suit for infringement of a patent relating to sewing-machines to give the plaintiff inspection of the defendant's stock before decree, but ordered the defendant to verify by affidavit all the different kinds of sewing-machines which he had sold since the last disclaimer entered by the plaintiff, and to produce one of each sort for inspection.

(*o*) *Shaw* v. *Bank of England*, supra. See further as to the affidavit, *The Patent Type Founding Co.* v. *Lloyd*, supra.

(*p*) Supra, n. (*m*).

(*q*) Johns. 727; 8 W. R. 353.

(*r*) See *Russell* v. *Cowley*, 1 Webs. P. Cases, 459: *Beardman* v. *Schwann*, Set. on Dec. 3rd ed. 910; Lush, Pr. by Dixon, 851.

(*s*) Supra, n. (*k*).

(*t*) 3 El. & Bl. 977; 23 L. J., Q. B. 357. And see *Holland* v. *Fox*, 23 L. J., Q. B. 211, as to obtaining an account after verdict.

(*u*) 13 W. R. 560, Ch.

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Inspection of persons injured in railway accidents.

Inspection of Persons injured in Railway Accidents.]—By the Regulation of Railways Act, 1868 (31 & 32 *V. c.* 119), *s.* 26, "Whenever any person injured by an accident on a railway claims compensation on account of the injury, any Judge of the Court in which proceedings to recover such compensation are taken, or any person who by the consent of the parties or otherwise has power to fix the amount of compensation, may order that the person injured be examined by some duly-qualified medical practitioner named in the order, and not being a witness on either side, and may make such order with respect to the costs of such examination as he may think fit."

CHAPTER LIII.

EVIDENCE OF ENTRIES IN BANKERS' BOOKS.

Copies of entries in bankers' books made evidence.

Proof of entries in bankers' books.

Copies of Entries in Bankers' Books made Evidence.]—By the *Bankers' Books Evidence Act*, 1879 (*a*), *s.* 3, "Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions and accounts therein recorded."

This section makes copies of entries in bankers' books evidence against all persons, even in cases where the originals would not have been so admissible before the Act (*b*).

(*a*) Stat. 42 V. c. 11. By this statute it is enacted as follows:—

"1. This Act may be cited as the Bankers' Books Evidence Act, 1879.

2. The Bankers' Books Evidence Act, 1876, shall be repealed as from the passing of this Act, but such repeal shall not affect anything which has been done or happened before such repeal takes effect.

9. In this Act the expressions 'bank' and 'banker' mean any person, persons, partnership, or company carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post office savings bank.

The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post office savings bank may be proved by a certificate purporting to be under the hand of her Majesty's Postmaster-General or one of the secretaries of the Post Office.

Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

10. In this Act—

The expression 'legal proceeding' means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

The expression 'the Court' means the Court, Judge, arbitrator, persons, or person before whom a legal proceeding is held or taken;

The expression 'a Judge' means, with respect to England, a Judge of the High Court of Justice, and with respect to Scotland, a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland, a Judge of the High Court of Justice in Ireland;

The Judge of a County Court may with respect to any action in such Court exercise the powers of a Judge under this Act.

11. Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act."

By stat. 45 & 46 V. c. 72, s. 11, the expressions "bank" and "bankers" in the above statute are extended to banking companies under the Acts of 1862 to 1880.

(*b*) *Harding* v. *Williams*, 14 Ch. D. 197; 49 L. J., Ch. 661.

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Proof that book is a banker's book.

By sect. 4, "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

"Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits."

Verification of copy.

By sect. 5, "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

"Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits."

When banker, &c. not compellable to produce book, &c.

By sect. 6, "A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a Judge made for special cause."

Court or Judge may order inspection, &c.

Application to Judge for Leave to inspect and take Copies.]—By sect. 7, "On the application of any party to a legal proceeding a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

The application should be made, in the first instance, to a Master at Chambers. In ordinary cases it should be made on a summons (*c*) supported by an affidavit stating shortly the facts on which the application is grounded.

Costs.

Costs of Application.]—By sect. 8, "The costs of any application to a Court or Judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a Court or Judge made under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding."

(*c*) It should not be made *ex parte*. *Davies* v. *White*, 50 L. T. 327.

CHAPTER LIV.

EXAMINATION OF WITNESSES AND PARTIES OUT OF COURT.

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1.	*Examination before Special Examiner*	533
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[As to taking evidence at the trial by affidavit by consent, *see post, Ch. LVI.*]

Sect. 1. *Examination before Special Examiner.*

Power to order examination.

Power to order Examination.]—As has already been pointed out the evidence of the parties and their witnesses must in ordinary cases be given *viva voce* and in open Court (*a*).

But *Ord. XXXVII. r.* 1 (*ante*, p. 452), provides that "the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with be *examined by interrogatories or otherwise* before a commissioner or examiner; provided that, where it appears to the Court or Judge that the other party *bonâ fide*, desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit" (*b*).

In what cases.

In what Cases.]—By *Ord. XXXVII. r.* 5, it is provided that "The Court or a Judge may in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or Judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct."

(*a*) See Ord. XXXVII. r. 1, ante, p. 452.

(*b*) The statute 1 Will. 4, c. 22, s. 4, which formerly gave power to order such examination, is repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 V. c. 49).

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Under these rules an order may be made by a Master at Chambers for the examination of a party (*c*) or a witness upon oath before a special examiner out of Court whenever it may appear necessary for the purposes of justice to do so (*d*), as, for instance, when a witness is going abroad, or is, from illness, age or other infirmity, unlikely to be able to attend the trial (*e*). This applies equally whether the witness is in this country or abroad, and in many cases an order for examination before an examiner will be found a more convenient course than a commission (*e*). The rules also apply to the case of a person who refuses to make an affidavit (*e*), and to the taking of evidence *de bene esse* (*f*).

The above rules are much more extensive in their terms than the repealed statute 1 *W.* 4, *c.* 22, *s.* 4 (*g*), under which these examinations were formerly ordered. That statute was held not to apply to proceedings to which the Crown was a party (*h*). Neither the statute nor the rules apply to a criminal information (*i*). They extend to the case of a witness who intends to leave the country before the trial of the action (*k*). It has been doubted whether pregnancy or imminent delivery be a cause for the examination of a witness under the Act; at all events, if it be so the affidavits of competent persons should be produced, showing that the delivery would probably happen about the time fixed for the trial (*l*). They extend to a case where the witness is so unwell that there is no probability of his being able to attend the trial (*m*). The affidavit of a medical man as to the health of the witness must in general be produced (*n*). They extend to the case of old persons who might die before the trial (*o*). If the plaintiff in an action seeks to have his deposition taken as a witness on his own behalf on the ground that he is about to leave the country, he must himself make an affidavit that the application is *bonâ fide* and that the voyage he is about to take is one of necessity (*p*).

Order for examination.

Order for Examination.]—In general the application cannot be made until after issue joined (*q*); but this rule may be and often is

(*c*) *Nadin* v. *Bassett*, 25 Ch. D. 21; 53 L. J., Ch. 253; 49 L. T. 451; 32 W. R. 70.

(*d*) *Warner* v. *Mosses* (C. A.), 16 Ch. D. 100; 50 L. J., Ch. 28; 43 L. T. 401; 29 W. R. 201: *Nadin* v. *Bassett*, supra.

(*e*) Id. See *Winfield* v. *Shoolbred*, W. N. 1881, 192.

(*f*) *Bidder* v. *Bridges* (C. A.), 26 Ch. D. 1; 53 L. J., Ch. 479; 50 L. T. 287; 32 W. R. 443.

(*g*) Repealed by the Stat. L. Rev. and Civil Proc. Act, 1883 (46 & 47 V. c. 49).

(*h*) See *R.* v. *Wood*, 7 M. & W. 571: *R.* v. *Douglas*, 2 Dowl., N. S. 416. See Ord. LXVIII. r. 2, ante, p. 203.

(*i*) R. of S. C., Ord. LXVIII. r. 1: *R.* v. *Upton St. Leonards*, 10 Q. B. 827; 17 L. J., M. C. 13.

(*k*) See *Carruthers* v. *Graham*, 8 Dowl. 947.

(*l*) *Abraham* v. *Newton*, 8 Bing. 274; 1 M. & Scott, 384; 1 Dowl. 266. See *Haviland* v. *Haviland*, 32 L. J., Prob. 144: *R.* v. *Inhabitants of Huddersfield*, 7 E. & B. 794: 26 L. J., M. C. 169: *R.* v. *Stephenson*, 31 L. J. M. C. 147: Leigh & Cave, 165. Cp. *Reg.* v. *Williams*, 3 Ch. D. 426; 47 L. J., M. C. 100.

(*m*) *Pond* v. *Dimes*, 3 M. & S. 161; Dowl. 730.

(*n*) *Davis* v. *Lowndes*, 7 Dowl. 101.

(*o*) *Bidder* v. *Bridges* (C. A.), 26 Ch. D. 1; 53 L. J., Ch. 479; 50 L. T. 287; 32 W. R. 443.

(*p*) *Fischer* v. *Hahn*, infra. In this case the Court also ordered plaintiff to give security for costs. Cp. *Castelli* v. *Groom*, 18 Q. B. 490. See post, p. 546, n. (*p*).

(*q*) *Mondel* v. *Steele*, 8 M. & W. 300; 9 Dowl. 812: *Fynney* v. *Beasley*, 20 L. J., Q. B. 395; 17 Q. B.

relaxed where a case of necessity is made out (*r*). The application may be refused if not made within a reasonable time after issue joined (*s*). This more particularly applies when the application is made by the defendant (*t*); but it also applies when it is made by the plaintiff (*u*). When application to be made.

The application should be made to a Master at Chambers on a summons or under the summons for directions. To whom.

The application should be supported by an affidavit, stating that issue has been joined in the action. If it has not been joined, satisfactory reasons for the application should be stated in the affidavit (*x*). The name (*y*), and perhaps the residence of the witness sought to be examined, ought to be stated. But this is not essential (*z*). It should be stated that he is a material and necessary witness in the action for the party making the application, and that the party cannot safely proceed to trial without the evidence of the witness (*a*), that the latter is going abroad, or is so ill or infirm that it is likely that he will not be able to attend the trial, and a medical man should in general depose to the illness or infirmity (*b*). Sometimes it may be necessary to state upon what facts it is proposed to have the witness examined, but this is in general unnecessary (*c*). The name of the person before whom it is proposed the examination shall take place should be stated (*d*), or else this should appear on the summons, or on the hearing of the application (*e*). In general, it is not necessary for defendant to swear to merits when the application is made on his part, nor need he, in general, swear that it is not made for delay (*f*). If there has been delay in making the application, such delay should be accounted for. In some cases it may be necessary to depose to other facts besides the above. The affidavit may in ordinary cases be made by the solicitor or the clerk having the management of the action or by the client according to circumstances (*g*). Affidavit in support of.

The application will not be granted if it be made for delay (*h*), or from some improper motive (*i*). The fact of plaintiff not proceeding When application will not be granted.

80: *Clutterbuck* v. *Jones*, 6 D. & L. 251, B. C.

(*r*) *Fynney* v. *Beasley*, *supra*: *Brown* v. *Mollett*, 24 L. J., C. P. 213; 16 C. B. 514: *Fischer* v. *Hahn*, 3 C. B., N. S. 659; 32 L. J., C. P. 209, where the application was made before appearance. *Elin* v. *Wilson*, 75 L. T. Jour. 47.

(*s*) *Stewart* v. *Gladstone*, 7 Ch. D. 394; 47 L. J., Ch. 154, *Fry*, J.

(*t*) *Brydges* v. *Fisher*, 4 M. & Scott, 453: *Summers* v. *Rawson*, 3 Jur. 288. See *Weeks* v. *Paul*, 6 Dowl. 462: *De Rossi* v. *Polhill*, 7 Sc. 836: *Butler* v. *Fox*, 9 C. B. 199.

(*u*) *Pirie* v. *Iron*, 8 Bing. 143; 1 Dowl. 252: *Stewart* v. *Gladstone*, supra.

(*x*) See supra.

(*y*) *Gunter* v. *M'Far*, 1 M. & W. 201: *Norton* v. *Lord Melbourne*, 3 Bing. N. C. 67.

(*z*) *Nadin* v. *Bassett*, 25 Ch. D. 23, 25; 53 L. J., Ch. 253.

(*a*) See *Baddeley* v. *Gilmore*, 1 M. & W. 55.

(*b*) *Davis* v. *Lowndes*, 7 Dowl. 101.

(*c*) See *Abraham* v. *Norton* or *Newton*, 8 Bing. 274; 1 M. & Scott, 384; 1 Dowl. 266: *Cow* v. *Kynnersley*, 1 D. & L. 906; 6 M. & Gr. 981.

(*d*) *Doe* v. *Phillips*, 1 Dowl. 56.

(*e*) *Fearon* v. *White*, 5 Dowl. 713. And see *Steinkeller* v. *Newton*, 1 Sc. N. R. 148.

(*f*) See *Baddeley* v. *Gilmore*, 1 Gale, 410; 1 M. & W. 55: *Westmoreland* v. *Huggins*, 1 Dowl., N. S. 800. See *Lloyd* v. *Key*, 3 Dowl. 253.

(*g*) See *M'Hardy* v. *Hitchcock*, 17 L. J., Ch. 256. Where plaintiff is to be examined on his own behalf, see *Fischer* v. *Hahn*, ante, n. (*r*).

(*h*) *Lloyd* v. *Key*, 3 Dowl. 253.

(*i*) See *Brydges* v. *Fisher*, 4 M. & Scott, 458: *Pirie* v. *Iron*, 8 Bing.

promptly in a cause is no answer to an application on his behalf for examining before the trial a material witness who is going abroad (*k*).

Form of order.

The ordinary form of order is that the witness attend before one of the Masters or a special examiner, or before one of the examiners of the Court appointed for that purpose (*see post*, p. 542), and be examined *vivâ voce* (*l*); but in special cases an order for the examination of the witness on interrogatories could be made. This, however, is very seldom, if ever, done now in the case of a witness within the jurisdiction. The witness or witnesses to be examined should generally be named in the order (*m*). But this is not essential (*n*). The order, or some subsequent order, should point out the time and place for and the manner of the examination (*o*). The omission, however, constitutes an irregularity only, which may be waived (*p*). The Master will sometimes impose terms on the party applying for the order; and in one case, where the party applying was the defendant, the Court ordered him to bring the money sought to be recovered into Court (*q*). He may command the attendance of the witness for the purpose of being examined, and also the production by him of any writings or other documents which the party obtaining the rule or order may require (*r*). The documents should be specified in the order, as is done in a *subpœna duces tecum*. An order cannot be made, without consent, that the opposite party shall produce documents in his possession before the examiner; but the order may provide, that the witness shall be examined as to their contents, if, after notice to produce them, the opposite party refuses or neglects to do so (*s*). If the witness be ill, or if any other cause make it convenient or necessary so to do, he may be directed to be examined at his own place of abode, or elsewhere.

Service of.

Serve a copy of the order on the opposite solicitor. The order itself should be delivered to the examiner. It is in itself in the nature of a commission for the examination of the witness.

Framing interrogatories.

Interrogatories.]—*If the examination is not to be a vivâ voce one, interrogatories must be prepared.* In the preparation of these interrogatories care should be taken that the questions are not leading ones, or in any way objectionable; otherwise, it seems, they and the answers may be struck out at the trial, if the opposite party object to them; though not so by the party who put them (*t*). It is the

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143; 1 M. & Scott, 223; 1 Dowl. 252. Cp. *Castelli* v. *Groom*, 18 Q. B. 490; 21 L. J., Q. B. 308.

(*k*) *Weeks* v. *Paul*, 6 Dowl. 462; 5 Sc. 713: *De Rossi* v. *Polhill*, 7 Sc. 836: *Carruthers* v. *Graham*, 9 Dowl. 947, where the witness was the son of the party applying.

(*l*) See the form, Chit. F., p. 302. See *Duckett* v. *Williams*, 1 Tyr. 502; 1 C. & J. 510; 1 Dowl. 291: *Pole* v. *Rogers*, 4 Sc. 479; 3 Bing. N. C. 780.

(*m*) *Warner* v. *Mosses*, 16 Ch. D. 100, per *Jessel*, M. R., at p. 103.

(*n*) *Nadin* v. *Bassett*, 25 Ch. D. 23, 24; 53 L. J., Ch. 253; 49 L. T. 454; 32 W. R. 70.

(*o*) See Ord. XXXVII. rr. 1 and 5, ante, p. 533.

(*p*) *Hawkins* v. *Baldwin*, 20 L. J., Q. B. 198.

(*q*) *Dalton* v. *Lloyd*, 1 Gale, 102.

(*r*) Ord. XXXVII. rr. 7 and 20, post, p. 537.

(*s*) Per *Parke*, B., at Chambers, who made an order in the latter terms in a case of *Llewellin* v. *Pershaw*, 10th May, 1848. And see *Cunliffe* v. *Whitehead*, 3 Dowl. 634.

(*t*) See *Hutchinson* v. *Bernard*, 2 M. & R. 1: *Tufton* v. *Whitmore*, 9 L. J., Q. B. 405: *Williams* v. *Williams*, 4 M. & Sel. 497: *Alcock* v.

practice to get the interrogatories signed by counsel. They must be ingrossed and a copy of them served on the opposite solicitor or agent. The latter may also draw up interrogatories by way of cross-examination. If he does, they should be drawn up, ingrossed and signed by counsel. It seems not to be necessary to deliver a copy of these cross interrogatories to the opposite party (*u*).

Compelling attendance of witness.

Compelling Witness to attend and answer Questions.]—By *R. of S. C., Ord. XXXVII. r.* 20, "Any party in any cause or matter may by *subpœna ad testificandum* or *duces tecum* require the attendance of any witness before an officer of the Court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such *subpœna* to attend before such officer or person for cross-examination."

Subpœna.

Under this rule a *subpœna* may be issued requiring the attendance of the witness before the examiner (*x*). A witness is not bound to attend unless he is served with a *subpœna* (*y*).

Refusal to attend, &c.

By *R. of S. C., Ord. XXXVII. r.* 13, "If any person duly summoned by *subpœna* to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court or a Judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be (*z*)."

Production of documents.

By *r.* 7, "The Court or a Judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of *producing any writings or other documents* named in the order which the Court or Judge may think fit to be produced: provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial."

The object of this rule appears to be to give power to summon a person to produce a document upon the hearing of any particular application and the order will only be made for that purpose (*a*).

Disobedience.

By *r.* 8, "Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of Court, and may be dealt with accordingly."

Conduct money.

By *r.* 9, "Any person required to attend for the purpose of being

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Royal Exchange Assurance Co., 13 Q. B. 292; 18 L. J., Q. B. 121. See *Small* v. *Nairne*, 13 Q. B. 26.

(*u*) *Norton* v. *Edgeley*, Ex., 19th Nov. 1844: *Forster* v. *Forster*, June, 1864, Sir J. *Wilde*, Prob. Court.

(*x*) *Raymond* v. *Tapson* (C. A.), 22 Ch. D. 430; 48 L. T. 603; 31 W. R. 394.

(*y*) *Stuart* v. *The Balkis Co.*, 53 L. J., Ch. 791; 50 L. T. 479; 32 W. R. 676.

(*z*) See r. 15, post, p. 538.

(*a*) *Central News Co.* v. *Eastern Telegraph Co.*, W. N. 1884, 23, *Mathew*, J., at Chambers; affirmed in Div. C., 53 L. J., Q. B. 236; 50 L. T. 235; 32 W. R. 493.

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examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in Court."

Objection to answer question.

By *r.* 14, "If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court or a Judge."

Witness may be ordered to pay costs.

By *r.* 15, "In any case under the two last preceding rules, the Court or a Judge shall have power to order the witness to pay any costs occasioned by his refusal or objection."

Where witness a prisoner.

By 1 *W.* 4, *c.* 22, *s.* 6 (*a*), "It shall be lawful for any sheriff, gaoler or other officer, having the custody of any prisoner, to take such prisoner for examination under the authority of this Act, by virtue of a writ of *habeas corpus* to be issued for that purpose, which writ shall and may be issued by any Court or Judge under such circumstances and in such manner as such Court or Judge may now by law issue the writ commonly called a writ of *habeas corpus ad testificandum*."

Appointment for examination and service of same.

Appointment for Examination.]—*Take the order to the person appointed to take the examination and get an appointment of the time and place of attendance for the witness to be examined, and serve it, with a copy of the order, on the witness. Serve a copy or notice of such appointment on the opposite solicitor.* The witness's conduct money and expenses must be paid or tendered to him on the service of the appointment (*b*). *Take the witness, or get him to attend at the time and place appointed.*

Notice to produce.

If it be sought to give evidence of any document in the possession of the opposite party, he must be served with a notice to produce it, as in other cases (*c*).

Examiner to be provided with copy of writ, &c.

By *R. of S. C., Ord. XXXVII. r.* 10, "Where any witness or person is ordered to be examined before any officer of the Court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties."

The examination.

The Examination.]—By *R. of S. C., Ord. XXXVII. r.* 11, "The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination."

By *r.* 19, "Any officer of the Court, or other person directed to take the examination of any witness or person, may administer oaths."

By *r.* 22, "The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage."

(*a*) Not repealed. See, as to the habeas corp. ad test., post, p. 567.
(*b*) See r. 9, supra; and post, p. 562.
(*c*) *Cunliffe* v. *Whitehead*, 3 Dowl. 634; ante, p. 536, n. (*s*).

By *r.* 23, "The practice of the Court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the Court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case."

There is no rule as to the order in which witnesses are to be examined, but the examiner may exercise his discretion in the matter (*e*).

Depositions.

By *r.* 12, "The depositions taken before an officer of the Court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question."

Special report.

By *r.* 17, "The person taking the examination of a witness under these rules may, and if need be shall, make a special report to the Court touching such examination and the conduct or absence of any witness or other person thereon, and the Court or a Judge may direct such proceedings and make such order as upon the report they or he may think just."

Filing, &c. depositions.

Filing, &c. Depositions.]—By *R. of S. C., Ord. XXXVII. r.* 16, "When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed."

Printing depositions.

By *Ord. LXVI. r.* 5, "Where any written deposition of a witness has been filed, such deposition shall be printed, unless otherwise ordered."

By *r.* 6, "The rules of Court as to printing depositions and affidavits to be used on a trial shall not apply to depositions and affidavits which have previously been used upon any proceeding without having been printed."

Notice of intention to use depositions made before issue joined.

Notice of Intention to use Depositions.]—By *Ord. XXXVII. r.* 24, "No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the Court or a Judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court or a Judge, notice in writing shall have

(*e*) *Stuart* v. *The Balkis Co.*, 53 L. J., Ch. 791; 50 L. T. 479; 32 W. R. 676.

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been given by the party intending to use the same to the opposite party of his intention in that behalf."

Use of depositions at the trial.

Use of Depositions at the Trial.]—By *Ord. XXXVII. r.* 18, "Except where by this Order otherwise provided, or directed by the Court or a Judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court or Judge is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate."

Proof of witness being ill abroad, &c.

To prove the illness of the witness at the trial it is better, if possible, to call a medical man, or some competent witness who can depose to the state of his health. In some cases an affidavit may be sufficient, but it is safest to produce a witness who may be cross-examined (*d*).

Where it is alleged that the examined witness is abroad, evidence must be given to satisfy the Judge that the witness is actually out of the jurisdiction of the Court at the time of the trial. What is sufficient evidence for this purpose depends on circumstances. It is usual to prove that defendant was at a certain time on board a ship bound for a place abroad, and to produce and prove his handwriting to a letter dated from such place or somewhere else abroad (*e*). The fact of the witness being abroad should be shown by some one who can speak to it of his own knowledge (*f*); statements in the depositions that the witness is going abroad, or proof of inquiries made at the residence of the witness, and of answers given, is not sufficient to prove it (*g*). The order directing the examination generally provides that an affidavit made by the solicitor for the party on whose behalf the witness is to be examined, of his (the solicitor's) belief that the witness is beyond the jurisdiction of the Court, shall be sufficient evidence on the trial of his being so.

Depositions and proceedings, how proved.

The interrogatories, depositions, &c., when filed, become a record of the Court, and may be proved by an examined copy, or an office copy, the same as any other record (*h*). A commission was sent by post to commissioners at Newfoundland, in the beginning of 1846. At the end of May, 1846, a sealed packet was left at the Master's office by a person not known: it contained the commission, the return to it, and the examinations of the witnesses signed by the persons named as commissioners, who were proved to have been living at St. John's, Newfoundland, where the return purported to have been made, seven years before the alleged return, and three months after it. The return and examinations were produced in the same state as when left at the Master's office, and bore no mark

(*d*) See *Duke of Beaufort* v. *Crawshay*, L. R., 1 C. P. 699, and *Knight* v. *Campbell* (ib. cit.), coram *Pollock*, C. B., who admitted an affidavit.

(*e*) See *Varicas* v. *French*, 2 C. & K. 1008. See *Carruthers* v. *Graham*, Car. & M. 5.

(*f*) *Robinson* v. *Markis*, 2 M. & R. 375.

(*g*) *Proctor* v. *Lainson*, 7 Car. & P. 629.

(*h*) *Duncan* v. *Scott*, 1 Camp. 100.

of alteration: it was held, that there was sufficient proof of the return, without further evidence, to show that the examinations were in the same state as when sent forth by the commissioners (*i*). It was also presumed in this case that the witnesses were examined apart, as was directed by the commission.

The proceedings must be regular and in conformity with the commission, &c.

We have noticed and shall notice several cases where defects in the proceedings will render examinations taken under an order or commission inadmissible (*k*). Where the commission directed the depositions to be returned, but, instead of them, certified copies were so, it was considered that they were inadmissible (*l*). But where the commission has been issued irregularly, or the examination was against good faith, it seems the Judge must receive the depositions at *Nisi Prius*, if there was due notice of the examination to the other side, though the Court may, under such circumstances, set aside the verdict, and grant a new commission (*m*). If the proceedings are irregularly conducted without any notice to plaintiff, to enable him, if he pleases, to put cross-interrogatories, such irregularity is a good objection to the admissibility of the depositions at the trial (*n*).

But, in general, if depositions are taken with authority the Judge cannot refuse to receive them; any irregularity in the mode of taking them should be taken advantage of by a substantive application to suppress them (*o*).

Depositions may be read by either party.

The depositions may, it seems, be read by either party (*p*).

The whole of the answers, both to the interrogatories and cross-interrogatories, must be read as part of the party's case who is desirous of making use of any of them (*q*).

The whole must be read.

Improper questions and answers may be excluded.

Objectionable questions or depositions, or any part (*r*) of an objectionable question or deposition, may be excluded from the jury on the trial; but not so by the party who put them (*s*). Where a witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced: it was held, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was argued, in support

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(*i*) *Sims* v. *Henderson*, 11 Q. B. 1015. It has been deemed advisable to insert here cases decided as to the admissibility of examinations taken abroad.

(*k*) See infra.

(*l*) *Clay* v. *Stephenson*, 7 A. & E. 185; 2 N. & P. 189. And see *Atkins* v. *Palmer*, 4 B & Ald. 377.

(*m*) *Steinkeller* v. *Newton*, 1 Sc. N. R. 148; 8 Dowl. 579; 9 Car. & P. 313; but the reports vary from each other.

(*n*) See *Scott* v. *Van Sandau*, 8 Jur. 1114, Q. B., 25th June, 1844: *Whyte* v. *Hallett*, 28 L. J., Ex. 208, where the irregularity was held to be waived.

(*o*) *Grill* v. *General Iron Screw Collier Co.*, L. R., 1 C. P. 601; 35 L. J., C. P. 321. See also *Hodges* v. *Cobb*, 36 L. J., Q. B. 265.

(*p*) *Proctor* v. *Lainson*, 7 Car. & P. 629.

(*q*) *Temperley* v. *Scott*, 5 Car. & P. 341: *Wheeler* v. *Atkins*, 5 Esp. 246. See *Stephens* v. *Foster*, 6 Car. & P. 280, where it was held that a document proved on cross-examination was not to be read as part of the cross-examination.

(*r*) See *Small* v. *Nairne*, 13 Q. B. 840.

(*s*) *Hutchinson* v. *Bernard*, 2 M. & R. 1: *Tufton* v. *Whitmore*, 9 L. J., Q. B. 405. See *Williams* v. *Williams*, 4 M. & S. 497: *Alcock* v. *Royal Exchange Ass. Co.*, 13 Q. B. 292; 18 L. J., Q. B. 121: *Lumley* v. *Gye*, 23 L. J., Q. B. 112.

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of its admissibility, that there were no means, as the witness was out of the jurisdiction of the English Courts, of compelling the production of the letter (*t*).

Costs of proceedings.

Costs of Proceedings.]—By *R. of S. C., Ord. LXV. r.* 1 (*post, Ch. LXVII.*), the costs are in the discretion of the Master. The *Stat.* 1 *W.* 4, *c.* 22, *s.* 9, provided that in the absence of a special order they should be costs in the cause. This section is repealed by 42 *& 43 V. c.* 59, *sched. pt.* 1; but the usual practice, in the absence of special circumstances, is to make them costs in the cause (*u*).

As a general rule, the costs of examining a witness under these rules will not be allowed when the depositions have not been used at the trial (*x*); but they may be allowed even in the case of a party to the action where the costs were reasonably incurred (*y*). Where a witness was so old and infirm that it was a prudent course to take his examination lest he should die before the trial, but he did attend the trial and was not called, the Court of Common Pleas refused a rule to review the taxation of a Master, who had allowed the costs of the examination as well as the costs of the attendance of the witness at the trial (*z*).

See post, p. 552, decisions under the rules when witnesses are examined abroad under a commission.

Mode of taking evidence subsequently to trial.

Mode of taking Evidence subsequently to Trial.]—By *Ord. XXXVII. r.* 21, "Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial."

Sect. 2. *Examination before Examiner of the Court.*

Rules of Court were published in February, 1884, providing for the appointment of examiners of the Court, before whom examinations of witnesses may be taken. These rules are in continuation of *Ord. XXXVII.*, and are numbered from 39 to 50. Some of them were amended by the *R. of S. C., October*, 1884.

Examination before examiner of the Court.

Examination before Examiner of the Court.]—By *Ord. XXXVII. r.* 39, "The examination of any witness or person ordered to be taken under Rules 1 and 5 of this Order shall, in any cause or

(*t*) *Steinkeller* v. *Newton*, 9 Car. & P. 313; but differently reported in 2 M. & R. 372. But this decision has been qualified by *Boyle* v. *Wiseman*, 11 Ex. 360; 24 L. J., Ex. 160; from which case it seems that secondary evidence is receivable of the contents of a private document in the possession of a person out of the jurisdiction, and who refuses to produce it. But it was held in this case that a mere demand of the document made by a stranger, who does not even disclose his object in making it, is insufficient to render such evidence admissible. It seems that a party may give secondary evidence of a private document which is out of the jurisdiction, if he has used all reasonable efforts to procure its production.

(*u*) See *Prince* v. *Samo*, 4 Dowl. 5; *Clay* v. *Stephenson*, 3 Ad. & El. 807.

(*x*) *Ridley* v. *Sutton*, 1 H. & C. 741; 32 L. J., Ex. 122: *Curling* v. *Robertson*, 7 M. & G. 525; 2 D. & L. 307.

(*y*) *Delaroque* v. *Oxenholme*, W. N. 1883, 227.

(*z*) *Duke of Beaufort* v. *Earl of Ashburnham*, 13 C. B., N. S. 898; 32 L. J., C. P. 97.

matter in the Chancery Division, unless the Court or a Judge shall otherwise direct, be taken before one of the examiners of the Court, and may, in any cause or matter in the Queen's Bench and Probate, Divorce and Admiralty Divisions, if the Court or a Judge shall so direct, be taken before one of such examiners."

Appointment.

Appointment of Examiners.]—By *r.* 40, "A sufficient number of barristers-at-law, of not less than three years' standing, shall be from time to time appointed by the Lord Chancellor to act as examiners of the Court for a period not exceeding five years, and shall be at any time removable by the same authority."

Distribution of examinations amongst.

Distribution of Examinations.]—By *r.* 41, "The examinations to be taken before the examiners of the Court shall be distributed among them in rotation by the first clerk to the registrars of the Chancery Division, and in his absence by the second clerk, and in the absence of the first and second clerks by such of the other clerks to the registrars as the senior registrar may determine."

By *r.* 42, "The clerk in the last preceding rule mentioned shall be responsible for making the distribution according to regular and just rotation and in such manner as to keep secret from all persons the rota or succession of examiners of the Court: and it shall be his duty to keep a record thereof with proper indexes and dates."

By *r.* 43, "The party prosecuting the order or his solicitor shall produce such order or a duplicate thereof to the clerk in Rule 41 mentioned, who shall, except in the case provided for in Rule 49, add at the foot thereof a memorandum specifying the name of the examiner of the Court in rotation before whom the examination is appointed to be taken; and the order or duplicate shall be left by the party prosecuting the same, or his solicitor, with the examiner so appointed, and shall be a sufficient authority for him to proceed with the examination."

Appointment for examination.

Appointment for Examination.]—By *r.* 44, "Upon production of the order indorsed with his name the examiner of the Court shall give an appointment in writing specifying the place and time (within not more than seven days) at which, subject to any application from the parties, the examination shall be taken; and the party prosecuting the order or his solicitor shall within twenty-four hours, or such shorter time (if any) as may be mentioned in the order, give notice of the appointment to all parties."

By *r.* 45 (*a*), "In determining the place and time at which an examination shall be taken, the examiner shall have regard to the convenience of the witnesses or persons to be examined and all the circumstances of the case; and he shall proceed with such examination at the place and time appointed, and subject to such adjournment as he shall think necessary or just continue the same *de die in diem*."

Additional witnesses.

Additional Witnesses.]—By *r.* 46, "The examiner may, with the consent in writing of all parties, take the examination of any

(*a*) As amended by R. of S. C., October, 1884, r. 7.

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witnesses or persons in addition to those named or provided for in the order, and shall annex such consent to the original depositions."

Depositions.

Depositions.]—By *r.* 47 (*b*), "Upon the completion of an examination taken before an examiner of the Court, he shall indorse the original depositions with a note, authenticated by his signature, certifying the number of hours or days (as the case may be) exclusively employed thereupon, and the fees received in respect thereof."

Inability of examiner to take examination.

Inability of Examiner to take Examination.]—By *r.* 48 (*c*), "In case any examiner of the Court, before whom according to the rotation any examination is to be taken, shall be engaged as counsel in the cause or matter to which such examination relates, or shall from illness or from any other cause be unable or decline to take such examination, the same shall be assigned by the clerk in Rule 41 mentioned to another examiner of the Court according to the rotation aforesaid: provided that it shall be the duty of any examiner before whom any examination is pending to decline any other examination in any case where the acceptance thereof is likely to create delay or inconvenience in the taking of any examination before him."

Transfer.

Transfer.]—By *r.* 49, "The Court or a Judge may, if they or he think fit, direct or transfer an examination to any one in particular of the examiners of the Court."

The examination.

The Examination.]—The examination before the examiner of the Court is conducted in exactly the same manner as that before a special examiner. *See ante*, pp. 538 *et seq.*

Fees.

Fees.]—

	£	*s.*	*d.*
1. For every examination before an examiner of the Court within three miles from the principal entrance of the Royal Courts of Justice (*d*) . . .	1	1	0
2. For the examiner's clerk	0	2	6
3. For each hour, or part of an hour, occupied in such examination beyond two hours	0	10	6
4. For the examiner's clerk, where such examination occupies more than three hours (in addition to fee No. 2), per day	0	2	6
5. For every examination before an examiner of the Court elsewhere than within three miles from the principal entrance of the Royal Courts of Justice (*d*)	5	5	0
6. For every day of six hours, or part of a day, occupied in such examination beyond the first day . .	5	5	0

The party prosecuting the order, or his solicitor, shall also pay all reasonable travelling and other expenses, including charges for the room (other than the examiner's chambers) where the examination is taken.

N.B.—The fees Nos. 1, 2 and 5 (as the case may be) shall be paid by the party prosecuting the order, or his solicitor, on

(*b*) As amended by R. of S. C., October, 1884, r. 8, which annuls the last paragraph of the original rule.

(*c*) Id. r. 9.

(*d*) As altered by the R. of S. C., October, 1884, r. 10.

obtaining the examiner's note of time and place for the examination. The fees Nos. 3, 4 and 6 (as the case may be), shall be paid so soon as the examination has been concluded, together with any travelling or other expenses as above mentioned.

—Order for payment of.

By *Ord. XXXVII. r.* 50 (*R. of S. C., October*, 1884, *r.* 10), "The Court or a Judge may, on the application of an examiner, order the payment to him by the party prosecuting the order of the fees and expenses payable to him on account of any examination, but without prejudice to any question on the taxation of costs as to the party by whom the costs of such examination should eventually be borne."

Sect. 3. *Examination of Witnesses or Parties out of the Jurisdiction on Commission* (*e*).

The rules as to examination of witnesses before a special examiner apply to witnesses out of the jurisdiction, and in many cases it is more convenient to have such an examination than one on commission (*e*).

Commission may issue to examine witnesses out of the jurisdiction.

Power to order, in what Cases.]—Under *R. of S. C., Ord. XXXVII. rr.* 1 and 5, a Master may order a commission to issue for the examination of witnesses on oath at any place or places out of the jurisdiction of the Court by interrogatories or otherwise (*f*). See the rules *ante*, p. 533.

When order will be made for such purpose.

It is in the discretion of the Master or Judge to grant this order, and they will do so only where it appears, from the affidavits in support of the application, to be conducive to the due administration of justice (*g*). This discretion, however, is subject to review by the Court of Appeal (*h*). All that the Court ordinarily requires is to see that there is a *bonâ fide* claim or defence, and that the evidence is *bonâ fide* required, and cannot reasonably be obtained without a commission (*i*). The point to be considered is whether it is necessary for the purposes of justice that the commission should be issued (*k*). A commission may issue under the rules into Dublin (*k*), France (*l*), a British colony (*m*), or India (*n*), or to any other place out of the jurisdiction of the Court. It is generally

(*e*) *Nadin* v. *Bassett*, 25 Ch. D. 21; 53 L. J., Ch. 253; 49 L. T. 454; 32 W. R. 70.

(*f*) As to ordering a commission to issue out of the superior Courts for the examination of witnesses at any place or places beyond the limits of England and Wales in aid of the Salford Hundred Court of Record, see 31 & 32 V. c. cxxx, s. 103.

(*g*) *Armour* v. *Walker* (C. A.), 25 Ch. D. 673; 53 L. J., Ch. 412; 50 L. T. 292; 32 W. R. 214: *Castelli* v. *Groome*, 18 Q. B. 490; 21 L. J., Q. B. 308: *Barry* v. *Barclay*, 15 C. B., N. S. 849: *Steuart* v. *Gladstone*, 7 Ch. D. 394; 47 L. J., Ch. 154: *Berdan* v. *Greenwood*, 20 Ch. D. 764, n.; 46 L. T. 526, n., C. A.: *In re Boyse, Crofton* v. *Crofton*, 20 Ch. D. 760; 51 L. J., Ch. 660: *Langen* v. *Tate*, 24 Ch. D. 522; 49 L. T. 758.

(*h*) *Berdan* v. *Greenwood*, supra.

(*i*) *In re Boyse*, supra.

(*k*) *Norton* v. *Lamb*, 5 Dowl. 181: *Norton* v. *Lord Melbourne*, 3 Bing. N. C. 67; 3 Sc. 398.

(*l*) *Duckett* v. *Williams*, 1 Dowl. 291; 1 C. & J. 510; 1 Tyr. 502; 9 L. J., Ex. 177: *Reynard* v. *Cope*, 1 Tyr. 505, a.

(*m*) *Solaman* v. *Cohen*, 15 Jur. 362, Ex.

(*n*) See *Bain* v. *De Vetry*, 3 Dowl. 516.

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advisable to examine witnesses under a commission when they are in India or the Queen's dominions abroad, and where they are willing to attend the commissioners and give their testimony, instead of proceeding by a writ of *mandamus*, under 13 *G.* 3, *c.* 63, *s.* 40, and 1 *W.* 4, *c.* 22, *s.* 1, *post*, p. 555, as it is generally less expensive to do so. The Court will not order a commission to issue into an enemy's country (*o*). A party to a suit who is abroad may be examined under a commission (*p*); but in this case it must be shown that the application is made *bonâ fide*, and not to avoid cross-examination (*q*). And where it is not shown that the plaintiff *cannot* attend at the trial the Court may impose terms such as that his deposition shall not be read if the opposite party requires him to attend to be cross-examined (*r*). Where a claim was of a suspicious nature, a commission to a foreign Court, where a witness would not be cross-examined in the ordinary way, for the examination of a witness whom it was necessary to cross-examine strictly, was refused (*s*).

Time for making application.

The cases which have been decided as to the time for making an application for an order to examine a witness within the jurisdiction of the Court, and which are referred to, *ante*, p. 534, apply to the time for making an application for a commission.

Affidavit in support of.

The application should in general be made to a Master at Chambers, and be supported by an affidavit, showing that issue has been joined in the action (*t*), or that the case is such that a commission should issue before issue joined (*u*). The affidavit should in general state the names of witnesses proposed to be examined (*v*). This, however, is not absolutely necessary (*x*); but unless some reason be given for not stating them, the non-statement might furnish a ground for contending that the application is made for delay or some other improper purpose. In many cases it may be impracticable to state them. The affidavit should also state that the witness is out of the jurisdiction of the Court (*y*); and in cases where the nature of the case is such that it is important that the witness should be examined here, it should show that the applicant cannot bring him to this country (*z*). It *must* show that he is a material and necessary witness in the action for the party making the application (*a*), and such other facts as will satisfy the Master

(*o*) *Barrick* v. *Buba*, 16 C. B. 492.
(*p*) *Armour* v. *Walker* (C. A.), 25 Ch. D. 673; 32 W. R. 214: *Castelli* v. *Groome*, 18 Q. B. 490; 21 L. J., Q. B. 308: *Codd* v. *Donnelly*, 9 Ir. Com. Law Rep. 465, C. P.: *Banque Franco-Egyptienne* v. *Lutscher*, 41 L. T. 468, *Fry*, J., where one of several parties was so examined.
(*q*) *Berdan* v. *Greenwood*, supra: *Castelli* v. *Groome*, supra: *Corbet* v. *Baldock*, Ex. D., "Times," 11th June, 1880: *Nadin* v. *Bassett*, supra.
(*r*) *Nadin* v. *Bassett*, supra.
(*s*) *In re Boyse*, supra.
(*t*) *Mondel* v. *Steele*, 8 M. & W. 300; 9 Dowl. 812.
(*u*) See ante, p. 524.
(*v*) See *Gunter* v. *M'Tear*, 1 M. & W. 201; 1 T. & G. 245; 4 Dowl. 722: *Norton* v. *Lord Melbourne*, 3 Bing. N. C. 67; 3 Sc. 398: *Carbonnell* v. *Bessell*, 5 Sim. 636: *M'Hardy* v. *Hitchcock*, 11 Beav. 93; 17 L. J., Ch. 256.
(*x*) *Cow* v. *Kynnersley*, 1 D. & L. 906; 7 Sc. N. R. 892; 6 M. & G. 981: *Heaty* v. *Young*, 2 C. B. 702: *Beresford* v. *Easthope*, 8 Dowl. 294: *Dimond* v. *Vallance*, 7 Dowl. 590: *Nadin* v. *Bassett*, 25 Ch. D. 21.
(*y*) See *Lloyd* v. *Key*, 3 Dowl. 253.
(*z*) *Lawson* v. *Vacuum Brake Co.*, C. A., 27 Ch. D. 137; 51 L. T. 275.
(*a*) *Langen* v. *Tate*, 24 Ch. D. 522; 53 L. J., Ch. 361; 49 L. T. 758; 32 W. R. 189. See *Baddeley* v. *Gilmore*, 1 M. & W. 55; 1 T. & G. 369; 1 Gale, 410.

of the necessity for issuing the writ. It is as well also to state that the party cannot safely proceed to trial without the witness's evidence. Where an affidavit stated that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and necessary, the Court held it to be sufficient, and that it was not necessary for it to state that the evidence was admissible, or that the application was *bonâ fide* and not for delay; and also that no affidavit of merits was necessary (*b*). It is not necessary that the affidavit should state what facts the witness will be able to depose to, or the matters as to which it is intended to examine him (*c*). But this might, in some cases, be required where there is ground for imputing that the application is made for delay or for an improper purpose. Where the commission is asked for the purpose of obtaining evidence as to a point of foreign law the affidavit should show that the evidence could not equally well be produced at the trial here (*d*). The names of the commissioners need not be stated in the affidavit (*e*). The affidavit may in ordinary cases be made by the solicitor or the clerk having the management of the cause, or by the client, according to circumstances (*f*).

Order.

By *R. of S. C., Ord. XXXVII. r.* 6, "An order for a commission to examine witnesses shall be in the Form No. 36, in App. K., and the writ of commission shall be in the Form No. 13, in App. J., with such variations as circumstances may require" (*g*).

The application should be made to a Master at Chambers on a summons for the purpose. The order will be for the commission to issue for the examination of the witnesses on oath, by interrogatories or *vivâ voce*, or otherwise, as the Court or Judge may direct (*h*). The usual course is to order the examination upon written interrogatories, and a power is given to put additional questions *vivâ voce* upon facts arising out of the answers to the interrogatories, and a power is added to enable the opposite party to cross-examine the witnesses *vivâ voce* (*i*); the order generally requires the examinations and answers to be afterwards reduced into writing, and returned under the seals of the examiners, with the commission, to the senior Master of the Supreme Court of Judicature (*k*); besides the witness or witnesses named in the affidavit, the Master or Judge may direct generally an examination of any other witness who may be found at the place of the examination knowing anything of the matter (*l*). By the same or some subsequent order, the Court or Judge should give such direc-

(*b*) *Baddeley* v. *Gilmore*, supra. And see *Westmoreland* v. *Huggins*, 1 Dowl., N. S. 800: *Dye* v. *Bennett*, 1 L., M. & P. 92.

(*c*) See *Cow* v. *Kynnersley*, supra, n. (*x*): *Strachan* v. *Green*, 9 Jur. 554, B. C.: *M'Hardy* v. *Hitchcock*, 17 L. J., Ch. 256; 11 Beav. 93.

(*d*) *The M. Mexham*, 1 P. D. 107; 34 L. T. 559 (C. A.), where a commission to Spain to get evidence of the law of that country was refused.

(*e*) *Nicol* v. *Alison*, 11 Q. B. 1006; 17 L. J., Q. B. 355.

(*f*) See *M'Hardy* v. *Hitchcock*, supra.

(*g*) See Chit. F. p. 310.

(*h*) Id. p. 314.

(*i*) See *Steinkeller* v. *Newton*, 1 Sc. N. R. 150, per *Tindal*, C. J.

(*k*) See R. of S. C., App. J., No. 13: *Duckett* v. *Williams*, 1 Tyr. 502; 1 C. & J. 510; 1 Dowl. 291: *Pole* v. *Rogers*, 3 Bing. N. C. 780; 4 Sc. 479.

(*l*) See *Dimond* v. *Vallance*, 7 Dowl. 590: *Beresford* v. *Easthope*, 8 Dowl. 294.

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tions as may be thought fit, touching the time, place (*m*) and manner of the examination, and other matters connected with it (*n*). Where a Judge's order in December, 1845, directed a commission to issue for the examination of certain witnesses *viva voce*, at Newfoundland, returnable on the last day of Trinity Term then next, it was held, that the order gave sufficient direction as to the "time, place and manner" of examination (*o*). If a commission be issued under an order which neither names the commissioners, nor the time, place or manner of examination, the Court may set aside a verdict which has been influenced by evidence obtained under such commission (*p*); and this, although these omissions are supplied in the commission (*q*). But any omission in this respect either in the order or commission amounts to no more than an irregularity, which may be waived by the parties by their agreement or consent, or by the conduct of the opposite party (*r*). The provision in the long order for a commission, that the depositions shall be signed by the witnesses, is directory only, and their omission to do so is no ground for rejecting the depositions at the trial: it is a mere irregularity (*s*). The Court will, if the circumstances of the case require it, order the commission to be addressed to two commissioners, or, in the absence of one, to the other of them (*t*). By the law of the Duchy of Schleswig, no one but a burgomaster is allowed to administer an oath in that country; therefore a commission to that country should be directed to a burgomaster (*u*). A commission may issue to the Judges of a foreign Court as individuals, although it appears that, according to the foreign law, the mode of examination will be conducted differently from the English practice, counsel not being allowed to put questions to the witnesses except through the Judge; and although hearsay evidence is there receivable (*x*). A commission obtained by defendant under 1 *W.* 4, *c.* 22, to examine witnesses, addressed to the Judges of a Court at Pesth, as individuals, was returned unexecuted; defendant's solicitor was informed at the Austrian embassy that it ought to have been addressed to the Court, and not to the individual Judges; the Court of Queen's Bench allowed a commission to issue addressed to the Court itself, the usual clause prescribing the form of oath being omitted, and directed that the costs of the abortive commission should be plaintiff's costs in the cause (*y*).

Terms imposed.

Where it appears questionable whether the application is not made to delay the plaintiff, defendant will sometimes be required to bring the money sought to be recovered, or part of it, into

(*m*) *Greville* v. *Stulz*, 11 Q. B. 997; 17 L. J., Q. B. 14.

(*n*) Ord. XXXVII. r. 5, ante, p. 533.

(*o*) *Sims* v. *Henderson*, 11 Q. B. 1015; 17 L. J., Q. B. 209.

(*p*) *Steinkeller* v. *Newton*, 1 Sc. N. R. 148; 2 Dowl. 579; 9 L. J., C. P. 262: *Greville* v. *Stulz*, supra.

(*q*) *Greville* v. *Stulz*, supra: *Hodges* v. *Cobb*, 36 L. J., Q. B. 265.

(*r*) See *Hawkins* v. *Baldwin*, 20 L. J., Q. B. 198: *Whyte* v. *Hallett*, 28 L. J., Ex. 208.

(*s*) *Hodges* v. *Cobb*, L. R., 2 Q. B. 652; 36 L. J., Q. B. 265, where the writ omitted the defendant's name.

(*t*) *Mills* v. *Wellbank*, 3 Sc. N. R. 177.

(*u*) *Boelen* v. *Melladew*, 10 C. B. 898; 20 L. J., C. P. 172.

(*x*) *Lumley* v. *Gye*, 23 L. J., Q. B. 112; 2 E. & B. 216: *Valentin* v. *Hall*, 35 L. J., Q. B. 121.

(*y*) *Fischer* v. *Sztaray* (or *Izataray*), 27 L. J., Q. B. 239; E., B. & E. 321.

Court (*z*), or else to give security for it to the satisfaction of the Master. In one case, the Court, upon granting the order, referred it to the Master to say whether or not the security the plaintiff (the party applying for the order) had given for costs should not be increased (*a*). The Court have refused to make it part of the order that plaintiff should produce a bill of exchange in his possession at the time of his executing the commission (*b*).

Stay of proceedings.

The order is generally drawn up with a stay of proceedings until the return of the commission (*c*). Where there is no necessity for it, a stay of proceedings will not be ordered (*d*).

Limiting time for return of commission.

The order generally limits the time within which the commission must be returned (*e*).

Commission, how sued out, and form of.

Prepare and sue out the commission (*f*), *directed to the commissioners according to the order; get it sealed at the proper office; and annex the interrogatories and cross-interrogatories* (*if any*) *to it.*

A form of commission is provided by the *R. of S. C., App. J., No.* 13. Its use is authorized by *Ord. XXXVII. r.* 6 (*ante*, p. 547). The commission is tested of the day of issuing (*g*). It may be doubtful whether any teste at all, properly so called, is requisite (*h*). The interrogatories and cross-interrogatories, if any, should be annexed to it. The names of the commissioners may be agreed on by the parties, and inserted in the commission, if they are not named in the order (*h*). If the commission is to be directed to the Judges of a foreign Court, it should contain words of authority only, not of command, and it should omit the usual clause requiring the commissioners to be sworn (*i*). The omission of the time and place for the examination of witnesses in the commission, is, as we have seen, *ante*, p. 548, only an irregularity, which may be waived. The master will not, without special grounds, depart from the ordinary form of commission (*k*). Where the commission is directed to a single commissioner, the form of order given in the Appendix

(*z*) *Dalton* v. *Lloyd*, 1 Gale, 102: *Sparkes* v. *Barrett*, 5 Sc. 402. See *Ingram* v. *Bligh*, 2 Jur. 1044: *Adams* v. *Corfield*, 28 L. J., Ex. 31. If, after the money is paid into Court, defendant become bankrupt, this will not deprive plaintiff of his right to the money: *Murray* v. *Arnold*, 3 B. & S. 287: *Birnie* v. *Janson*, 2 G. & D. 630.

(*a*) *De Rossi* v. *Polhill*, 7 Sc. 836.

(*b*) *Cunliffe* v. *Whitehead*, 3 Dowl. 634. And see *Baddeley* v. *Gilmore*, 1 M. & W. 55; 1 Gale, 410. See also *Clinton* v. *Peabody*, 7 M. & G. 399, where the Court directed certain notes to be deposited with the Master, and afterwards directed them to be sent out, to be produced under the commission, upon facsimiles being deposited in lieu of them.

(*c*) See the form referred to, ante, p. 547, n. (*g*). Cp. *Forbes* v. *Wells*, 3 Dowl. 318.

(*d*) *Beresford* (*Lord*) v. *Easthope*, 8 Dowl. 294; 4 Jur. 104, B. C.

(*e*) See *Sparkes* v. *Barrett*, 5 Sc. 402: *Birnie* v. *Janson*, 2 G. & D. 630: *Reynard* v. *Cope*, 3 Tyr. 605, a.

(*f*) See the form, Chit. Forms, p. 314. As to the impressed fee stamp, see Vol. 2, App.

(*g*) *Nicol* v. *Alison*, 11 Q. B. 1006; 17 L. J., Q. B. 355.

(*h*) *Nicol* v. *Alison*, supra. A commission directed to "the judges of the Supreme Court at Calcutta," after that Court had been abolished and the High Court of Judicature at Fort William, in Bengal, substituted, was held good. *Wilson* v. *Wilson*, 9 P. D. 8; 49 L. T. 430; 32 W. R. 282.

(*i*) *Ponsford* v. *O'Connor*, 5 M. & W. 673; 7 Dowl. 866: *Clay* v. *Stephenson*, 3 A. & E. 807: *Fischer* v. *Sztaray* (or *Izataray*), El., B. & E. 321; 27 L. J., Q. B. 239, ante, p. 548.

(*k*) *Follett* v. *Delany*, 7 C. B. 775.

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to the Rules empowers him to administer the oath to himself (*l*). A Judge's order, made in December, 1845, directed a commission to issue for the examination of witnesses *vivâ voce* at Newfoundland, returnable on the last day of Trinity Term then next: the commission issued in pursuance of this order, was addressed to certain commissioners, described as of St. John's, in the island of "Newfoundland," and commanded that at a certain day and place, or certain days and places, to be appointed by them, they should cause the witnesses to come before them at "Newfoundland," and then and there examine each of the said witnesses apart: it was held, that the commission was warranted by the order (*m*). It should be sued out without delay. It seems that any mistake in the direction of the commission would be waived by appearing before the commissioner and cross-examining (*n*).

Interrogatories, &c.

If the examination is not to be *vivâ voce*, *interrogatories must be prepared as directed ante*, p. 536, *and signed by counsel* (*o*); *they must then be engrossed, and a copy of them served on the opposite solicitor. The opposite solicitor may also, if it be thought advisable, draw up interrogatories by way of cross-examination; they should be signed by counsel.* The Master has power to strike out or disallow any of the interrogatories or cross-interrogatories which he may think improper (*p*). Thus, when the interrogatories were calculated to deter a witness from giving evidence at all they were struck out on the application of the opposite party (*p*). It is not, it seems, necessary to deliver these cross-interrogatories to the opposite party for inspection (*q*). It seems that the opposite party is entitled to notice of the several proceedings under the commission and to cross-examine the witnesses though he has not joined in the commission; but he is not entitled to examine witnesses in chief (*r*). He is also entitled to a copy of the interrogatories and depositions, when taken, although he did not join in the commission or cross-examine the witnesses (*s*).

Proceedings after commission sued out.

After the commission has been sued out, it should be forwarded, with full instructions, to an agent, who will deliver it to the commissioners. The directions of the commission should be followed (*t*). *The commissioners will give the agents of both parties notice of the time and place of examination* (*u*).

(*l*) Chit. F. p. 318. See *Wilson* v. *De Coulon*, 22 Ch. D. 841; 53 L. J., Ch. 248; 48 L. T. 514; 31 W. R. 839.

(*m*) *Sims* v. *Henderson*, 11 Q. B. 1015; 17 L. J., Q. B. 209: *Ponsford* v. *O'Connor*, 5 M. & W. 673; 7 Dowl. 866.

(*n*) *Wilson* v. *Wilson*, supra.

(*o*) See the forms, Chit. Forms.

(*p*) *Stocks* v. *Ellis*, L. R., 8 Q. B. 454; 42 L. J., Q. B. 241.

(*q*) Ante, p. 537, n. (*u*).

(*r*) See *Attorney-General* v. *Davison*, M'Cl. & Y. 160: *Cazenove* v. *Vaughan*, 1 M. & S. 4; 2 Stark. Ev. 264: and per *Tindal*, C. J., in *Steinkeller* v. *Newton*, 1 Sc. N. R. 149. One who altogether disclaims to have anything to do with a commission is not entitled to notice of the proceedings under it. *M'Combie* v. *Anton*, 6 Sc. N. R. 923; 6 M. & G. 27. Where an order directed that the defendant was to have six days' notice of the examination of a witness, it was held that a notice by the opposite party, though not signed or directed by the commissioners, was sufficient. *Scott* v. *Van Sandau*, 8 Jur. 1114, Q. B.: *Whyte* v. *Hallett*, 28 L. J., Ex. 208.

(*s*) *Davis* v. *Nicholson*, 7 Bing. 358.

(*t*) See *Scott* v. *Van Sandau*, 8 Jur. 1114, Q. B., where a list of the witnesses was not delivered to the opposite party as directed.

(*u*) *Kay* v. *Gennell*, 2 D. & L. 21: *Whyte* v. *Hallett*, 28 L. J., Ex. 208.

Take the witness, at the time, to the place appointed, unless he will attend of his own accord. By 6 & 7 *V.* c. 82, s. 5, after reciting that, "There are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the Courts of law or equity in England or Ireland, or by the Courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof," it is enacted, "that, if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent to or on behalf of any party suing out such commission to apply to any of the superior Courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such Courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission; and it shall be lawful for the Court or Judge to whom such application shall be made, by rule or order, to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned in such rule or order." This enactment extends to a commission from the Scotch Courts for the production of documents; a rule to compel a party to produce the documents required will not be granted on an *ex parte* application (*y*).

Compelling attendance of witness out of the jurisdiction but within the realm (*x*).

Sect. 6. "Upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or fail to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland; and if such disobedience shall happen in Scotland, it shall be competent to the Lord Ordinary on the bills, upon an application made to him by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order."

—Punishment of witness for non-attendance.

Sect. 7. "Every person whose attendance shall be so required shall be entitled to the like conduct-money and payment of expenses, and for loss of time, as for and upon attendance at any

—Expenses of witnesses.

(*x*) See 22 V. c. 20, an Act to provide for taking evidence in suits and proceedings pending before tribunals in her Majesty's dominions, in places out of the jurisdiction of such tribunals, noticed Vol. 2, Ch. CXX.

(*y*) See *Scott* v. *Van Sandau*, ante, p. 550, n. (*r*).

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trial in a Court of law (*a*); and no person shall be compelled to produce, under such rule or order, any writing or other document that he or she would not be compellable to produce at a trial (*b*), nor to attend on more than two consecutive days, to be named in such rule or order." See 22 *V.* c. 20, noticed *Vol.* 2, *Ch. CXX.*

Examination of witnesses.

The commissioners to whom the commission is directed must examine the witness on oath (*c*); *in some cases, however, the witness may make a solemn affirmation or declaration instead of being sworn* (*d*). *Any objection to the right of a witness to affirm must be taken at the time* (*e*). *When a witness affirms and there is nothing on the face of the deposition to show that his affirmation was not properly taken it is too late to raise the objection at the trial* (*e*). *His examination should be conducted by the same rules as the examination of witnesses on a trial at Nisi Prius* (*f*). Care should be taken that the facts required to be proved are proved by legal evidence. An answer which is not evidence will be rejected on the trial (*g*). But secondary evidence of written documents, which is taken at the commission without objection, cannot be objected to at the trial (*h*). Where the commission directed the witnesses to be examined on interrogatories, and directed that the commissioners might put, or cause to be put, additional questions, when it should appear to them to be necessary and proper; it was held, that the commissioners ought to have decided as to the necessity and propriety of additional questions that were put, and that they were wrong in leaving the point for the Court (*i*).

Return of commission.

The commissioners should return the commission and interrogatories with the depositions according to the time and mode directed by the commission, certified under their seals. Either party will be entitled to a copy of the depositions, and this though he did not join in the commission (*k*). When the order directed that the depositions should be signed by the witnesses, but the commission only required them to be signed by the commissioners, and they alone signed them, this was held sufficient as the order was only directory (*l*). When the proceedings are filed, they become a record (*m*). The original depositions should be returned, and not merely a certified copy, unless the commission directs the return of such a copy (*n*). If no time be mentioned for the return of the commission, but it appear from the order that the cause is to be tried at some particular time, the commission should be returned before such time (*o*). Where the commissioners were directed to

(*a*) See post, p. 562.
(*b*) See post, Ord. XXXVII. r. 7, ante, p. 537.
(*c*) *Boelen* v. *Melladew*, 10 C. B. 898; 20 L. J., C. P. 172.
(*d*) See C. L. P. Act, 1854, s. 20, and other enactments noticed Ch. LXV.
(*e*) *Richards* v. *Hough*, 51 L. J., Q. B. 361; 30 W. R. 676.
(*f*) *Cunliffe* v. *Whitehead*, 3 Dowl. 634.
(*g*) See *Alcock* v. *Royal Exchange Assurance Co.*, 13 Q. B. 292: *Lumley* v. *Gye*, 23 L. J., Q. B. 112. As to leading questions, see *Small* v. *Nairne*, 13 Q. B. 840.
(*h*) *Robinson* v. *Davies*, 5 Q. B. D. 26; 49 L. J., Q. B. 218.
(*i*) *Williamson* v. *Page*, 1 C. B. 464; 3 D. & L. 14; 14 L. J., C. P. 172.
(*k*) See *Davis* v. *Nicholson*, 7 Bing. 358.
(*l*) *Hodges* v. *Cobb*, L. R., 2 Q. B. 652; 36 L. J., Q. B. 265.
(*m*) As to filing the depositions, see Ord. XXXVII. r. 16, ante, p. 539; and see p. 540.
(*n*) *Clay* v. *Stephenson*, 7 A. & E. 185; 2 N. & P. 189.
(*o*) *Steinkeller* v. *Newton*, 1 Sc. N. R. 148; 8 Dowl. 579.

take the examinations and reduce them into writing in the English language, and power was given them to swear an interpreter well and duly to interpret the oath and interrogatories which should be administered, out of the English language into that of the witnesses, and also to interpret their depositions into the English language; it was holden no objection that the original depositions were not reduced into English till six weeks after they were taken, and were, therefore, properly a translation; and the Court observed that it was not necessary to send the identical paper or parchment on which the commissioners made their minutes, because the witnesses may occasionally make corrections in their depositions: that the examinations would necessarily be first taken in a rough manner, and would afterwards be fairly copied out (*p*). As to the statement in the return, that the interpreter interpreted the evidence, *see Greville* v. *Stulz*, 11 Q. B. 997.

If the time for taking the examinations prove to be insufficient, the Court or a Judge may enlarge it (*q*).

The party obtaining the commission may, if nothing has been done under it, quash it almost as of course, and the Master will grant an order for this purpose (*r*).

Admissibility of examinations on the trial.

Admissibility of Examinations on the Trial.]—As to this, *see ante*, p. 540.

Costs of proceedings, &c.

Costs of Proceedings, &c.]—*See ante*, p. 542, as to the costs of the proceedings. The costs of executing a commission in a foreign land are now always made costs in the cause, unless there is some special reason for ordering otherwise (*s*). It is a question for the discretion of the Master, in each particular case, whether the expenses of bringing witnesses from abroad should be allowed on taxation, or only the costs of the commission; and the stat. 1 *W.* 4, *c.* 22, made no alteration in this respect (*t*). In order to review a taxation by the Master for disallowing the expenses of a detention of a foreign witness in this country, it should be shown that the Master did not exercise his discretion on the subject, after special grounds for the allowance had been laid before him (*u*). The Court have refused to interfere with the discretion of the Master as to the costs of a solicitor for going abroad to attend a commission for the examination of a witness (*x*); and though the increased expense of sending out counsel to act as commissioner in taking evidence abroad will not generally be allowed on taxation, yet it may be allowable under peculiar circumstances; and where the Master, in the exercise of his discretion, allowed such increased expense, the Court declined to interfere, but suggested that, for the future, it would be better that the propriety of sending out counsel should be settled before

(*p*) *Atkins* v. *Palmer*, 4 B. & A. 377.

(*q*) *Shorey* v. *Shebelli*, 1 Tyr. 505, a.

(*r*) See *Hodges* v. *Daly*, 8 Dowl. 808.

(*s*) *Prince* v. *Samo*, 4 Dowl. 5. And see *Clay* v. *Stephenson*, 5 N. & M. 318; 3 A. & E. 807; 1 H. & W. 409: *Brydges* v. *Fisher*, 1 Bing. N. C. 510; 1 Sc. 485, where the commission was peculiarly for the benefit of one party.

(*t*) *M'Alpine* v. *Poles*, 1 C. & M. 795; 3 Tyr. 871; 2 Dowl. 299.

(*u*) *White* v. *Mayor*, 5 Tyr. 487.

(*x*) *Cornet* v. *Dempsey*, 1 Dowl., N. S. 422.

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sending out the commission (*y*). And where a commission to take evidence abroad authorised questions beyond the written interrogatories, and the commissioners appointed solicitors to put such questions, and the Master, in the exercise of his discretion, allowed the expenses occasioned thereby, the Court refused to interfere (*z*). The costs of a letter of instructions sent with the commission may be allowed (*a*). Where the Master allowed a large sum for costs incurred in the execution of a commission for the examination of witnesses abroad, without exercising any discretion as to the propriety of the particular charges, the Court directed him to review his taxation (*b*).

Sect. 4. *Examination on Request in lieu of Commission.*

Examination on request in lieu of commission.

By *R. of S. C.*, 1884, *Ord. XXXVII. r.* 6a (*R. of S. C., Oct.*, 1884, *r.* 6), "If in any case the Court or a Judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. The Forms 1 and 2 in the Appendix hereto shall be used for such order and request respectively, with such variation as circumstances may require, and may be cited as Forms 37a and 37b in Appendix K."

This request in lieu of commission is a new mode of procedure. It is necessary where the witnesses whom it is desired to examine reside in a country, such as Germany, where the examination can only be held by an officer of the Court. It will be found very useful and advantageous in cases where the witnesses reside in one of her Majesty's dominions where there is a Court to which it may be directed; and also in the case of foreign tribunals having power to examine witnesses at the request of other tribunals similar to those given to the Courts of this country by the stat. 19 & 20 *V. c.* 113 (*see post, Ch. CXX.*).

The order.

The form of order given in the Appendix to the *R. of S. C., October*, 1884 (*App. K. No.* 37a), is as follows (*c*):—

"It is ordered that a letter of request do issue directed to the proper tribunal for the examination of the following witnesses, that is to say: *E. F.*, of ———, *G. H.*, of ———, and *I. J.*, of ———. And it is ordered that the depositions taken pursuant thereto when received be filed at the Central Office, and be given in evidence on the trial of this action, saving all just exceptions."

The request.

The form of request given in the Appendix to the *R. of S. C., October*, 1884 (*App. K. No.* 37b), is as follows (*c*):—

"Whereas an action is now pending in the ——— Division of the High Court of Justice in England, in which *A. B.* is plaintiff and *C. D.* is defendant. And in the said action the plaintiff claims ——— [*endorsement upon writ*].

And whereas it has been represented to the said Court that it is

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(*y*) *Yglesias* v. *Royal Exchange Assurance Corporation*, L. R., 5 C. P. 141; 39 L. J., C. P. 173.

(*z*) *Potter* v. *Rankin*, 38 L. J., C. P. 130.

(*a*) *Mann* v. *Harbord*, 39 L. J., Ex. 27.

(*b*) *Stewart* v. *Steele*, 4 C. B. 460.

(*c*) It is thought useful to give these forms here, as illustrating the rule, and as they were issued subsequently to the last edition of Chitty's Forms, and are consequently not given there.

necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say: *E. F.*, of ———, *G. H.*, of ———, and *I. J.*, of ———.

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court.

Now I, ———, as the President of the said ——— Division of the High Court of Justice have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the High Court of Justice, you, as the President and Judges of the said ——— or some one or more of you, will be pleased to summon the said witnesses (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you, or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses, through Her Majesty's Secretary of State for Foreign Affairs, for transmission to the said High Court of Justice in England."

Sect. 5. *Examination out of the Jurisdiction on Mandamus.*

Enactments on the subject—India.

On indictments or informations.

Enactments on the Subject.]—By 13 *G.* 3, c. 63, *s.* 40, "In all cases of indictments or informations, laid or exhibited in the said Court of King's Bench, for misdemeanors or offences committed in India, it shall and may be lawful for his Majesty's said Court, upon motion to be made on behalf of the prosecutor, or of the defendant or defendants, to award a writ or writs of mandamus, requiring the Chief Justice and Judges of the said Supreme Court of Judicature for the time being, or the Judges of the Mayor's Court at Madras (*e*), Bombay (*f*), or Bencoolen, as the case may require, who are hereby respectively authorized and required accordingly, to hold a Court with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations respectively, and in the meantime to cause such public notice to be given of the holding of the said

(*e*) This Court is abolished. See *R.* v. *Douglas*, 13 Q. B. 42; 37 G. 3, c. 142; 39 & 40 G. 3, c. 79; 4 G. 4, c. 71.

(*f*) See 24 & 25 V. c. 104; 28 & 29 V. c. 15, acts for establishing High Courts of Judicature in India instead of these Courts.

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Court, and to issue such summons or other process as may be requisite for the attendance of witnesses and of the agents or counsel of all or any of the parties respectively, and to adjourn, from time to time as occasion may require; any such examination as aforesaid shall be then and there openly and publicly taken *vivâ voce* in the said Court, upon the respective oaths of witnesses, and the oaths of skilful interpreters, administered according to the forms of their several religions, and shall, by some sworn officer of such Court, be reduced into one or more writing or writings on parchment, in case any duplicate or duplicates should be required by or on behalf of the parties interested, and shall be sent to his Majesty, in his Court of King's Bench, closed up, and under the seals of two or more of the Judges of the said Court; and one or more of the said Judges shall deliver the same to the agent or agents of the party or parties requiring the same: which said agent or agents (or, in case of his or their death, the person into whose hands the same shall come) shall deliver the same to one of the clerks in Court of his Majesty's Court of King's Bench, in the public office, and make oath that he received the same from the hands of one or more of the Judges of such Court in India (or, if such agent be dead, in what manner the same came into his hands), and that the same has not been opened or altered since he so received it (which said oath such clerk in Court is hereby authorized and required to administer); and such depositions being duly taken and returned, according to the true intent and meaning of this Act, shall be allowed and read, and shall be deemed as good and competent evidence as if such witness had been present, and sworn and examined *vivâ voce* at any trial for such crimes and misdemeanors as aforesaid in his Majesty's said Court of King's Bench, any law or usage to the contrary notwithstanding; and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges."

In actions or suits.

By *s.* 44, "When and as often as the said united company, or any person or persons whatsoever, shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen or shall hereafter arise in India against any other person or persons whatever, in any of his Majesty's Courts at Westminster, it shall and may be lawful for such Court respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a mandamus or commission, as aforesaid, to the Chief Justice and Judges of the said Supreme Court of Judicature for the time being, or the Judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses as aforesaid; and such examination, being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action, in the same manner, in all respects, as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated" (*g*).

In the colonies and abroad, within the dominions of her Majesty.

By 1 *W.* 4, *c.* 22, *s.* 1, after reciting that great difficulties and delays are often experienced, and sometimes failure of justice takes place, in actions depending in Courts of law, by reason of

(*g*) See *R.* v. *Jones*, 8 East, 31: *Francisco* v. *Gilmore*, 1 B. & P. 177: *Grillard* v. *Hogue*, 1 B. & B. 519; 4 Moore, 313.

the want of a competent power and authority in the said Courts to order and enforce the examination of witnesses, when the same may be required before the trial of a cause, and the above enactment of 13 *G.* 3, *c.* 63, *s.* 44, and that it is expedient to extend the powers and provisions therein; it is enacted, "that all and every the powers, authorities, provisions and matters contained in the said recited Act relating to the examination of witnesses in India shall be, and the same are hereby extended to all colonies, islands, plantations and places under the dominion of his Majesty in foreign parts (*h*), and to the Judges of the several Courts therein, and to all actions depending in any (*i*) of his Majesty's Courts of law at Westminster in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ of commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for."

When enactments apply.

When Enactments apply.]—These provisions do not apply to a case where the Crown is a party, at least where the application is not made on the part of the Crown (*k*). The Courts have jurisdiction under 1 *W.* 4, *c.* 22, to issue the writ into India, though the cause of action arose out of it (*l*). A *mandamus* cannot be issued to examine a witness in Scotland or Ireland; for these are not "foreign parts" within the meaning of 1 *W.* 4, *c.* 22, *s.* 1. In order to examine a witness before trial in either of those countries a commission must be issued, or a Judge's order obtained for the purpose (*m*). A *mandamus* will not in general be granted where the same end may be attained by a commission (*n*).

Obtaining mandamus, &c.

Obtaining Mandamus, &c.]—Under the former practice the application for leave to issue this writ had to be made to the Court; a Judge at Chambers could not order it (*o*). Looking at the words of the section this would appear to be so still, and it is submitted that it is so, though sect. 39 of the *Judicature Act*, 1873, might be held to justify an application to a Judge at Chambers. It should, in general, be made within the same time that an application should be made to examine a witness within the jurisdiction. As to which, *see ante*, p. 534. It should be founded on an

(*h*) This does not include Scotland. See *Wainwright* v. *Bland*, 1 Gale, 103; 3 Dowl. 653.

(*i*) *Savage* v. *Binney*, 2 Dowl. 643.

(*k*) *R.* v. *Wood*, 7 M. & W. 571; 9 Dowl. 310. See *R.* v. *Douglas*, 2 Dowl., N. S. 416. In *Att.-Gen.* v. *Reilly*, 13 M. & W. 676, a rule was granted to examine a witness on the part of the Crown, leaving open the question whether the examination would be admissible as evidence.

(*l*) *Bain* v. *De Vetry*, 3 Dowl. 516; 1 Gale, 52.

(*m*) *Wainwright* v. *Bland*, 1 Gale, 103; 3 Dowl. 653: *Norton* v. *Lamb*, 5 Dowl. 181: *Norton* v. *Lord Melbourne*, 3 Bing. N. C. 67; 3 Sc. 398. As to obtaining a judge's order, see Ord. XXXVII. r. 5, ante, p. 533. As to subpœnaing a witness who is in Scotland or Ireland, see post, p. 570.

(*n*) *Farnworth* v. *Hyde*, 14 C. B., N. S. 719.

(*o*) *Clarke* v. *East India Co.*, 6 D. & L. 278, B. C.; 18 L. J., Q. B. 23.

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affidavit, except when made on behalf of the Crown, when the statement of the Attorney-General, that the writ is necessary, is sufficient (*p*). The cases which have been decided as to the affidavit for a commission to examine witnesses abroad, and which will be found *ante*, p. 546, will, for the most part, apply here. Notice of the application to the Court must be given. Terms may be imposed upon granting the order, in the same way as when an order is granted for a commission to examine witnesses abroad (*see ante*, p. 548). Distance and the smallness of plaintiff's claim form no ground for refusing the writ (*q*).

The *mandamus* is directed to the Court which is to take the examinations (*r*). The writ must be sealed at the proper office and a stamped *præcipe* filed there at the time of issuing the writ. A *præcipe* impressed with the proper fee stamp can be purchased at a stationer's. *See Appendix.*

Proceedings after mandamus obtained.

Proceedings after Mandamus obtained.]—*Send out the writ to an agent in India, with full instructions to examine the witnesses, and he will get the writ executed.*

Compelling attendance of witnesses.

By 1 *W.* 4, *c.* 22, *s.* 2, "When any writ or commission shall issue under the authority of the said recited Act (13 *G.* 3. c. 63), or of the power hereinbefore (*s.* 1) given by this Act, the Judge or Judges to whom the same shall be directed shall have the like power to compel and enforce the attendance and examination of witnesses, as the Court whereof they are Judges does or may possess for that purpose in suits or causes depending in such Court."

Examination of same.

By 13 *G.* 3, *c.* 63, *s.* 40, the witnesses are to be examined *vivâ voce* in the Court to which the *mandamus* is directed, and their examinations are to be reduced into writing. Where a *mandamus* was directed to the Chief Justice and other Judges of the Supreme Court at Madras, and only the Chief Justice and one other Judge sat and took the examination, it was held that the *mandamus* was well executed (*s*).

Return of examinations.

The 13 *G.* 3, *c.* 63, *s.* 40, *ante*, p. 555, points out the way in which the examinations are to be returned to this country. The Judges of the Supreme Court at Madras, who took the examinations under a writ of *mandamus* for that purpose, made a return, stating that they had held a Court, and certifying that parchment writings which they transmitted were the examinations reduced into writing by *T.* and *O.*, the clerk and deputy clerk of the Crown, openly taken *vivâ voce* before the said Judges, on the oath of, &c. [witnesses] under the *mandamus;* and they certified that *T.* and *O.* were the clerk and deputy clerk, &c., and sworn officers of the Court. *T.* and *O.* added a certificate stating they were present, as clerk and deputy clerk, during the proceedings under the writ; and that the parchments annexed, containing the several examinations of *W. H. B.*, &c., witnesses, "are true and faithful copies of the *vivâ voce* examinations of the said *W. H. B.*," &c., "who were

(*p*) *R.* v. *Douglas*, 2 Dowl., N. S. 416.
(*q*) *Dye* v. *Bennett*, 9 C. B. 281.
(*r*) See *R.* v. *Douglas*, 13 Q. B. 44. See form of mandamus, Chit. Forms, p. 325.
(*s*) *R.* v. *Douglas*, 13 Q. B. 42; et per Cur., "Two out of the three judges might well compose a Court."

severally produced, sworn, and examined as witnesses, in pursuance of the said writ of *mandamus*, such parchment writings having been transcribed in the Crown Office from the original examinations of the several witnesses taken by us, the said" *T.* and *O.* " in open Court, as such clerk of the Crown and deputy clerk of the Crown as aforesaid, the same having been carefully collated and compared by us, the said" *T.* and *O.*, "as such officers as aforesaid, with such originals; and that the said examinations are subscribed by the said *W. H. B.*," &c., "respectively.' The examinations were not in the handwriting of *T.* or *O.*, nor did it appear by whom they had been transcribed: it was held, that the parchment writings so returned sufficiently appeared to be such examinations, reduced into writing, as were required by 13 *G.* 3, *c.* 63, *s.* 40, and were evidence on the trial of the information (*t*). Where one of the witnesses, examined under a writ of *mandamus* before the Court at Madras, gave in evidence certain original accounts, copies of which were returned to the Court of Queen's Bench by the Court at Madras, with the examinations, it was ruled by Lord *Denman*, that these copies were not receivable in evidence on the trial, and that the Court of Madras should have transmitted the original accounts (*u*).

As to the admissibility of the examinations at the trial, *see* the latter part of the 40th and 44th sects. of 13 *G.* 3, *c.* 63, *ante*, p. 556.

Costs of the proceedings.

Costs of the Proceedings.]—The costs are in the discretion of the Court or Judge. (*See Ord. LXV., post, Ch. LXVII.*) By 1 *W.* 4, *c.* 22, *s.* 3 (*x*), which is repealed by stat. 46 *&* 47 *V. c.* 49, it was provided that the costs of every writ or commission to be issued under the authority of 13 *G.* 3, *c.* 63, *s.* 44, or of the power given by 1 *W.* 4, *c.* 22, *s.* 1 (*ante*, p. 556), in any action at law depending in either of the said Courts at Westminster, and of the proceedings thereon, should be in the discretion of the Court issuing the same.

(*t*) *R.* v. *Douglas*, 13 Q. B. 42.

(*u*) *R.* v. *Douglas*, 1 C. & K. 670.

(*x*) As to the practice before this enactment, see Tidd, Suppl. 159: *Stephens* v. *Crichton*, 2 East, 259: *Taylor* v. *Royal Exchange Co.*, 8 East, 393: *Muller* v. *Hartshorne*, 3 B. & P. 556: *Fairlie* v. *Parker*, 1 M. & P. 438: *Savage* v. *Binney*, 2 Dowl. 643. Where defendant obtained depositions from India under 13 G. 3, c. 63, plaintiff was held entitled to copies at his own expense. *Davis* v. *Nicholson* or *Davidson* v. *Nicol*, 7 Bing. 358; 5 M. & P. 185; 1 Dowl. 220. And if the plaintiff gained the cause, he was held entitled to the costs of cross-examining those witnesses. *Whytt* v. *M'Intosh*, 8 B. & C. 317; 2 M. & R. 133.

CHAPTER LV.

WITNESSES—COMPELLING ATTENDANCE OF.

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2. *When they are out of the Jurisdiction, but within the United Kingdom* 570

[As to compelling the attendance of witnesses before an examiner, *see ante*, p. 537; before a referee, *see post, Ch. CXXXV.*; before an arbitrator, *see post, Ch. CXXXVI.*; at Chambers, *see post, Ch. CXXIII.*]

Sect. 1. *Compelling Attendance of Witnesses when they are within the Jurisdiction.*

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Subpœna, in what cases issued.

Subpœna.]—If it is not certain that a witness will attend at the trial voluntarily and give evidence, he must be served with a subpœna. It has been held that a person actually present in Court at the trial of a civil case is not guilty of a contempt of Court if he refuse to be sworn as a witness, unless he has been duly subpœnaed, and an attachment was refused (*a*).

A subpœna may now be issued by either party at any stage of the proceedings (*b*); but the Court has and will exercise a control over this privilege to prevent its being abused (*b*).

A subpœna is the proper mode of compelling the attendance of a witness before an examiner (*c*), but it cannot be issued to compel the attendance before an arbitrator (*d*).

Form of (*e*).

The subpœna, when the witnesses are within the jurisdiction, is directed to them by their christian and surnames, and commands them to attend at the time and place of trial, and from day to day, till the action is tried, to give evidence on behalf of the party who issues it (*e*). It has been considered that the writ may be issued in blank, and the name of the witness inserted after he has been served, and at the time he is called in Court (*f*); but this seems questionable. The writ must name the place of trial (*g*): also the

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(*a*) *Bowles* v. *Johnson*, 1 W. Bl. 37; 2 Bac. Ab. Ev. (D).

(*b*) *Raymond* v. *Tapson* (C. A.), 22 Ch. D. 430; 48 L. T. 453; 31 W. R. 394.

(*c*) *Stuart* v. *The Balkis Co.*, 59 L. J., Ch. 791; 50 L. T. 479; 32 W. R. 676.

(*d*) *Rooney* v. *Whiteley*, W. N. 1883, 225.

(*e*) By R. of S. C., Ord. XXXVII. r. 27, "A writ of subpœna shall be in one of the Forms 1 to 7 in Appendix J., with such variations as circumstances may require." See the forms, Chit. F. p. 328 *et seq.*

(*f*) *Wakefield* v. *Gall*, Holt, N. P. C. 526.

(*g*) *Milson* v. *Day*, 3 M. & P. 333.

parties in the action (*h*). When a subpœna in an action in the Common Pleas required the attendance of a witness in Westminster Hall, the Nisi Prius sittings being then held in a detached building called Westminster Sessions House: it was held, that, notwithstanding the apparent inconsistency of the writ, an attachment might be granted for disobedience to it, by reason of the witness neglecting to appear at the Nisi Prius Court, there being notices affixed to the walls of the Court in Westminster Hall directing witnesses to proceed to the Sessions House (*i*). A subpœna requiring the party to attend the trial of an action on the commission day of the assizes extends to the whole assizes, and it need not go on to require his attendance from day to day until the action is tried (*k*). But, where a subpœna required defendant's solicitor to appear on a particular day, but did not command him to appear "from day to day" after that day, and the action was postponed at the instance of defendant, and the solicitor did not appear on the day when the action was called on, the Court refused an attachment for disobedience to the subpœna (*l*). As to the date and teste of the writ, *see ante*, p. 320.

How issued—Præcipe.

By *R. of S. C., Ord. XXXVII. r.* 26, "Where it is intended to sue out a subpœna, a præcipe for that purpose, in the Form No. 21, in Appendix G., and containing the name or firm and the place of business or residence of the solicitor intending to sue out the same, and, where such solicitor is agent only, then also the name or firm and place of business or residence of the principal solicitor, shall in all cases be delivered and filed at the Central Office."

How sued out.

A blank form may be obtained at any law stationer's. A præcipe with a 5s. impressed fee stamp on it (see Orders as to Stamps and Fees, post, Vol. 2, App.) must be taken with the writ to the proper office, and the clerk there will stamp the writ and file the præcipe.

Make as many copies of the writ on paper as there are witnesses to be subpœnaed. In each copy it is the practice only to insert the name of the witness on whom it is to be served, although there are other names in the subpœna itself (*m*). Care must be taken that the copy is in other respects correct (*n*).

Number of witnesses.

By *r.* 29, "Every subpœna other than a *subpœna duces tecum* shall contain three names where necessary or required, but may contain any larger number of names."

Correction of errors.

By *r.* 31, "In the interval between the suing out and service of any subpœna the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ resealed upon leaving a corrected præcipe of such subpœna marked with the words "altered and resealed," and signed with the name and address of the solicitor suing out the same."

For attendance of witness at Chambers.

By *Ord. XXXVII. r.* 28, "Where a subpœna is required for the attendance of a witness for the purpose of proceedings in Chambers, such subpœna shall issue from the Central Office, upon a note from the Judge."

(*h*) *Doe* d. *Clarke* v. *Thomson*, 9 Dowl. 948.

(*i*) *Chapman* v. *Davis*, 1 Dowl., N. S. 239; 3 Sc. N. R. 238.

(*k*) *Scholes* v. *Hilton*, 10 M. & W. 15; 2 Dowl., N. S. 229.

(*l*) *Vaughton* v. *Brine*, 9 Dowl. 179.

(*m*) *Mullett* v. *Hunt*, 1 C. & M. 752.

(*n*) *Doe* d. *Clarke* v. *Thomson*, 9 Dowl. 948.

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Service of, how made.

By *Ord. XXXVII. r.* 32, "The service of a subpœna shall be effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ."

By *r.* 33, "Affidavits filed for the purpose of proving the service of a subpœna upon any defendant, must state when, where, and how, and by whom, such service was effected."

By *r.* 34, "The service of any subpœna shall be of no validity if not made within twelve weeks after the teste of the writ."

A copy of the subpœna must be personally (*o*) *served on, and left with the witness, and, at the same time, the subpœna must be produced and shown to him* (*p*), *and this whether he requires to see it or not* (*q*). The witness has also, perhaps, a right within a reasonable time after the service has been effected, to inspect the subpœna; and if inspection of it be refused, the service might be held bad (*r*).

Tender or payment of expenses, &c.

It may be sometimes advisable to inform the witness when it is likely his attendance will actually be required (*s*). *At the time of the service* (*t*) *the practice is to pay or tender to the witness* 1*s. in town actions, if he live within the weekly bills of mortality* (*u*); *or his reasonable expenses of going to, staying at, and returning from the place of trial, if he live at a greater distance, or the action is to be tried at the assizes* (*x*). It seems, however, that it is not absolutely necessary that these expenses should be tendered at the time of serving the writ, but that, if they be tendered to the witness a reasonable time before he is required to appear, it is sufficient (*y*). Where a witness, who is subpœnaed, but whose expenses are not tendered, attends at the trial, he may refuse to answer any questions until his expenses are paid to him (*z*); and where such a witness refused to be sworn, although his expenses were tendered to him at the trial, the Court refused to grant an attachment against him (*a*). It seems not necessary to pay or tender his expenses if they have

(*o*) *Smalt* v. *Whitmill*, 2 Str. 1054: *Garden* v. *Creswell*, 5 Dowl. 461; 2 M. & W. 319; 6 L. J., Ex. 84: *Wadsworth* v. *Marshall*, 1 C. & M. 87: *R.* v. *Sloman*, 1 Dowl. 618: *Jacob* v. *Hungate*, 3 Dowl. 456: *Smith* v. *Truscott*, 12 L. J., C. P. 336; 6 Sc. N. R. 808; 1 D. & L. 530.

(*p*) *Barnes* v. *Williams*, 1 Dowl. 615: *Thorpe* v. *Gisbourne*, 11 Moore, 55; 3 Bing. 223: *Wadsworth* v. *Marshall*, 1 C. & M. 87: *Jacob* v. *Hungate*, 3 Dowl. 456: *Smith* v. *Truscott*, 1 D. & L. 530; 6 Sc. N. R. 808: *Pitcher* v. *King*, 2 D. & L. 755: *Marshall* v. *York, Newcastle and Berwick R. Co.*, 11 C. B. 398.

(*q*) *R.* v. *Sloman*, 1 Dowl. 618.

(*r*) See ante, p. 232, as to service of a writ of summons.

(*s*) See *Blandford* v. *De Tastet*, 5 Taunt. 260.

(*t*) *Chapman* v. *Pointon*, 3 Str. 1150; 13 East, 16 a: *Fuller* v. *Prentice*, 1 H. Bl. 48: *Bowles* v. *Johnson*, 1 W. Bl. 36: *Horne* v. *Smith*, 6 Taunt. 9: *Ashton* v. *Haigh*, 2 Chit. 201. As to the mode of payment of fees and expenses when an officer of the Court is subpœnaed, see Orders, post, Vol. 2, App.

(*u*) *Jacob* v. *Hungate*, 3 Dowl. 456; 1 Sel. 454; but this does not seem absolutely requisite.

(*x*) *Newton* v. *Harland*, 1 Sc. N. R. 502; 1 M. & Gr. 956; 9 Dowl. 16: *Fuller* v. *Prentice*, 1 H. Bl. 48: *Ashton* v. *Haigh*, 2 Chit. 201. The Court of Queen's Bench has held that conduct money received with a subpœna to give evidence, may be recovered back by the party who paid it as money had and received to his use when the attendance of the witness becomes unnecessary, and no expenses or trouble have been incurred under the subpœna: *Martin* v. *Andrews*, 26 L. J., Q. B. 39; 7 E. & B. 1.

(*y*) *Whiteland* v. *Grant*, 4 Jur. 1061, B. C.: *Horne* v. *Smith*, 6 Taunt. 9: *Newton* v. *Harland*, supra.

(*z*) *In re Working Men's Mutual Society*, 21 Ch. D. 831; 51 L. J., Ch. 850, *Kay*, J.

(*a*) *Bowles* v. *Johnson*, 1 W. Bl. 36.

already been paid by the opposite party who has subpœnaed him (*b*). If the witness be a married woman, the money should be tendered to her, and not to her husband (*c*). The witness may waive his right to these expenses (*d*). The amount of them should be calculated according to the witness's station in life, and the circumstances under which he is placed, and the distance of his residence from the place of trial (*e*). And if he, at the time of the service of the subpœna on him, makes no objection on the ground of the amount tendered for his expenses being insufficient, but offers to bear his own expenses, he cannot avail himself of the insufficiency of the amount tendered as an answer to a motion for an attachment (*f*). Where the wife of an innkeeper in the country, residing sixty miles from the place of trial, accepted without objection a sum which was sufficient to pay the outside coach fare, but not the inside, and did not attend, and it appeared that she had an infant at her breast in delicate health, the Court refused an attachment against her on the ground that she was entitled to the inside fare, but without costs, as she did not require a further sum, observing that the party must resort to his action (*g*). A professional witness may claim compensation for loss of time (*h*); but an ordinary witness cannot do so as of right, though the Master, in his taxation of costs, may, in certain cases, allow the witness compensation for it (*h*). And except, perhaps, in the case of professional men, even though there be an express promise to pay a witness for loss of time, he could not maintain an action for it (*i*). The witness may refuse to appear or give evidence at the trial until the expenses which he is entitled to have been paid him (*k*). And in one case it was considered that a witness, who had come to, and stayed at, the assizes, on a subpœna, without requiring payment, might refuse to appear till payment of the expenses of his returning was made (*l*). He may also maintain an action for his expenses against the party on whose behalf he was subpœnaed at the trial, though he refused to give evidence unless his expenses were paid, and he was thereupon not examined (*m*). The solicitor of the party on whose behalf

Amount of.

No right to be paid for loss of time.

Witness's remedy for expenses.

(*b*) *Betteley* v. *M'Leod*, 5 Dowl. 481; 3 Bing. N. C. 405: *Edmonds* v. *Pearson*, 3 Car. & P. 113: *Allen* v. *Foxall*, 1 C. & K. 315.

(*c*) *Goodwin* v. *West*, Cro. Car. 522: *S. C.*, W. Jones, 430.

(*d*) *Newton* v. *Harland*, 1 Sc. N. R. 502; 1 M. & Gr. 956; 9 Dowl. 16, per *Tindal*, C. J.

(*e*) *Dixon* v. *Lee*, 3 Dowl. 259; 1 C. M. & R. 645. And see *Vice* v. *Anson*, M. & M. 96. In *In re Working Men's Mutual Society* (supra), an auctioneer was held entitled to first-class travelling expenses. As to what expenses the Master will allow on taxation, see post, Ch. LXVII.

(*f*) *Goff* v. *Mills*, 13 L. J., Q. B. 227; 2 D. & L. 23.

(*g*) *Dixon* v. *Lee*, 1 C. M. & R. 645; 3 Dowl. 259.

(*h*) As to this, and what will be allowed by the Master on taxation, see Ch. LXVII.: *In re Working Men's Mutual Society*, supra.

(*i*) See *Collins* v. *Godefroy*, 1 B. & Ad. 950; 1 Dowl. 326. See *Bentall* v. *Sydney*, 10 A. & E. 162; 2 P. & D. 416, where it was held that the senior clerk of the Petty Bag Office might recover for his attendance at a trial to produce the rolls of the Court of Chancery.

(*k*) *In re Working Men's Mutual Society*, supra.

(*l*) *Newton* v. *Harland*, 1 M. & Gr. 956; 1 Sc. N. R. 502; 9 Dowl. 16. And see *Bowles* v. *Johnson*, 1 W. Bl. 36: *Chapman* v. *Pointon*, 2 Stra. 1150; 13 East, 16 a.

(*m*) *Hallett* v. *Mears*, 13 East, 15. See *Webb* v. *Page*, 1 C. & K. 23: *Pell* v. *Daubeny*, 5 Ex. 955; 20 L. J., Ex. 44: *Hale* v. *Bates*, E. B. & E. 575; 28 L. J., Q. B. 14.

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the witness was subpœnaed is not liable for these expenses unless he expressly pledged his credit for the payment of them, and the witness gave credit to him, and him only, accordingly (*n*).

Time of service of subpœna.

The subpœna must be served before the time mentioned in it for the witness's attendance (*o*). Where, however, the subpœna required the attendance of the witness on 31st March, and so on from day to day till the cause should be tried, and it was served on 2nd April, with notice that sufficient time remained for witness to repair to the place of trial, and the trial took place on 6th, when plaintiff was nonsuited for want of the witness's evidence; it was held, that the witness was liable to an action for disobeying it (*p*); but, perhaps, such service would not suffice to render him liable to an attachment (*o*). It should be served a reasonable time before the trial, so as to give the witness reasonable time to put his affairs in such order that his attendance may be as little prejudicial to himself as possible (*q*). Whether it has been so served is a question for the Court (*r*). What is a reasonable time depends upon the circumstances of each particular case: where a witness was served at twelve o'clock, while he was standing on the steps of the Court house, and was told that the trial would come on the same day, which it did at five o'clock, it was held that the service was sufficient (*s*). Where a person subpœnaed was placed in charge of a quantity of malt in the process of manufacture by his master, who was a maltster, resident at a considerable distance, with strict injunctions not to leave it night or day, as it required constant watching, it was held, that this was not a reasonable excuse for disobeying the subpœna, although it was served upon him so short a time before the trial as not to admit of his communicating with his master (*t*). On the other hand, a service in London at two o'clock in the afternoon, for a witness to attend the sittings at Westminster on the same afternoon, has been held to be too short (*u*). The service may be made at any hour, and on any day, except a Sunday.

(*n*) *Robins* v. *Bridge*, 6 Dowl. 140; 3 M. & W. 114. See *Fendall* v. *Nokes*, 7 Sc. 647, where it was held, that the mere circumstance of a party being the solicitor in the cause will not make him responsible for refreshments supplied by a coffee-house keeper to the witnesses while attending the trial. But the fact of his being found in communication with the witnesses at the coffee-house is some evidence to go to the jury that the supplies were sanctioned by him.

(*o*) *Alexander* v. *Dixon*, 1 Bing. 366.

(*p*) *Davis* v. *Lovell*, 7 Dowl. 178; 4 M. & W. 678.

(*q*) *Hammond* v. *Stewart*, 1 Str. 510.

(*r*) *Barber* v. *Wood*, 2 M. & R. 172.

(*s*) *Maunsell* v. *Ainsworth*, 8 Dowl. 869; *Jackson* v. *Seager*, 2 D. & L. 13; 13 L. J., Q. B. 217, where the solicitor of defendant was served just before ten o'clock at night at his residence at Chelsea, to produce papers which were at his chambers in Symond's Inn, on the trial of the cause which stood in the list for trial on the following day, next after a special jury action, which, it was believed, would last a considerable time; the solicitor, being clerk to a board of guardians, had previously made arrangements to perform his duty in that capacity, and was absent when the cause came on at ten o'clock on the following morning, in consequence of the unexpected termination of the special jury cause, and it was held, that these facts were no sufficient excuse, and that an attachment might issue against him. See *Pitcher* v. *King*, 2 D. & L. 755; 14 L. J., Q. B. 99.

(*t*) *Goff* v. *Mills*, 2 D. & L. 23; 13 L. J., Q. B. 227.

(*u*) *Hammond* v. *Stewart*, 1 Str. 510; *Sims* v. *Kitchen*, 5 Esp. 46; Tidd, 806. See *Barber* v. *Wood*, 2 M. & Rob. 172.

How long in force.

Subpœnas remain in force only till the end of the sitting or assize for which they were issued. A new writ must afterwards be issued, or the former writ may be (at the option of the parties) altered as to date and sitting, or assize, and re-issued as a new writ (*x*).

Amendment of.

The date of return in the writ and præcipe may, before service, be amended without the direction of a Master, and without fee, provided the amended date be within the sitting or assize for which the subpœna issued (*x*).

Re-sealing where cause a remanet.

If the action be made a remanet, the subpœna must be re-sealed, and a copy of it again served (*y*).

Subpœna duces tecum.

Subpœna duces tecum.]—If a person, even a party to the action (*z*), have in his possession any written instrument, &c., which could be evidence for a party at the trial, instead of the common subpœna, he must be served with a *subpœna duces tecum*, commanding him to bring the written instrument with him and produce it at the trial (*a*).

By *Ord. XXXVII. r.* 30, "No more than three persons shall be included in one *subpœna duces tecum*, and the party suing out the same shall be at liberty to sue out a subpœna for each person if it shall be deemed necessary or desirable."

Let the writ be stamped at the proper office and a copy served, and the witness's expenses (if he be entitled to any) paid or tendered, in the same manner as in the case of the common subpœna (*b*).

By *Ord. LXI. r.* 28, "No affidavit or record of the Court shall be taken out of the Central Office without the order of a Judge or Master, and no subpœna for the production of any such document shall be issued." It seems that neither the Master of the Rolls nor the senior clerk in the Petty Bag Office can be compelled to produce the rolls of the Court of Chancery upon a *subpœna duces tecum*, but that the proper mode of obtaining their production at a trial is to apply to the senior clerk of the Petty Bag Office to get an order from the Master of the Rolls for their production, which order the former will procure, and will produce the rolls at the trial, upon being served with a *subpœna duces tecum* for such purpose (*c*). If the subpœna is served on a public officer, and his personal attendance be required, he must be informed of it at the time of service; otherwise the Court will not grant an attachment against him for not personally attending (*d*).

By *Ord. LXI. r.* 29, "Any officer of the Central Office, being required to attend with any record or document at any assizes or

(*x*) See Masters' Practice Rules, Vol. 2, App.

(*y*) *Anon.*, 23rd June, 1792, M.S.: *Sydenham* v. *Bond*, 2 Tidd, 855; 3 Doug. 429: *Barber* v. *Wood*, 2 M. & Rob. 172.

(*z*) See 14 & 15 V. c. 99. See *Colley* v. *Smith*, 6 Dowl. 399, a case before this Act.

(*a*) See the form, Chit. Forms, p. 328. As to the præcipe, and the fee stamp on same, see ante, p. 561.

(*b*) As to the mode of payment of fees and expenses when an officer of the Court is subpœnaed, see Orders as to Stamps and Fees, post, Vol. 2, App.

(*c*) *Bentall* v. *Sydney*, 10 Ad. & E. 162; 2 P. & D. 416. The form of the order will be found in the report of this case. See Jud. Act, 1873, s. 17, sub-s. 6.

(*d*) *Bennett* v. *Jones*, 2 Chit. Rep. 403. Where an inferior clerk in a public office is subpœnaed to produce a document, it may sometimes be necessary to communicate with his principal on the subject. See *Austen* v. *Evans*, 9 Dowl. 498.

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at any Court or place out of the Royal Courts of Justice, shall be entitled to require that the solicitor or party desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges, and expenses in respect of such attendance, and undertake to pay any further just fees, charges, and expenses which may not be fully answered by such deposit."

When witness excused from producing document (*e*).

Upon being served with a copy of this subpœna, the witness must attend at the trial with the document required, and produce it in evidence, unless he have some lawful or reasonable excuse for withholding it, of the validity of which excuse the Court, and not the witness, is to judge (*f*). The witness has no right to have the question of his liability to produce argued by counsel retained for that purpose (*g*). It is no excuse that the legal custody of the document belongs to another, if it be in the actual possession of the witness (*h*); or that the production of the document is not material (*i*). But, if the document required to be produced would, if disclosed, subject the party to a criminal charge or penalty (*k*), or if it be his title deed (*l*), or, if he be a solicitor, his client's (*m*) title deed, or if he be a clerk in a public office, and he is called upon to produce an official paper, which his principal has not given him leave to produce (*n*), the Court will not compel him to produce it. When the production of a document is excused, secondary evidence may be given of its contents (*o*). But this cannot be done if the witness improperly neglect or refuse to produce the document (*p*). If the witness, instead of bringing the papers, &c. required, deliver them to the opposite party, by whom they are withheld, the Court will allow secondary evidence of the contents

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(*e*) As to when a bank is not compellable to produce its books unless a judge so orders, see 39 & 40 V. c. 48, s. 6, ante, p. 532.

(*f*) *Ex p. Reynolds, In re Reynolds*, 20 Ch. D. 294; 51 L. J., Ch. 756: *Amey* v. *Long*, 9 East, 473. And see *Pearson* v. *Fletcher*, 5 Esp. 90. It seems, that, if a judge improperly overrule a privilege claimed by a witness, and compel him to produce documents in evidence, which are good evidence in the cause, the Court cannot review the decision of the Judge at the instance of a party to the suit. *Doe* d. *Earl of Egremont* v. *Dale*, 3 Q. B. 609, *dub.* Lord *Denman*, C. J. See *Doe* v. *James*, 2 M. & Rob. 47.

(*g*) *Doe* d. *Rowcliffe* v. *Egremont* (*Earl*), 2 M. & Rob. 386.

(*h*) *Amey* v. *Long*, 9 East, 473; 1 Camp. 14, 180 a; 6 Esp. 116: *Corsen* v. *Dubois*, Holt, 239. See *Roberts* v. *Simpson*, 2 Stark. 203: *Doe* v. *Dale*, 6 Jur. 990, Q. B.

(*i*) *Doe* v. *Kelly*, 4 Dowl. 273.

(*k*) *Roe* v. *Harvey*, 4 Burr. 2484: *Whitaker* v. *Izod*, 2 Taunt. 115.

(*l*) *Pickering* v. *Noyes*, 1 B. & C. 263; 2 D. & R. 386: *R.* v. *Upper Boddington*, 8 D. & R. 726: *Doe* d. *Carter* v. *James*, 3 M. & Rob. 47: *Doe* d. *Bowdler* v. *Owen*, 8 Car. & P. 110: *Hodson* v. *Warden*, 1 D. & L. 286. Secondary evidence of the deed can be given on refusal to produce. See *Doe* d. *Gilbert* v. *Ross*, infra: *Mills* v. *Oddy*, 6 Car. & P. 728.

(*m*) See *Harris* v. *Hill*, 3 Stark. 140: *Ditcher* v. *Kenrick*, 1 Car. & P. 161. As to a solicitor being compelled to produce a document upon which he has a lien, see ante, p. 503.

(*n*) *Austin* v. *Evans*, 2 M. & G. 430. And see *Lord Falmouth* v. *Ross*, 11 Price, 455, where the witness was the plaintiff's steward. See *Crowther* v. *Appleby*, 43 L. J., C. P. 7: *Beatson* v. *Skene*, 6 Jur., N. S. 780; 5 H. & N. 838; 29 L. J., Ex. 430, where it was objected that the production of a document was injurious to the public interests.

(*o*) *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102. See *Marston* v. *Downes*, 1 Ad. & E. 31.

(*p*) *R.* v. *Inhabs. of Llanfaethly*, 23 L. J., M. C. 33.

of them to be given, without a notice to produce the originals (*q*). A witness producing papers under a *subpœna duces tecum* need not be sworn unless he be examined (*r*). Even where the witness producing a document was sworn, but by mistake, and a question asked, but to which he made no answer, it was held that the opposite party had no right to cross-examine him (*s*). A witness being sworn, and having a document in his possession, was held bound to produce it, although he had not been served with a *subpœna duces tecum* (*t*).

Witness need not be sworn.

Habeas Corpus ad testificandum.]—If the witness be in custody on civil process at the time of the trial, he may be brought into Court to give evidence by a writ of *habeas corpus ad testificandum* (*u*). This writ is obtained upon application to a Judge at Chambers, and not to the Court (*x*), founded upon an affidavit, intituled in the Court and cause (*y*), stating that the party is a material witness in custody, and willing to attend (*z*). It would seem that a sailor on board a Queen's ship under the command of an officer who refuses to allow him to attend at the trial, though h[illegible]willing to do so, may be brought up by this writ (*a*), and that [illegible] be obtained to bring up the body of a confined lunatic to [illegible] evidence in a cause, upon an affidavit showing that he is not a dangerous lunatic, and that he is in a fit state to be brought up (*b*). But it will not be granted to bring up a prisoner of war; the proper way of proceeding in that case being by application to the Secretary of State (*c*). Where the application appeared to be a mere contrivance to remove a prisoner in execution, the writ was refused (*d*). The Judge, upon being satisfied that it ought to be granted, will grant his fiat for it. *The writ must be directed to the officer in whose custody the witness is* (*e*). *Take the writ and affidavit to*

Habeas corpus ad testificandum where witness is in custody on civil process, &c.

How obtained, and proceedings on.

(*q*) *Leeds* v. *Cook*, 4 Esp. 256.
(*r*) *Davis* v. *Dale*, 1 M. & M. 514: *Perry* v. *Gibson*, 1 Ad. & E. 48; 3 N. & M. 462: *Summers* v. *Mosely*, 4 Tyr. 158.
(*s*) *Rush* v. *Smith*, 1 C. M. & R. 94.
(*t*) *Snelgrove* v. *Stevens*, Car. & M. 508.
(*u*) See *Geery* v. *Hopkins*, 2 Ld. Raym. 851; 7 Mod. 129: *R.* v. *Burbage*, 3 Burr. 1440: *Leigh* v. *Sherry*, 2 Moore, 33: *Burdus* v. *Shorter*, Barnes, 222; Comb. 17, 48. As to compelling attendance of witnesses by *habeas corpus* before an election committee of the House of Commons, see *Re Pilgrim*, 3 Ad. & E. 485, nom. *Rex* v. *Pilgrim*, 4 Dowl. 89: *Re Sir Edward Price*, 4 East, 587.
(*x*) *Browne* v. *Gisborne*, 2 Dowl., N. S. 963. See *Gordon's case*, 2 M. & S. 582: and *Fennell* v. *Tait*, 1 C. M. & R. 584.
(*y*) *R.* v. *Sayer*, Fost. 396.
(*z*) See the form, Chit. Forms, p. 332. See *R.* v. *Murray*, 2 Tidd, 809, n. It is said in Chit. Cr. Law, 610, that the affidavit of readiness to attend only applies when the party is on board ship, and not then in all cases.
(*a*) *R.* v. *Roddam*, Cowp. 672. See 43 G. 3, c. 140; 44 G. 3, c. 102.
(*b*) See Com. Dig. Testm. A. 1.
(*c*) *Furly* v. *Newnham*, 2 Doug. 419.
(*d*) *R.* v. *Burbage*, 3 Burr. 1440.
(*e*) By "The Prison Act, 1865," (28 & 29 V. c. 126, which by sect. 3 does not extend to Scotland or Ireland, and does not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prisons), s. 61, "Any writ, warrant, or other legal instrument addressed to the gaoler of a particular prison, describing the prison by its situation or other definite description, shall be valid, by whatever title such prison is usually known or whatever be the description of the prison, whether gaol, house of correction, bridewell, penitentiary, or otherwise." By sect. 57, "Every prison wheresoever

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a Judge at Chambers, and he will indorse his name upon the writ (f). Then take the writ, together with the præcipe, which can be purchased at a law stationer's with the impressed fee stamp on it (g), to the proper office, and the clerk there will seal it. Then leave the writ with the officer to whom it is directed. Pay or tender to him his reasonable charges for bringing up the witness, and the officer will bring the witness into Court on the day of trial, according to the exigency of the writ. If the officer disobey the writ, he will be subject to an attachment.

New writ where cause postponed without further fee.

By *Ord. XXXVI. r.* 35, "Where a party is brought up to attend the trial or hearing of a cause or matter by virtue of any writ of *habeas corpus* duly issued from the Central Office, and by reason of the pressure of other business, or from any other cause, the trial or hearing of the cause or matter in which such party is concerned is postponed to a future day, a new writ of *habeas corpus* may be issued for such future day, if the Court or a Judge shall so direct, without payment of any fee."

Warrant or order to bring up prisoner not in custody under civil process to give evidence.

Warrant or Order to bring up Prisoner not in Custody under Civil Process to give Evidence.]—By 16 & 17 *V. c.* 30, *s.* 9, "It shall be lawful for one of her Majesty's principal Secretaries of State, or any Judge of the Court of Queen's Bench or Common Pleas, or any baron of the Exchequer, in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand, for bringing up any prisoner or person confined in any gaol, prison or place, under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit or proceeding) before any Court, Judge, justice or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such Court, Judge, justice or judicature; and the person required by any such warrant or order to be so brought before such Court, Judge, justice or other judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of her Majesty's superior Courts of law at Westminster to be brought before such Court to be examined as a witness in any cause or matter depending before such Court, is now by law required to be dealt with."

Privilege of witnesses from arrest.

Privilege of Witnesses from Arrest.]—As to this, *see Ch. CXXVII.*

Punishment for not obeying subpœna.

Punishment for not obeying the Subpœna, &c.]—There are three ways of proceeding against a person who refuses or neglects to attend a trial, after being regularly served with a subpœna for that purpose: by attachment; by action on the stat. 5 *El. c.* 9; and by action at common law.

Attachment.

The Court will, in general, grant an attachment against a

situate shall for all purposes be deemed to be within the limits of the place for which it is used as a prison." And by sect. 4, "gaoler" shall mean governor, keeper, or other chief officer of a prison. See 40 & 41 V. c. 21, s. 60, post, Ch. CV.

(*f*) *R.* v. *Roddam*, Cowp. 672.

(*g*) See form, Chit. Forms, p. 333. As to the impressed stamp on the præcipe, see Order as to Stamps, post, Vol. 2, App.

witness, if he, in contemptuous disregard of the process of the Court (*h*), do not attend a trial when duly served with a subpœna for that purpose (*i*), whether the cause were called on or not (*k*), provided a copy of the subpœna was served a reasonable time before the trial (*l*), the witness was personally served with it (*m*), the original was at the same time shown him (*n*), and his reasonable expenses (*m*), when he was entitled to them, were paid, or tendered to him at the time of service (*o*), or, it seems, a reasonable time before he was required to appear (*o*), and there has been no unreasonable delay in applying for the attachment (*p*). It seems that the Court will grant the attachment, though the witness was not called on his subpœna, if it be clearly shown that he was absent at the time his testimony was required (*q*). If the witness be called on his subpœna, it is not indispensable for the granting of an attachment for his disobedience, that, when he is so called, the officer of the Court should hold the writ in his hand; it is sufficient that the writ should be exhibited in Court, and the officer call him three times (*r*). But to warrant an attachment against a party for not attending or not producing documents pursuant to a subpœna, it must be made out to the satisfaction of the Court that his non-attendance or neglect to produce the documents was the result of a contemptuous disregard of the process of the Court (*s*). Therefore, where, in answer to a motion for an attachment, the witness swore, that he had been for some time in bad health; that, on the day before the trial came on, he had been in readiness to attend and give evidence; that, on the morning of the trial, he was unwell, and did not rise until ten o'clock, and that, on going shortly afterwards to his office, which was in his way to the Court, he found the cause had been tried; the Court refused the rule (*t*). If it clearly appears that the subpœna was served merely for the purpose of vexation and annoyance to the witness, and that his presence would have been of no use to the party subpœnaing him,

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(*h*) See *Chapman* v. *Davis*, 4 Sc. N. R. 319; 3 M. & G. 609; 1 Dowl., N. S. 239: *R.* v. *Lord John Russell*, 7 Dowl. 693: *Scholes* v. *Hilton*, 10 M. & W. 15; 2 Dowl., N. S. 229.

(*i*) *Hammond* v. *Stewart*, 1 Stra. 510: *Wyatt* v. *Wingford*, 2 Stra. 80; 2 Ld. Raym. 1528: *Doe* d. *Jupp* v. *Andrews*, Cowp. 845: *Pearson* v. *Iles*, 2 Doug. 556. See *Blandford* v. *De Tastet*, 5 Taunt. 260; 1 Marsh. 42: *Holme* v. *Smith*, 6 Taunt. 9; 1 Marsh. 410.

(*k*) *Lamont* v. *Crook*, 6 M. & W. 615; 8 Dowl. 737: *Barrow* v. *Humphreys*, 3 B. & Ald. 598.

(*l*) Ante, p. 564.

(*m*) Ante, p. 562.

(*n*) *Smith* v. *Truscott*, 1 D. & L. 530; 6 Sc. N. R. 808; 12 L. J., C. P. 336.

(*o*) Ante, p. 562.

(*p*) Tidd, 723: *R.* v. *Stretch*, 4 Dowl. 30; 3 A. & E. 503. In that case, where the trial was on 11th December, and the application was not until 23rd April, the Court refused it.

(*q*) *Goff* v. *Mills*, 2 D. & L. 23; 13 L. J., Q. B. 227, per Cur.: *Malcolm* v. *Ray*, 3 Moore, 222: *R.* v. *Stretch*, 3 Dowl. 363: *Re Jacobs*, 1 H. & W. 123.

(*r*) *R.* v. *Fenn*, 3 Dowl. 546. It is at all events necessary that the writ should be produced. *Langley* v. *Faircross*, C. P., 8th November, 1844.

(*s*) *Chapman* v. *Davis*, 4 Sc. N. R. 319; 3 M. & G. 609; 1 Dowl., N. S. 239: *R.* v. *Lord John Russell*, 7 Dowl. 693: *Scholes* v. *Hilton*, 10 M. & W. 15; 2 Dowl., N. S. 229: *Dixon* v. *Lee*, 1 C. M. & R. 645: *Netherwood* v. *Wilkinson*, 17 C. B. 226: *Crowther* v. *Appleby*, 43 L. J., C. P. 7.

(*t*) *Scholes* v. *Hilton*, 10 M. & W. 15; 2 Dowl., N. S. 229.

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the Court will refuse an attachment against him (*u*). Illness is a sufficient excuse for his not attending (*x*). So is leave of absence given by the solicitor of the party who has subpœnaed him (*y*). The affidavit for the attachment must distinctly show all that is requisite to bring the party into contempt (*z*); *ex. gr.* that he was a material witness, &c. (*a*). As to proceedings by attachment, *see post*, *Ch. LXXXIII.*

Action under 5 El. c. 9.

Also, by stat. 5 *El. c.* 9, *s.* 12, if a person, being regularly subpœnaed as a witness, and having his expenses tendered to him, and not having any reasonable or lawful impediment, do not appear according to the tenor of the process, he shall forfeit 10*l.*, and shall pay such damages to the party grieved as to the Court out of which the process was awarded shall seem meet. These damages must be assessed by the Court, and not by the jury or Judge at Nisi Prius, and an action will lie afterwards on such assessment (*b*).

Action at common law.

Or, instead of this action on the statute, the party injured may have an action against the witness for his non-attendance (*c*), when his evidence was wanted (*d*), or for his not producing papers required of him by a *subpœna duces tecum* (*e*). An action will lie, although, in consequence of the witness's absence, the cause was not called on, or the jury sworn (*f*). Nor is it necessary to maintain the action to show that the defendant was called on his subpœna by the officer of the Court, if it be shown by other satisfactory evidence that he was not present at the proper time and place when he was required to give evidence, or even that he was absent when the cause was called on for trial, under such circumstances that he could not have been forthcoming when required to give evidence (*g*). Actual damage must be sustained in order to maintain the action (*h*).

Sect. 2. *Compelling Attendance of Witnesses when out of the Jurisdiction but within the United Kingdom.*

Enactments as to.

Enactments as to.]—The 17 *&* 18 *V. c.* 34, recites that "great inconvenience arises in the administration of justice from the want of a power in the superior Courts of law to compel the attendance

(*u*) *Dicas* v. *Lawson*, 3 Dowl. 427.

(*x*) *Re Jacobs*, 1 H. & W. 123. See *Scholes* v. *Hilton*, supra.

(*y*) *Farrah* v. *Keat*, 6 Dowl. 470.

(*z*) See *Garden* v. *Creswell*, 2 M. & W. 319; 5 Dowl. 461; 6 L. J., Ex. 84.

(*a*) *Tinley* v. *Porter*, 5 Dowl. 744. And see *Chapman* v. *Davis*, supra: *R.* v. *Lord John Russell*, supra. Though it seems it is not sufficient, in answer to an application for an attachment against a witness for disobedience to a subpœna, to show that his evidence was not material. Id.: *Scholes* v. *Hilton*, supra.

(*b*) *Pearson* v. *Iles*, 2 Doug. 556, 561.

(*c*) *Pearson* v. *Iles*, 2 Doug. 556. See *Mullett* v. *Hunt*, 1 C. & M. 752: *Davis* v. *Lovell*, 4 M. & W. 678; 7 Dowl. 178: *Maunsell* v. *Ainsworth*, 8 Dowl. 869.

(*d*) See *Lamont* v. *Crook*, 6 M. & W. 615; 8 Dowl. 737.

(*e*) *Amey* v. *Long*, 9 East, 473; 1 Camp. 14, 180a.

(*f*) *Mullett* v. *Hunt*, 1 C. & M. 752: *Hopper* v. *Smith*, Mood. & M. 115: *Lamont* v. *Crook*, supra: overruling *Bland* v. *Swafford*, Peake, 60.

(*g*) *Lamont* v. *Crook*, supra: *Yeatman* v. *Dempsey*, infra.

(*h*) *Couling* v. *Coxe*, 6 D. & L. 399; 6 C. B. 703; 18 L. J., C. P. 100: *Yeatman* v. *Dempsey*, 7 C. B., N. S. 628; 29 L. J., C. P. 177.

of witnesses resident in one part of the United Kingdom at a trial in another part, and the examination of such witnesses by commission is not in all cases a sufficient remedy for such inconvenience."

Subpœna may issue upon obtaining order for that purpose.

By *s.* 1, "If, in an action or suit now or at any time hereafter depending in any of her Majesty's Superior Courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the Court (*i*) in which such action is pending, or if such Court is not sitting, to any Judge of any of the said Courts respectively (*i*), that it is proper to compel the personal attendance at any trial (*k*) of any witness (*l*) who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such Court or Judge, if in his or their discretion it shall so seem fit, to order that a writ, called a writ of *subpœna ad testificandum* or of *subpœna duces tecum* or warrant of citation, shall issue in special form, commanding such witnesses to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the Court from which it issues."

Statement at foot of writ that it is issued by order.

By *s.* 2, "Every such writ shall have at foot thereof a statement or notice that the same is issued by the special order of the Court or Judge, as the case may be; and no such writ shall issue without such special order."

Witnesses making default how to be punished.

By *s.* 3, "In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the Court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said Court, to transmit a certificate of such default under the seal of the same Court, or under the hand of one of the Judges or justices of the same, to any of her Majesty's Superior Courts of Common Law at Westminster in case such service was had in England, or in case such service was had in Scotland to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland to any of her Majesty's Superior Courts of Common Law at Dublin; and the Court to which such certificate is so sent shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to the writ of subpœna or other process issued out of such last-mentioned Court" (*m*).

Persons not to be punished if expenses not tendered.

By *s.* 4, "None of the said Courts shall in any case proceed against or punish any person for having made default by not appearing to give evidence in obedience to any writ of subpœna or

(*i*) A judge has now power to make the order when the Court is sitting. See Jud. Act, 1884, *s.* 16, post, p. 572.

(*k*) This act is not available to compel the attendance of a person in Ireland as a witness before an arbitrator upon a compulsory reference: *O'Flanagan* v. *Geoghegan*, 16 C. B., N. S. 636: or a reference by consent of the action and all matters in difference: *Hall* v. *Brand*, 12 Q. B. D. 39; 53 L. J., Q. B. 19; 49 L. T. 492; 32 W. R. 133.

(*l*) See *Harris* v. *Barber*, 25 L. J., Q. B. 98, where the Court ordered a subpœna to issue to compel the attendance of the plaintiff.

(*m*) As to the mode of proceeding when a witness within the jurisdiction neglects to attend in obedience to a subpœna, see ante, p. 568.

PART VI.

other process issued under the powers given by this Act, unless it shall be made to appear to such Court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person" (*n*)

Commission to examine witnesses may still be issued.

By *s.* 5, "Nothing herein contained shall alter or affect the power of any of such Courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission." (*See ante*, p. 545.)

Act not to affect the admissibility of evidence.

By *s.* 6, "Nothing herein contained shall alter or affect the admissibility of any evidence at any trial where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court; but the admissibility of all such evidence shall be determined as if this Act had not passed." (*See ante*, p. 541.)

Application may be made to Judge although Court sitting.

By the Judicature Act, 1884 (47 & 48 *V. c.* 61), *s.* 16, "Section one of the Act seventeen and eighteen Victoria chapter thirty-four entitled, 'An Act to enable Courts of Law in England, Ireland, and Scotland to issue process to compel the attendance of witnesses out of their jurisdiction, and to give effect to the service of such process in any part of the United Kingdom,' is hereby amended so as to authorize and empower a Judge of the High Court to make orders as therein mentioned as well when the Court is sitting as at any other time."

Practical directions as to.

Practical Directions as to.]—*Make an affidavit stating that the action is pending, the nature of it, and the issue to be tried. In some cases it may be advisable to make the pleadings an exhibit to the affidavit. Show by the affidavit where the witness proposed to be examined is residing, and that he is a material and necessary witness for the party making the application upon the trial of the cause* (*o*). *It is advisable to show what is the nature of the evidence he will give. Any other facts should be stated, showing the necessity for the personal attendance of the witness at the trial* (*p*).

Indorsement.

Indorse the affidavit thus: "Affidavit in support of application for an order for a writ of subpœna to compel the attendance of W. W. [*the witness*] as a witness at the trial of this action." *Take the affidavit to a Judge at Chambers, and apply ex parte for the order. It is not necessary to take out a summons or to give a notice of motion* (*q*). *If the Judge is satisfied with the affidavit, he will indorse on it an order for the subpœna to issue. It is not necessary to draw up the order* (*Ord. LII. r.* 14). *Take the affidavit indorsed by the Judge, with a præcipe, which can be purchased at a law stationer's with the impressed fee stamp on it, and the subpœna to the proper office, and get the subpœna stamped there. The form of the subpœna will be*

(*n*) As to tendering a witness's necessary expenses when he is within the jurisdiction, see ante, p. 562.

(*o*) The affidavit must show that he is reasonably necessary: *Allen* v. *Duke of Hamilton*, L. R., 2 C. P. 630.

(*p*) See form of affidavit, Chit. Forms, p. 331.

(*q*) *Readman* v. *Broers*, 1 Jur., N. S. 1052, *Alderson*, B.: *Harris* v. *Barber*, 25 L. J., Q. B. 98.

found in Chit. Forms. It is issued in the same way as a subpœna is issued, where the witness is within the jurisdiction. As to which, see ante, p. 561.

Where an action and all matters in difference have been referred to arbitration, there is no jurisdiction to make the order for the issue of the subpœna (*r*).

Service of subpœna.

The subpœna should be served in the same way as a subpœna issued to a witness within the jurisdiction is served. A reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, must be tendered to the witness at the time when the writ is served (*s*).

Punishment of witnesses making default.

The 17 & 18 *V. c.* 34, *s.* 3, *ante*, p. 571, points out how witnesses making default are to be punished.

(*r*) *Hall* v. *Brand*, 12 Q. B. D. 39; 52 L. J., Q. B. 19; 49 L. T. 492.

(*s*) See s. 4, ante, p. 571. As to the expenses to be tendered to a witness when he is within the jurisdiction, see ante, p. 562.

CHAPTER LVI.

EVIDENCE AT TRIAL BY AFFIDAVIT BY CONSENT.

PART VI.

Agreement to take evidence at trial by affidavit.

It is competent to the parties to agree that the evidence at the trial of an action shall be taken by affidavit instead of *viva voce*. (*See R. of S. C., Ord. XXXVII. r.* 1, *ante*, p. 452.) The agreement may, it would seem, be confined to the evidence of particular facts, or, at all events, an order by consent that the evidence as to particular facts should be given by affidavit could clearly be made. (*See Id.*) This mode of giving evidence is rarely, if ever, adopted in the Queen's Bench Division. A guardian *ad litem* to an infant may consent to the evidence being taken by affidavit (*a*). Notwithstanding the consent of the parties the Court may order that the witnesses be examined *viva voce* (*b*).

The agreement.

The Agreement.]—The agreement to take the evidence should be in writing (*c*). It should be formally drawn up and signed and not be left to be collected from correspondence (*c*).

The Affidavits.]—As to the form of the affidavits, *see ante*, *Ch. XLIV.*, "*Affidavits.*"

Filing affidavits; —plaintiff's;

Filing Affidavits—Plaintiff.]—By *R. of S. C., Ord. XXXVIII. r.* 25, "Within *fourteen days* after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon, or the Court or a Judge may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof."

—defendant's;

Defendant's Affidavits.]—By *r.* 26, "The defendant, within *fourteen days* after delivery of such list, or within such time as the parties may agree upon, or the Court or a Judge may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof."

—in reply.

Affidavits in reply.]—By *r.* 27, "Within *seven days* after the expiration of the last-mentioned fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof."

The affidavits in reply need not be confined to matters contra-

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(*a*) *Knatchbull* v. *Fowle*, 1 Ch. D. 604; 24 W. R. 629: *Fryer* v. *Wiseman*, 45 L. J., Ch. 199; 33 L. T. 779.

(*b*) *Lovell* v. *Wallis*, 49 L. T. 593; 53 L. J., Ch. 494.

(*c*) *New Westminster Brewery* v. *Hannah*, 1 Ch. D. 278; 24 W. R. 137, 899.

dicting the defendant's affidavits, but matter confirmatory of the plaintiff's case may be introduced into them (*d*).

Cross-examination of deponent.

Cross Examination of Deponent.]—By *r.* 28, "When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a *notice in writing*, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of *fourteen* days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court or a Judge. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production."

Notice for production of deponent.

When the production of a witness for cross-examination is *bonâ fide* desired the Court will not allow his affidavit to be used unless some very strong reason be given why he should not be produced (*e*). After the affidavit has once been filed neither the party nor the deponent will be allowed to withdraw it, so as to avoid examination (*f*). The deponent may be cross-examined, although his affidavit is not used by the party who filed it (*g*). This rule is confined to cases when evidence is to be taken by consent at the trial (*h*).

Compelling attendance of deponent.

By *r.* 29, "The party to whom such notice as is mentioned in the last preceding rule is given shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined."

Printing evidence.

Printing Evidence, &c.]—By *r.* 30, "When the evidence under this Order is taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time after the close of the evidence as in other cases is by these rules provided after the close of the pleadings: provided that other affidavits may be printed if all the parties interested consent thereto, or the Court or a Judge so order: provided also that this rule shall not apply in the Probate Divorce and Admiralty Division to default actions *in rem*, or references in actions, or actions for limitation of liability, unless the Court or a Judge shall otherwise order."

Notice of trial. Subsequent proceedings.

Notice of Trial and subsequent Proceedings.]—The notice of trial is given in the same manner and within the same time after the close of the evidence as in other cases: it is given after the close of the plead-

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(*d*) *Peacock* v. *Harper*, 7 Ch. D. 648; 47 L. J., Ch. 238. See *Gilbert* v. *Comedy Opera Company*, 16 Ch. D. 594; 43 L. T. 665, which shows that affidavits will not before the trial be ordered to be taken off the file on the ground that they infringe the provisions of r. 27.

(*e*) See *Blackburn Union* v. *Brooks*, 7 Ch. D. 68; 47 L. J., Ch. 156.

(*f*) *In re Quartz Hill, &c. Co., Ex p. Young*, 21 Ch. D. 642; 51 L. J., Ch. 940.

(*g*) *Ex p. Child, In re Ottaway*, 20 Ch. D. 126; 51 L. J., Ch. 494.

(*h*) *In re Knight, Knight* v. *Gardiner* (C. A.), 25 Ch. D. 297; 25 L. J., Ch. 297; 49 L. T. 545; 31 W. R. 469.

PART VI.

ings (*see r.* 30, *supra*; *and see post, Ch. LVII.*, "*Notice of Trial*"). The action must be tried by a Judge, the consent being equivalent to an agreement not to require a jury (*i*). The subsequent proceedings are the same as in ordinary cases (*see post, Part VII.*, "*Trial*"). If *vivâ voce* evidence is not expressly excluded by the agreement, a witness, who is present at the trial for the purpose of being cross-examined, may be called by the party on whose behalf he has made the affidavit, and give *vivâ voce* evidence (*k*).

(*i*) *Brook* v. *Wigg*, 8 Ch. D. 510; 47 L. J., Ch. 749 (C. A.).

(*k*) *Glossop* v. *Heston, &c. Local Board*, 47 L. J., Ch. 536; 26 W. R. 433, V.-C. M.

PART VII.

TRIAL, AND PROCEEDINGS CONNECTED THEREWITH.

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CHAPTER LVII.

NOTICE OF TRIAL.

CHAP. LVII.

In what cases notice of trial must be given

In what Cases Notice of Trial must be given.]—Notice of trial, unless dispensed with, must be given in all cases where there is an issue to be tried. It is necessary, even where plaintiff is under a peremptory undertaking to try at the next assizes, or the like (*a*); or where the cause has been made a *remanet* at the assizes (*b*). It is also necessary if a new trial be granted (*c*).

But where a town cause is made a *remanet* from one sittings to another (*d*), or where a cause is put off by order of *Nisi Prius* (*e*); or postponed by Judge's order, obtained at defendant's instance, to a subsequent sittings (*f*), a fresh notice of trial is not necessary.

(*a*) *Ifield* v. *Weeks*, 1 H. Bl. 222: *Monk* v. *Wade*, 8 T. R. 246, n.: *Bainbridge* v. *Purvis*, 1 Dowl. 444: *Sulsh* v. *Cranbrook*, 1 Dowl. 148.

(*b*) *Gains* v. *Bilson*, 1 M. & P. 87; 4 Bing. 414.

(*c*) *Bingley* v. *Mallison*, 3 Dougl. 402.

(*d*) *Jacks* v. *Mayer*, 8 T. R. 245: *Ham* v. *Greg*, 6 B. & C. 125; 9 D. & R. 125: *Gibbins* v. *Phillips*, 8 B. & C. 437: *M'Intyre* v. *Somers*, 14 M. & W. 102: *Crockford* v. *Tucker*, 18 L. J., Q. B. 114; cf. Ord. XXXVI. r. 17, post, p. 578.

(*e*) *Shepherd* v. *Butler*, 1 D. & R. 15.

(*f*) *Claudet* v. *Prince*, L. R., 2 Q. B. 407: *S. C.*, nom. *Laudet* v. *Prince*, 36 L. J., Q. B. 196, over-

PART VII.

When and by whom to be given; —plaintiff; —defendant;

When and by whom to be given.]—By *R. of S. C., Ord. XXXVI. r.* 11, "Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial"(*g*).

By *r.* 12, "If the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial. . . ." Instead of giving notice of trial the defendant may apply to have the action dismissed for want of prosecution. (*See ante*, p. 328, "*Dismissal for want of Prosecution.*")

—before entry for trial.

The notice must be given before the action is entered for trial (*Ord. XXXVI. r.* 15). As to the effect of not entering the action for trial after giving notice, *see Ord. XXXVI. r.* 20, *post*, p. 598, "*Entry of Action for Trial.*"

What length of notice necessary.

What length of Notice necessary.]—By *R. of S. C., Ord. XXXVI. r.* 14, "Ten days' notice of trial shall be given, unless the party to whom it is given has consented, or is under terms or has been ordered to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be four days' notice, unless otherwise ordered." The ten days are reckoned exclusive of the day of giving the notice, and inclusive of the day on which the trial is to be had, or rather of that for which the notice of trial is given.

Short notice.

Short Notice.]—By *R. of S. C., Ord. XXXVI. r.* 14, "Short notice of trial shall be *four days*' notice, unless otherwise ordered."

Where defendant is under terms of taking short notice of trial, it is usual to give as long a notice as the time will admit of (*h*); but this does not appear to be absolutely necessary (*i*). If, by an order for him to plead or otherwise, the defendant is bound to take short notice of trial, "if necessary," the plaintiff is entitled to give such notice if he cannot, using reasonable diligence, give full notice, although the regular course of pleading is not such as to render short notice absolutely necessary (*j*).

If a Master's order binds the defendant to take short notice for a particular sittings, it does not bind him to take short notice for any other sittings (*k*). Even where it was to accept short notice for the

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ruling on this point *Jacks* v. *Mayer*, 8 T. R. 245, and *Ellis* v. *Trusler*, 2 W. Bl. 798. See *Stockton and Darlington R. Co.* v. *Fox*, 2 L. M. & P. 141; 6 Ex. 127; 20 L. J., Ex. 96.

(*g*) This rule obviates the difficulty that arose in *Asquith* v. *Molineux*, 49 L. J., Q. B. 800. See also *Metropolitan Inner Circle R. Co.* v. *Metropolitan R. Co.*, 5 Ex. D. 196; 42 L. T. 590.

(*h*) Prac. Reg. 390; Tidd, 9th ed. 457.

Drake v. *Pickford*, 15 M. & W. 607. See *Dignam* v. *Ibbotson*, 3 M. & W. 431.

(*j*) *Preity* v. *Nauseaveen*, L. R., 9 Exch. 42; 43 L. J., Exch. 3: *Drake* v. *Pickford*, ubi supra: *Dignam* v. *Ibbotson*, 3 M. & W. 431: *Woolley* v. *Aldritt*, 17 L. T. 120: *Flowers* v. *Welch*, 9 Exch. 272; 23 L. J., Ex. 7.

(*k*) *Slatter* v. *Painter*, 1 Dowl., N. S. 35; 8 M. & W. 672: *Dignam* v. *Mostyn*, 6 Dowl. 547: *Abbott* v. *Abbott*, 7 Taunt. 452; 1 Moo. 160: *O'Keefe* v. *Culler*, 6 Ir. R., C. L. 452, Q. B.

sittings in term, and the plaintiff, without any default on the part of the defendant, was unable to reply, so as to give such notice, it was held, that a short notice for the second sittings was irregular (*l*). Inasmuch as a party is not entitled to the costs of preparing for trial unless notice of trial is given, it is, in many cases, where the term of taking short notice is imposed, advisable to insist on some terms which will enable the party to commence the preparation for trial before the four days (*m*). It seems that under an order to take short notice of trial the defendant is not bound to take short notice of inquiry (*n*).

Sometimes the Master will put defendant under terms of taking less than four days' notice of trial (*o*).

Form of notice (*q*).

Form of Notice.]—By *R. of S. C., Ord. XXXVI. r.* 13 (*p*), "Notice of trial shall state whether it is for the trial of the cause or matter or of issues therein; and the place and day for which it is to be entered for trial. It shall be in the Form No. 16 in App. B., with such variations as circumstances may require" (*q*). The notice must be in writing. (*Ord. LXVI. r.* 1). It may be written on the back of the reply or on a separate paper. When it is written on the reply, the title, &c. should be omitted.

Where there were several *issues*, and the notice was to try the *issue*, the Court held the notice sufficient (*r*). If there are two or more defendants, and one of them lets judgment go by default, and the other pleads, the notice of trial should state that the issue joined with the latter will be tried, and that the jury will, at the same time, assess the damages against the former (*s*). It would seem, however, that the notice need not state that there will be an assessment of damages where such assessment will necessarily be involved in the issues to be tried.

For what day sittings, &c.

For what Day, Sittings, &c.]—By *Ord. XXXVI. r.* 17, "Notice of trial for London or Middlesex shall not be or operate as for any particular sittings; but shall be deemed to be for any day after the expiration of the notice on which the trial may come on in its order upon the list."

By *r.* 18, "Notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given."

As to the place of trial, and applications to change it, *see post*, p. 589, "*Changing Place of Trial.*"

(*l*) *White* v. *Clarke*, 8 Dowl. 730. And see *Lewis* v. *Hay*, 4 Jur. 579, B. C.

(*m*) *Freeman* v. *Springham*, 14 C. B., N. S. 203; 32 L. J., C. P. 249: *Curtis* v. *Platt*, 16 C. B., N. S. 465; 33 L. J., C. P. 255.

(*n*) *Blaaw* v. *Chaters*, 6 Taunt. 458: *Stevens* v. *Pell*, 2 Dowl. 355; 2 C. & M. 421; 4 Tyr. 267.

(*o*) See *Lawson* v. *Robinson*, 2 Dowl. 69; 1 C. & M. 499.

(*p*) As amended by R. of S. C., October, 1884, r. 5, by which "Order XXXVI. r. 13, shall be read as if the words 'in actions in the Queen's Bench Division' were omitted therefrom." See *Ginger* v. *Pycroft*, 17 L. J., Q. B. 182: per *Erle*, J., in *Cory* v. *Hotson*, 1 L. M. & P. 23; 19 L. J., Q. B. 250: *Fenn* v. *Green*, 6 E. & B. 656; 25 L. J., Q. B. 353: *Cross* v. *Lang*, 1 Dowl. 342: *Harris* v. *Gamble*, 7 Ch. D. 877; 47 L. J., Ch. 344.

(*q*) See the form, Chit. F. 335.

(*r*) *Flowers* v. *Welch*, 9 Exch. 272; 23 L. J., Ex. 7.

(*s*) Tidd, 9th ed. 754. See ante, p. 326.

PART VII.

Mode of trial.

Mode of Trial.]—In actions for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff, if he desires a trial by jury, must say so in his notice. (*See Ord. XXXVI. r.* 2, *post*, p. 585.)

As to the application to change the mode of trial, *see post*, p. 585.

To whom given.

To whom to be given.]—The Rules of the S. C. contain no express provision as to the person to whom the notice of action is to be given, but by *r.* 34, *H. T.*, 1853 (repealed), it was provided that "Notice of trial or inquiry, and of continuance of trial or inquiry, shall be given in town: but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a Judge." The meaning of which rule was that the notice might be given by the solicitor or agent either in town or country; and either might give it in town as well as in the country, although the agent's name were on the record (*t*). As the practice would probably be held to be still guided by this rule the notice should be given as therein directed.

As to the service of proceedings, where defendant has appeared in person, *see post, Ch. CXXVI.* (*u*). As to the mode of service on solicitors, *see post, Ch. CXXVI.* (*x*). If there be several defendants, a notice must be given to each, if they appear in person; or if they appear separately by different solicitors, it must be given in town to the solicitor or agent of each.

As to the proceedings when the defendant becomes bankrupt, &c. pending action, *see post, Vol.* 2, *Ch. LXXXVIII.*, "*Change of Parties by Death, &c.*"

How long in force.

How long in force.]—By *Ord. XXXVI. r.* 16, "In London and Middlesex, unless within six days after notice of trial is given the trial shall be entered by one party or the other, the notice of trial shall be no longer in force." See as to the entry for trial, *post*, p. 598.

Countermanding notice.

Countermanding Notice.]—By *Ord. XXXVI. r.* 19, "No notice of trial shall be countermanded except by consent, or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just" (*y*).

The repealed rule above referred to provided that "Countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a Judge." The meaning of which rule was, that it might be given to the solicitor or agent either in town or country, and this although the agent's name were on the record (*z*). If given in town in a country cause on the last day allowed by the order for giving it, it would seem it should be given

(*t*) *Cheslyn* v. *Pearce*, 4 Dowl. 693; 1 M. & W. 56: *Margettson* v. *Rush*, 8 Dowl. 388.

(*u*) See *Fry* v. *Mann*, 1 Dowl. 419.

(*x*) See *Brown* v. *Wildbore* or *Whitfall*, 1 Sc. N. R. 159; 8 Dowl. 592: *Peddie* v. *Pratt*, 7 Sc. N. R. 894: *Ashley* v. *Brown*, 19 L. J., Q. B. 477.

(*y*) As to withdrawing a bad notice and giving a valid one, see *Fell* v. *Tyne*, 5 Dowl. 246: *Ranger* v. *Bligh*, Id. 235. Notice of countermand should be in writing, ante, Ord. LXVI. r. 1.

(*z*) *Cheslyn* v. *Pearce*, 4 Dowl. 693; 1 M. & W. 56; 1 Gale, 423: *Margettson* v. *Rush*, 8 Dowl. 388.

before post-time (*a*). It must be given to defendant's solicitor where he defends by one, and in such a case notice to defendant himself will not do (*b*).

Irregularity in notice.

Irregularity in Notice.]—The Court will not in general set aside an irregular notice, but will leave the plaintiff to proceed at his peril. There are instances, however, in which the Court has done so (*c*). The Court (*d*) will set aside a verdict for an irregularity in the notice, if the same has not been waived by defendant defending at the trial, or the like (*e*).

Waiving irregularity.

The irregularity may, of course, be waived (*f*). Therefore, if defendant appear and defend the action at the trial, he will thereby waive any irregularity in the notice, or even the want of it (*g*). The defendant is not bound to return an irregular notice, and therefore does not waive the irregularity simply by retaining it (*h*).

When to be taken advantage of.

Within what time an irregularity must in general be taken advantage of, *see ante*, p. 445 (*i*).

Bankrupt may set aside trial for want of notice, &c.

A defendant, who has become bankrupt, and obtained his certificate after trial and verdict against him, has a right to set it aside for the want of a sufficient notice of trial, although his estate is insolvent, and his trustee is no party to the application (*k*).

(*a*) See *Pound* v. *Penfold*, 3 A. & E. 655.

(*b*) *Margettson* v. *Rush*, 8 Dowl. 388.

(*c*) See *Cotton* v. *Thompson*, 5 Jur. 270: *Brown* v. *Wildbore*, 1 Sc. N. R. 159: 8 Dowl. 592, nom. *Brown* v. *Whitfall*.

(*d*) See *Orgill* v. *Bell*, 1 Ex. 466.

(*e*) See *Williams* v. *Williams*, 2 Dowl. 350.

(*f*) *Berresford* v. *Geddes*, L. R., 2 C. P. 285: *Farmer* v. *Mountfort*, 3 M. & W. 100; 1 Dowl., N. S. 366.

(*g*) *Doe* d. *Antrobus* v. *Jepson*, 3 B. & Ad. 402: *Fraas* v. *Paravacini*, 4 Taunt. 545: *Gillingham* v. *Waskett*, M'Clel. 198: *Yonge* v. *Fisher*, 4 M. & G. 814; 2 Dowl., N. S. 637; 5 Sc. N. R. 893: *Berresford* v. *Geddes*, supra. See *Figg* v. *Wedderburn*, 6 Jur. 218, B. C., where under very particular circumstances a new trial was granted, although defendant appeared and defended at the trial.

(*h*) *Dignam* v. *Mostyn*, 6 Dowl. 547: *Dignam* v. *Ibbotson*, 3 M. & W. 431. And see *Brown* v. *Wildbore*, 1 Sc. N. R. 159; 8 Dowl. 592, nom. *Brown* v. *Whitfall*: *Wood* v. *Harding*, 3 C. B. 968. See *Stevens* v. *Pell*, 2 C. & M. 421; 2 Dowl. 355, where the Court refused to allow the defendant his costs of setting aside a notice of inquiry because he retained it and did not give the plaintiff notice of the irregularity.

(*i*) *Ellaby* v. *Moore*, 22 L. J., C. P. 253; 13 C. B. 907.

(*k*) *Shepherd* or *Shepheard* v. *Thompson*, 9 M. & W. 110; 1 Dowl., N. S. 345.

CHAPTER LVIII.

MODE OF TRIAL.

PART VII. Mode of trial.

PRIOR to the coming into operation of the Rules of the Supreme Court, 1883, the ordinary mode of trial of an action in the Queen's Bench Division was by a Judge and jury, and, except in certain special cases, either party had the right to have the issues of fact so tried. Since these rules, by which the present practice is regulated, every action is to be tried by a Judge alone, unless in certain cases notice for a trial with a jury is given, or in others an order for a trial with a jury or in some other manner is obtained.

Trial by judge in absence of notice or special order.

Trial by Judge without a Jury.]—By *Ord. XXXVI. r.* 7 (a), "In every cause or matter, unless under the provisions of Rule 6 of this Order a trial with a jury is ordered, or under Rule 2 of this Order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a Judge without a jury; provided that in any such case the Court or a Judge may at any time order any cause, matter, or issue to be tried by a Judge with a jury, or by a Judge sitting with assessors, or by an official referee or special referee with or without assessors" (a).

This rule prescribes what is now theoretically the ordinary mode of trial, namely, trial by a Judge sitting alone without any jury. Unless the action falls within Rule 2 (*see post*, p. 585), and one party gives notice for a trial with a jury or some special order is made, the action is tried by a Judge alone. The trial by a Judge is conducted in the same mode, *mutatis mutandis*, as a trial by jury; all questions both of law and fact being left for the decision of the Judge, who acts as both Judge and jury. This mode of trial is now frequently adopted in the Queen's Bench Division, and in very many cases is preferable to trial by jury.

Trial by jury; general right to.

Trial by Jury.]—The present rules do not take away the right of either party to have the issues of fact arising in an action tried by a jury, or rather, as the rules term it, tried by a "Judge with a jury." They merely alter the mode in which that right is to be enforced.

Either party to an action in the Queen's Bench Division (b), has still an absolute right to have the issues of fact in any action tried

(a) Clauses (b), (c), and (d) of this rule relate to special juries and will be found post, p. 604.

(b) As to the Chancery Division, see Ord. XXXVI. r. 3.

by a jury (*c*), subject only to the exception of cases falling within Rules 4 and 5 of *Ord. XXXVI.* (*d*).

Exceptions.

The first of these rules (*r.* 4) provides that, "The Court or a Judge *may, if it shall appear desirable,* direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act could, without any consent of parties, have been tried without a jury."

This rule, which corresponds exactly in its terms with the former Rule 26, includes all those cases which the Court of Chancery had power, prior to the passing of the Judicature Acts, to try without a jury (*e*), and also cases which could have been compulsorily referred under sect. 3 of the *Com. Law Proc. Act*, 1854 (*f*). In these cases there is no absolute right to a trial by jury (*g*), and the Judge may, in the exercise of his discretion (*h*), if it shall appear to him desirable to do so (*i*), direct a trial otherwise than by jury, notwithstanding that one of the parties desires such a trial. But even in these cases if either party desires a trial by jury the onus of showing that the action ought *not* to be tried by a jury lies on the party opposing such a trial (*k*). As a rule a trial with a jury will not be ordered in these cases unless the action involves a simple issue of fact (*l*).

Chancery cases.

Under the former Rule 26 (which corresponds with the present Rule 4), orders have been made in administration actions (*m*) for a trial before a jury; in actions for dissolution of partnership (*n*) for a trial without a jury; though in a former case (*o*) it had been held that any party had a right, subject to the control of the Court, to submit the issues of fact in his case to a jury. Orders for trial without a jury were made in actions for setting aside deeds and the rescission of contracts on the ground of misrepresentation and fraud (*p*), for redemption of mortgages (*q*) and specific performance

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(*c*) *Sugg* v. *Silber*, 1 Q. B. D. 362; 45 L. J., Q. B. 460; 34 L. T. 682: *Clow* v. *Harper*, 3 Ex. D. 198, per *Cockburn*, C. J., at p. 201: *In re Martin, Hunt* v. *Chambers*, 20 Ch. D. 365; 51 L. J., Ch. 683; 46 L. T. 399; 30 W. R. 527. Cp. Jud. Act, 1875, s. 22, ante, p. 17: *Ex p. Price, In re Roberts* (C. A.), 31 W. R. 104.

(*d*) Id.

(*e*) *Swindell* v. *Birmingham Syndicate* (C. A.), 3 Ch. D. 127; 45 L. J., Ch. 756; 35 L. T. 111: *Back* v. *Hay*, 5 Ch. D. 235; 36 L. T. 295: *Pilley* v. *Baylis*, 5 Ch. D. 241; 46 L. J., Ch. 847.

(*f*) *Clow* v. *Harper*, 3 Ex. D. 198; 47 L. J., Ex. 393.

(*g*) See cases cited supra, n. (*e*)

(*h*) *Ruston* v. *Tobin*, 10 Ch. D. 558; 49 L. J., Ch. 262: *In re Martin, Hunt* v. *Chambers*, cited supra, n. (*c*): *Burgoyne* v. *Moordaff*, 8 P. D. 205; 52 L. J., P. 77: *Back* v. *Hay*, 5 Ch. D. 235: *Moss* v. *Bradburn*, 32 W. R. 368.

(*i*) See per *Jessel*, M. R., *In re Martin*, 20 Ch. D. at p. 368.

(*k*) *In re Martin, Hunt* v. *Chambers* (C. A.), 20 Ch. D. 365; 51 L. J., Ch. 683; 46 L. T. 399: *Clarke* v. *Cookson*, 2 Ch. D. 746: *Coles* v. *Civil Service Supply Association*, 32 W. R. 407.

(*l*) *Cardinall* v. *Cardinall*, 25 Ch. D. 772; 53 L. J., Ch. 636; 32 W. R. 411.

(*m*) *In re Martin, Hunt* v. *Chambers*, 20 Ch. D. 365: *Clarke* v. *Cookson*, 2 Ch. D. 746.

(*n*) *Cardinall* v. *Cardinall*, W. N. 1884, 6, 16.

(*o*) *Clements* v. *Norris*, W. N. 1877, 241; 26 W. R. 94.

(*p*) *Back* v. *Hay*, 5 Ch. D. 235: *Mirehouse* v. *Barnett*, 47 L. J., Ch. 689: *Moss* v. *Bradburn*, W. N. 1884, 14: *Ruston* v. *Tobin*, 10 Ch. D. 558, commented on in *In re Martin, Hunt* v. *Chambers*, supra.

(*q*) *Moss* v. *Bradburn*, supra.

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of contracts (*r*); in actions for an injunction to prevent the infringement of a patent (*s*), trade-mark (*t*), and trade-name (*u*). But in actions for injunctions to restrain a nuisance (*x*); obstruction to ancient lights (*y*); interference with hatches and watercourses (*z*); for obstruction to a right of way where special circumstances existed which rendered a trial without a jury more convenient (*a*), and in an action to restrain the publication of a libel (*b*), orders for trial without a jury were refused.

In actions properly assigned to the Chancery Division, the mere desire of both parties is not a sufficient reason to order a trial before a jury (*c*); but where the parties both desired such a trial, the action being only for damages, and relating to land in Staffordshire, where a great many witnesses resided, an order was made directing a trial at the Staffordshire assizes (*d*). In such actions where the question raised is one of mixed law and fact, and can be more conveniently tried without a jury, an order directing such trial will be made (*e*). The mere fact that an action will be tried more quickly at the assizes is not a sufficient reason for ordering a trial with a jury (*c*), nor is the fact that the plaintiff has fixed the place of trial at an assize town (*f*). In an action which had been tried twice before a special jury, who in each case had disagreed and been discharged, the Court of Appeal held that the Judge had jurisdiction to make an order for trial before a Judge without a jury (*g*). Where both parties agreed to take evidence by affidavit, this was held equivalent to an agreement that the action should be tried without a jury even though the case was one peculiarly adapted for trial by jury (*h*). A Judge of the Chancery Division cannot try a case with a jury (*i*).

The exception contained in the second of the rules above referred to (p. 583), consists of cases within *Ord. XXXVI. r. 5* (*post*, p. 585), which empowers the Court or a Judge to direct the trial without a jury of any "cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury" (*k*).

(*r*) *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127: *Pilley* v. *Baylis*, 5 Ch. D. 241: *Usil* v. *Whelpton*, 50 L. J., Ch. 511; 45 L. T. 39; 29 W. R. 799: *Fuller* v. *Sargeant*, W. N. 1882, 4.

(*s*) *Bovill* v. *Hitchcock*, L. R., 3 Ch. 417.

(*t*) *Spratt's Patent* v. *Ward & Co.*, 11 Ch. D. 240.

(*u*) *Singer Manufacturing Co.* v. *Loog*, 11 Ch. D. 656.

(*x*) *West* v. *White*, 4 Ch. D. 631: *Powell* v. *Williams*, 12 Ch. D. 234: *Clarke* v. *Skipper*, 21 Ch. D. 134; 51 L. J., Ch. 519; 46 L. T. 811.

(*y*) *Bordier* v. *Burrell*, 5 Ch. D. 512.

(*z*) *Peter* v. *Lailey*, W. N. 1881, 22.

(*a*) *Wedderburn* v. *Pickering*, 13 Ch. D. 769: *Att.-Gen.* v. *Arkcoll*, W. N. 1882, 82.

(*b*) *Thomas* v. *Williams*, 14 Ch. D. 864.

(*c*) *Wood and Ivery (Limited)* v. *Hamblet*, 6 Ch. D. 113.

(*d*) Id.

(*e*) *Smith* v. *N. Staffordshire R. Co.*, 44 L. T. 85.

(*f*) *Cardinall* v. *Cardinall*, 25 Ch. D. 772; 53 L. J., Ch. 636; 32 W. R. 411.

(*g*) *Burgoyne* v. *Moordaff*, 8 P. D. 205.

(*h*) *Brown* v. *Wigg*, 8 Ch. D. 510.

(*i*) *Clarke* v. *Cookson*, 2 Ch. D. 746: *Farmer* v. *Murdoch* (C. A.), 4 Ch. D. 750.

(*k*) See post, Vol. 2, Ch. CXXXV., "*Official and Special Referees.*"

Mode of insisting on trial by jury.—Notice.

By *R. of S. C., Ord. XXXVI. r.* 2, "In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff may, in his notice of trial to be given as hereinafter provided, and the defendant may, upon giving *notice within four days* from the time of the service of notice of trial or within such extended time as the Court or a Judge may allow, or in the notice of trial to be given by him as hereinafter provided, signify his desire to have the issues of fact tried by a Judge with a jury, and thereupon the same shall be so tried."

A form of notice will be found in *Chitty's Forms*, p. 339.

—Order.

By *r.* 6, "In any other cause or matter, upon the application of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order *shall* be made for a trial with a jury."

This application should generally be included in or brought on with the summons for directions.

Special order as to mode of trial.

Special Order as to Mode of Trial.]—*Ord. XXXVI. r.* 7 (*supra*), provides that the Court or a Judge may at any time order any cause, matter or issue to be tried by a Judge with a jury, or by a Judge sitting with assessors, or by an official referee or special referee with or without assessors.

By *r.* 4, "The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act could, without any consent of parties, have been tried without a jury" (*l*).

By *r.* 5, "The Court or a Judge may direct the trial without a jury of any cause matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury" (*m*).

Any application for a particular mode of trial may and generally should be included in the general summons for directions.

Referee.

Trial before Referee.]—As to trial before referees, *see post, Vol. 2, Ch. CXXXV.*

Assessors.

Trial with Assessors.]—By *Ord. XXXVI. r.* 43, "Trials with assessors shall take place in such manner and upon such terms as the Court or a Judge shall direct."

Commissioner.

Trial by Commissioner.]—By *Ord. XXXVI. r.* 44, "In any cause or matter the Court, or a Judge of the Division to which the cause or matter is assigned, may, at any time, or from time to time, order the trial and determination of such cause or matter, or of any issue of fact, or partly of fact and partly of law, therein, by any commissioner appointed in pursuance of the 29th section of the Principal Act, or at the sittings to be held in London and Middlesex, and such cause, matter, or issue shall be tried and determined accordingly."

(*l*) See ante, p. 583. (*m*) Supra, n. (*k*).

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Trial of different questions by different modes or at different times.

Trial of different Questions, &c. by different Modes.]—By *R. of S. C., Ord. XXXVI. r.* 8, "Subject to the provisions of the preceding Rules of this Order, the Court or a Judge may in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others." The exercise of the powers given by this rule is discretionary (*y*). Looking at the expense occasioned by having two or more hearings in an action, an order for the separate hearing of different questions will only be made on very special grounds, and when it is clearly shown that it is desirable to have one or more questions decided upon or in a different manner from the others, or that by doing so it is probable that the necessity for the trial of the others will be avoided (*z*). Where there is a preliminary question of law it is often desirable to have it disposed of before the questions of fact. *See ante*, p. 325.

Trial at bar.

Trial at Bar.]—By *Ord. XXXVI. r.* 9, "Every trial of any question or issue of fact with a jury shall be by a single Judge, unless such trial be specially ordered to be by two or more Judges." A trial under this order before two or more Judges, it seems, may be had either in town or in the country (*Judicature Act*, 1873, *s.* 26, *ante*, p. 189).

In what cases granted.

Before the Judicature Acts a trial at bar could not be had without leave of the Court, even though the parties consented to it. And it was entirely discretionary with the Court to grant it or not (*a*), unless the Crown were actually and immediately interested, in which case the Attorney-General might demand it, as of right (*b*). The Court rarely granted it; as the trial caused so much inconvenience, and delayed the other business of the Court. In general, it was granted only where the matter in dispute was of considerable value, and difficulties were expected to arise in the course of it (*c*). Formerly, it was a ground for granting it that one of the parties was a Judge or officer of one of the superior Courts (*d*); but this was not so at the time of the passing of the Judicature Acts: and in a case where the application was made upon the ground of the defendant being the Lord Chancellor and the plaintiff a solicitor, it was refused (*e*). A trial at bar could not be had where the venue was laid in London, for the citizens are ex-

(*y*) *Emma Mining Co.* v. *Grant*, 11 Ch. D. 918, 926.

(*z*) Id.: *Piercy* v. *Young*, 15 Ch. D. 475, 479, 480; 42 L. T. 292: *Dent* v. *Sovereign Life Assurance Co.*, W. N. 1879, 33: *Tasmanian, &c. R. Co.* v. *Clark*, Id. 88; Id. 106.

(*a*) *R.* v. *Burgesses of Carmarthen*, Say. 79: *R.* v. *Amery*, 1 T. R. 363.

(*b*) *R.* v. *Hales*, 2 Stra. 816: *Rowe* v. *Brenton*, 8 B. & C. 737; 3 M. & R. 133: *Brown* v. *Lord Granville*, 1 H. & W. 270: *Paddock* v. *Forrester*, 1 Scott, N. R. 391; 8 Dowl. 834; 1 M. & Gr. 583.

(*c*) *Holmes* v. *Brown*, 2 Doug. 437. And see *Lord Sandwich's case*, 2 Salk. 648: *Preston* v. *Lingen*, 1 Stra. 479: *Lord Rivers* v. *Pratt*, 1 B. & B. 265; 3 Moore, 582: *R.* v. *Burgesses of Carmarthen*, Say. 79; Andr. 271.

(*d*) *Morton* v. *Hopkins*, 1 Sid. 407: *Sir Samuel Astrey's case*, Id.; 2 Salk. 651; 6 Mod. 123.

(*e*) *Dimes* v. *Lord Cottenham*, 5 Ex. 311; 19 L. J., Ex. 290.

empted from serving on juries out of the city by their charter (*f*). There was some doubt whether it could be had where the venue was laid in a county palatine; it being doubtful whether the Court had the power to compel the attendance of the inhabitants upon a jury at Westminster (*g*).

Terms imposed on applicant.

As it was entirely discretionary with the Court to grant a trial at bar or not, they might impose what terms they pleased upon the party applying as the condition of their granting it (*h*).

When and how moved for, &c.

A trial at bar was never granted before issue joined (*i*), except in ejectment (*k*); nor in an issuable term (*l*), unless the Crown were concerned in interest (*m*), or under very particular and pressing circumstances (*n*). It must have been moved for in the term previous to that in which the cause was intended to be tried, unless the action were for lands in Middlesex (*o*); and it could not be moved for on the last paper day of the term, unless moved for on the part of the Crown (*p*). If the Crown is desirous of having a trial at bar, the course is for the Attorney-General to certify to the Court *ore tenus* that the Crown has an interest in the suit, and pray that a trial at bar may be directed (*q*). In other cases the application is made on notice of motion (*r*); and generally must be supported by an affidavit stating the value of the matter in question, the difficulties likely to arise in the cause, and such other facts as might induce the Court to grant the application (*s*).

Notice of trial, &c.

The Judges might appoint any day for the trial they thought fit (*t*). By the *Com. Law Proc. Act*, 1852, *s.* 97, ten days' notice of trial was sufficient unless otherwise ordered by the Court or a Judge (*u*). By *r.* 41, *H. T.* 1853, "Notice of a trial at bar shall be given to the Masters of the Court before giving notice of trial to the party." The cause was, in the Court of Queen's Bench, entered with one of the Masters; and the day appointed for it must have been entered in his book previously to notice of trial being given (*v*). The practice, it seems, was for the parties to make up paper books of the issue, and to deliver the same to the Judges four days at least before the trial.

Countermand of.

Notice of trial might be countermanded, as in other cases; but it seems the cause could not afterwards be tried without a new rule being obtained for that purpose (*x*); and it was said that a second rule could not be made between the same parties in the same term (*y*).

The jury.

The action was tried by a jury of the county in which the venue was laid, in the same manner as it would have been if tried at Nisi

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(*f*) *Anon.*, 2 Salk. 644: *Castell* v. *Bambridge*, 2 Str. 856; but they now serve on trials at Nisi Prius in the Royal Courts.

(*g*) See *Gally* v. *Clegg*, Say. 47: *R.* v. *Amery*, 1 T. R. 366: *Lockyer* v. *East India Co.*, 2 Wils. 136 b.

(*h*) *Holmes* v. *Brown*, 2 Doug. 437.

(*i*) *Borough of Christchurch case*, 1 Str. 596.

(*k*) *Anon.*, Say. 155.

(*l*) See *Dimes* v. *Lord Cottenham*, 5 Ex. 311—per *Pollock*, C. B.; R. M. 4 Anne; Fitzg. 267; 1 H. Bl. 211.

(*m*) See R. M. 4 Anne.

(*n*) See *R.* v. *Foley*, 1 Stra. 52.

(*o*) *Turner* v. *Barnaby*, 2 Salk. 649; Ca. Pr., C. B. 66.

(*p*) *Lord Bellamont's case*, 2 Salk. 625.

(*q*) *Paddock* v. *Forrester*, 1 Sc. N. R. 391; 8 Dowl. 843; 1 M. & Gr. 583.

(*r*) See form, Chit. Forms, 340.

(*s*) See *R.* v. *Burgesses of Carmarthen*, Sayer, 79.

(*t*) 11 G. 4 & 1 W. 4, c. 70, s. 1.

(*u*) See ante, p. 578.

(*v*) 2 Lil. Pr. R. 608.

(*x*) See R. M. 4 Anne.

(*y*) Fitzg. 267.

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Prius, unless the parties consented to the contrary (*y*). The jury was almost invariably special; and the rule for the special jury formed a part of the rule for the trial at bar (*z*). Before the *Com. Law Proc. Act*, 1852, which abolished jury process, when a trial at bar was granted in a penal action, upon motion of the Attorney-General, it must have been noted on the back of the *distringas* (*a*).

Tales.

If, when the trial was called on, a sufficient number of jurors did not attend, the trial must have been adjourned, and an *undecim*, *decem*, or *octo tales*, according to the number deficient, awarded as at common law (*b*); for the stat. 6 *G.* 4, *c.* 50, *s.* 37, which allows the *tales de circumstantibus*, is expressly confined to trials at *Nisi Prius* and the assizes. And, in one case, the Court ordered the *decem tales* returnable on the day but one following, there being jurors sufficient in town to make a jury; otherwise the trial must have been put off for two terms (*c*).

The trial, &c.

The Judges might appoint any day for the trial they thought fit; and the time so appointed, if in vacation, for the purpose of such trial, was deemed a part of the preceding term (*d*). The Masters and their clerks acted as the officers of the Court during the trial. One of the Masters called over and swore the jury, read the record and written evidence, marked all deeds and papers given in evidence, and had the custody of them afterwards until called for, and recorded the verdict (*e*). The trial was had in the Court at Westminster, and the jury were obliged to attend there at their peril. The Chief Justice (or, in his absence, the senior judge) summed up the evidence (*f*); and if any question of law arose, either collaterally or as forming a part of the case, each of the Judges delivered his opinion upon it *seriatim* (*f*). Each of the presiding Judges might, on the trial, make such observations to the jury upon the whole case, by way of direction, as he considered to be requisite (*g*). In all other respects the trial at bar was the same as a trial at Nisi Prius; and if either party were dissatisfied with the verdict, he might move for a new trial as in other cases (*h*).

(*y*) See *Pierse* v. *Lord Fauconberg*, 1 Burr. 292: *Holmes* v. *Brown*, 2 Doug. 437.

(*z*) *Phelps* v. *Keily*, 4 Sc. N. R. 376; 3 M. & G. 883: *Clark* v. *Harris*, 2 Sc. N. R. 82.

(*a*) 18 El. c. 5, s. 2.

(*b*) See *Denn* v. *Cadogan*, 1 Burr. 273; 2 Saund. 349 a; Cab. C. P. 73, 3rd ed.: *Buron* v. *Denman*, 1 Ex. 769.

(*c*) *Denn* v. *Cadogan*, 1 Burr. 273. See R. H. 15 C. 2.

(*d*) 11 G. 4 & 1 W. 4, c. 70, s. 7.

(*e*) Tidd, 9th ed. 751. See 1 H. Bl. 212, n.

(*f*) See the trial of the Seven Bishops, 12 St. Tr. 426.

(*g*) *Rowe* v. *Brenton*, 8 B. & C. 737; 3 M. & R. 266.

(*h*) *Bright* v. *Eynon*, 1 Burr. 395; 2 L. Ken. 53: *Musgrave* v. *Nevinson*, Ld. Raym. 1358.

CHAPTER LIX.

PLACE OF TRIAL AND CHANGES THEREOF.

Place of trial —venue.

By *R. of S. C., Ord. XXXVI. r.* 1, "There shall be no local venue for the trial of any action, *except where otherwise provided by statute.* Every action in every Division (*a*) shall, unless the Court or a Judge otherwise orders, be tried in the county or place named on the statement of claim, or (where no statement of claim has been delivered or required) by a *notice in writing to be served on the defendant*, or his solicitor, within six days after appearance. Where no place of trial is named, the place of trial shall, unless the Court or a Judge shall otherwise order, be the county of Middlesex."

By *r.* 1a (*R. of S. C., October*, 1884, *r.* 2), "The provisions of Ord. XXXVI. r. 1 shall apply to every action notwithstanding that it may have been assigned to any Judge."

The above rule gives the plaintiff a *primâ facie* right to fix the place for trial (formerly called the "venue") where he likes (*a*), and abolishes the rule as to local venues, which in former times rendered it necessary that certain actions should be tried in the county where the subject matter of the action existed or arose (*b*). If no place of trial is proposed in the statement of claim, the trial will take place in Middlesex (*c*).

Statutory venue.

The rule, it will be observed, expressly excepts those cases where a particular venue is specially preserved by statute (*d*).

Change of place of trial.

A Master may, on an application to him for that purpose, order that the trial shall be held at some place other than that fixed on by the plaintiff (*e*). The rule, however, gives the plaintiff a *primâ facie* right to fix the place of trial where he pleases, and the place so proposed by him will not be altered on the application of the defendant unless the latter shows a "manifest preponderance of convenience" (*f*) in trying elsewhere; and very strong grounds must be shown in order to induce the Court to deprive the plaintiff of his right (*f*). Therefore, in an action for breach of warranty on

(*a*) See *Philips* v. *Beale* (C. A.), 26 Ch. D. 621; 50 L. T. 433; 32 W. R. 848: *Redmayne* v. *Vaughan*, 24 W. R. 983. As to changing the venue in such cases, see *Green* v. *Bennett*, 50 L. T. 706; 32 W. R. 848.

(*b*) As to local venues, see Bull. & L. Prec. Pl. 2. As to the effect of the Jud. Acts in enlarging the jurisdiction of the Court in cases when the venue was formerly local, see *Whitaker* v. *Forbes*, 1 C. P. D. 51; 45 L. J., C. P. 140 (C. A.): *Buenos Ayres, &c. R. Co.* v. *Northern R. Co. of Buenos Ayres*, 2 Q. B. D. 210; 46 L. J., Q. B. 224, and ante, p. 4.

(*c*) *Ridge* v. *Ridge*, 35 L. T. 428, P. D.

(*d*) Cp. *Bryson* v. *Russell*, 51 L. T. 90.

(*e*) See Ord. XXXVI. r. 1, supra.

(*f*) *Cossham* v. *Leach*, 32 L. T. 665, per *Lord Coleridge*, C. J. at p. 666: *Church* v. *Barnett*, L. R., 6 C. P. 116; 40 L. J., C. P. 138: *Durie* v. *Hopwood*, 7 C. B., N. S. 835; 29 L. J., C. P. 151: *Bucknell* v. *Phillipps*, 7 Sc. 274: *Atkinson* v. *Sadler*, 2 Chit. 419, per *Denman*, C. J.: *Plun* v. *Normanton Iron Co.*, W. N. 1876, 105; Bitt. No. ccovii.

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the sale of horses at Liverpool, the Court refused to change the venue from Middlesex to South Lancashire, upon affidavits stating that the defendant's witnesses all resided at Liverpool and in Ireland, the affidavits in answer stating that the plaintiff's witnesses, scientific men and others, all resided in or near to the place where the venue was originally laid (*g*). Where, however, in an action for breach of a contract made in Liverpool, where the defendant resided, and where the contract was to be performed, the plaintiff laid the venue in London, and a Judge at Chambers, on the defendant's application upon affidavits swearing that all the defendant's witnesses, thirteen in number, resided at Liverpool, and that a cross-action was pending there, notwithstanding the plaintiff swore that all but one of his witnesses, twenty-eight in number, resided in London, ordered the venue to be changed to Liverpool, the Court refused to interfere (*h*). As a general rule, in an action for breach of contract, the place where the contract was made, the breach took place, and the defendant resides should be the place of trial (*h*).

The place for trial may be ordered to be changed if it be most clearly and satisfactorily made out by affidavit (*i*), that, from political excitement and the general interest taken in the case, or other cause, a fair and impartial trial cannot be had in the county where it is proposed to try the cause (*k*). So it may be changed where the trial of the cause in the county where the venue is laid would be attended with very great additional expense (*l*). The Master, in granting the application, may impose terms (*m*): thus, he may make the defendant pay the plaintiff any extra expense that may be occasioned to him by it, and relieve plaintiff from paying any extra expense occasioned to defendant by it, in the event of defendant succeeding in the action (*n*). The place for trial may be changed where it is necessary to have a view by the jury (*o*); and in other cases where justice requires it. The mere circumstance of there being only twenty-nine special jurors in a county (*p*), or that the defendant intends to call as witnesses persons in official situations, whose absence might be

(*g*) *Durie* v. *Hopwood*, *supra*.

(*h*) *Levy* v. *Rice*, L. R., 5 C. P. 119; 21 L. T. 717.

(*i*) *Doe* d. *Hickman* v. *Hickman*, 9 Dowl. 364: *Seeley* v. *Ellison*, 6 Bing. N. C. 229; 8 Dowl. 266: *Thornton* v. *Jennings*, 7 Dowl. 449; 5 Bing. N. C. 485.

(*k*) See *Anon.*, Lofft, 49: *Mayor of Poole* v. *Bennett*, 2 Str. 874: *R.* v. *Harris*, 3 Burr. 1333: *Mylocke* v. *Saladin*, Id. 1564: *Mayor, &c. of Bristol* v. *Proctor*, 1 Wils. 298: *Hill* v. *Payne*, 3 Dowl. 695: *Pybus* v. *Scudamore*, 7 Sc. 124: *Walker* v. *Brogden*, 17 C. B., N. S. 571: *Penhallow* v. *Mersey Dock and Harbour Board*, 29 L. J., Ex. 21.

(*l*) *Alcock* v. *Cook*, 6 Bing. 733; 4 M. & P. 593: *Holmes* v. *Wainwright*, 3 East, 329: *Foster* v. *Taylor*, 1 T. R. 781: *Crompton* v. *Stewart*, 1 Dowl. 567; 2 C. & J. 473; 10 Price, 171: *Palmer* v. *Marshall*, 8 Bing. 155: *Pugh* v. *Kerr*, 6 M. & W. 17: *Thornhill* v. *Oastler*, 7 Sc. 272: *Green* v. *Bennett*, 50 L. T. 706; 32 W. R. 848.

(*m*) See *Bowring* v. *Bignold*, 1 Dowl. 685: *Pybus* v. *Scudamore*, 7 Sc. 124.

(*n*) See *Keys* v. *Smith*, 10 Bing. 1; 3 M. & Sc. 338: *Wing* v. *Jenkins*, 7 Moore, 62: *Attwood* v. *Ridley*, 2 M. & G. 893; 3 Sc. N. R. 319.

(*o*) *Hodinott* v. *Cox*, 8 East, 268: *Pybus* v. *Scudamore*, 8 L. J., N. S., C. P. 159; 7 Sc. 124: *Atkinson* v. *Sadler*, 2 Chit. R. 419: *Keys* v. *Smith*, 10 Bing. 1; 3 M. & Sc. 338; 2 Dowl. 210.

(*p*) *Doe* d. *Lloyd* v. *Williams*, 5 Bing. N. C. 205: nom. *Doe* d. *Williams* v. *Lloyd*, 7 Sc. 143.

detrimental to the public service (*q*), is, in general, no ground for changing the venue.

The power of the Court or a Judge to change the venue in an action is not taken away by the 264th section of the Public Health Act, 1875, which requires that in actions against a local board of health for anything done under the Act, the venue shall be laid in the county or place where the cause of action occurred, and not elsewhere (*r*).

Application for.

The application should generally be included in or brought on with the summons for directions. It should in general be made after issue joined; for before granting such an application, the Court or Judge requires to be informed where the witnesses reside; and the defendant cannot give this information until he knows from the issue what facts it will be necessary to give in evidence (*s*); and the issue may eventually prove to be one of law, and not of fact (*t*). Where, however, the pleadings and facts of the case are such that it is obvious what the issues will be, a change of venue may be allowed before issue joined (*u*). The application should in general be made as speedily as possible after issue has been joined (*x*).

It seems that the application may be made though the defendant is under an undertaking to try at a particular sittings or to take short notice of trial, or the like (*y*).

The affidavit must state all the circumstances on which it is intended to rely in support of the application. When the affidavit goes into the circumstances it should state the nature of the cause of action and of the defence thereto, and the grounds for the application (*z*).

Formerly it was usual to state shortly for what the action was brought, and the defence thereto (*a*); but it is apprehended that this will no longer be necessary. Where the ground is the extra expense of witnesses, it will not in general suffice for the defendant to swear that all his witnesses reside in the county to which he seeks to have the venue changed (*b*); he must show how many witnesses he will probably call, and where they reside (*c*); and that

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(*q*) *Bucknell* v. *Phillips*, 7 Sc. 274.

(*r*) *The Itchin Bridge Co.* v. *Local Board of Health of Southampton*, 27 L. J., Q. B. 128.

(*s*) *Hodge* v. *Churchward*, 5 D. & L. 514; 5 C. B. 495: *Youde* v. *Youde*, 4 Dowl. 32; 1 H. & W. 338: *Begg* v. *Forbes*, 23 L. J., C. P. 222: *Weatherby* v. *Goring*, 3 B. & C. 552: *Griffin* v. *Walker*, 7 Scott, 846: *Cotterill* v. *Dixon*, 2 Dowl. 112: *Tolson* v. *Bishop of Carlisle*, 7 C. B. 79.

(*t*) Per *Patteson*, J., 1 Dowl., N. S. 288.

(*u*) See *Dowler* v. *Collis* or *Caller*, 4 M. & W. 581; 7 Dowl. 55: *Clifton* v. *Sayer*, 7 Jur., Exch. 1139.

(*x*) *Hams* v. *Pawlett*, 5 D. & L. 780: *Philips* v. *Beale*, 26 Ch. D. 621; 50 L. T. 433; 32 W. R. 665.

(*y*) *Johnson* v. *Nevison*, 2 Dowl. 260: *Jackson* v. *Kidd*, 8 C. B., N. S. 354; 29 L. J., C. P. 221: *Cluler* v. *Bradley*, 13 C. B. 604. But see *Haythorn* v. *Birch*, 29 L. J., C. P. 240: *Tonks* v. *Fisher*, Id. 22. See *Durie* v. *Hopwood*, 29 L. J., C. P. 151.

(*z*) *Ladbury* v. *Richards*, 7 Moore, 82. See *Johnson* v. *Berrisford*, 2 C. & M. 222: *Thornhill* v. *Oastler*, 7 Sc. 272: *R.* v. *Harris*, 3 Burr. 1333: *R.* v. *Hunt*, 3 B. & A. 444.

(*a*) *Ladbury* v. *Richards*, 7 Moore, 82. And see *Johnson* v. *Berrisford*, 2 C. & M. 222: *Thornhill* v. *Oastler*, 7 Sc. 272.

(*b*) *Tonks* v. *Fisher*, 2 Dowl. 22.

(*c*) *Smallcombe* v. *Williams*, 7 C. B. 77: *Evans* v. *Weaver*, 1 B. & P. 20: *Ladbury* v. *Richards*, 7 Moore, 82: *Parmeter* v. *Otway*, 3 Dowl. 66: *Clifton* v. *Sayer*, 7 Jur., Exch. 1139.

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it will be necessary to call them (*d*). And if, on the other hand, it appears that the plaintiff has many witnesses residing in the county where the venue is, and who are material to support his case, the application will generally be refused (*e*). If the cause of action arose only in the county into which the venue is sought to be changed, that fact had better be stated. Where the ground is that the defendant cannot have a fair and impartial trial in the county where the venue is laid, the affidavit should make this out clearly (*f*). In general the affidavit in support of an application by the defendant should state that he has a good defence on the merits (*g*), and that the application is not made for the purpose of delay.

The affidavits, in answer to the application, may state facts, showing that the cause may be more conveniently tried in the county in which it was originally proposed to try the cause, or other good reasons why the venue should not be changed (*h*).

The Master, on granting the application, will, in general, impose on the applicant such terms, as to payment of costs or expenses (*i*), admissions (*k*), and other matters (*l*), as may be considered just.

Where a summons by the defendants to change the venue from London to N. was dismissed by the Judge on the plaintiff undertaking to tax, if successful, as if tried at N., the undertaking was held to be binding on the plaintiff, although no order had been drawn up and served (*m*).

One of several defendants may get the venue changed without the consent of the others (*n*). If, indeed, the latter be really prejudiced by that step, they may, on an affidavit showing facts to establish that they would be so prejudiced, obtain an order for bringing the venue back again (*n*).

If the plaintiff after proposing that the action should be tried in one county afterwards desires to try it in another, he may obtain a Master's order for leave to amend the statement of claim by altering it accordingly, upon satisfying the Master that there is reasonable ground for the application (*o*). Formerly, where the venue was laid in the proper county, and it was sworn that all the

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(*d*) *Crompton* v. *Stewart*, 1 Dowl. 567; 2 C. & J. 473: and per *Bayley*, J., in *Tonks* v. *Fisher*, 2 Dowl. 22.

(*e*) *Flecke* v. *Godfrey*, 1 T. R. 782, n.: *Jenkins* v. *Hutton*, 7 Moore, 520: *Holmes* v. *Wainwright*, 3 East, 329: *Higgins* v. *Houseman*, 3 Dowl. 549: *Durie* v. *Hopwood*, supra. And see *Blackman* v. *Bainton*, 15 C. B., N. S. 432.

(*f*) See *Mayor of Bristol* v. *Proctor*, 1 Wils. 298: *Walker* v. *Ridgway*, 11 Moore, 486: *Lewis* v. *Morris*, 2 Dowl. 60: *Hill* v. *Payne*, 3 Dowl. 695: *Walker* v. *Brogden*, 17 C. B., N. S. 571.

(*g*) See *Anon.*, 2 Tyrw. 501: *Johnson* v. *Berrisford*, 2 C. & M. 222; 4 Tyr. 75.

(*h*) See *Gough* v. *Bertram*, 27 L. J., Ex. 53: *Ross* v. *Napier*, 30 L. J., Ex. 2: *Penhallow* v. *The Mersey Dock and Harbour Board*, 29 L. J., Ex. 21: *Channon* v. *Parkhouse*, 13 C. B., N. S. 341: *Att.-Gen. for P. of W.* v. *Crossman*, 35 L. J., Ex. 215.

(*i*) See *Bowring* v. *Bignold*, 1 Dowl. 685, per Cur.: *Attwood* v. *Ridley*, and other cases, ante, p. 590.

(*k*) See *Holmes* v. *Wainwright*, 3 East, 329: *Hodinott* v. *Cox*, 8 East, 268.

(*l*) See *Bowring* v. *Bignold*, 1 Dowl. 685, per Cur.: *Evans* v. *Weaver*, 1 B. & P. 20.

(*m*) *Clarke* v. *Tyne Improvement Commissioners*, L. R., 3 C. P. 230; 37 L. J., C. P. 110.

(*n*) *Job* v. *Butterfield*, 1 L. M. & P. 734; 5 Exch. 827; 20 L. J., Ex. 8.

(*o*) *Stroud* v. *Tilly*, 2 Str. 1162: *Petre* v. *Craft*, 4 East, 433: *Dover* v. *Mestaer*, Id. 435: *Fife* v. *Bousfield*, 2 Dowl., N. S. 705; 12 L. J., Q. B. 186: *Coleman* v. *Foster*, 1 L. M. & P. 273.

witnesses resided there, the Court of Common Pleas refused to allow the plaintiff to amend by changing the venue, the only object of the application being to obtain a more speedy trial (*p*). The order is generally granted on the terms of the plaintiff paying the costs of the application and amendment, or of making them the defendant's costs in the cause in any event (*q*).

Appeal against order.

Any order of a Master as to the place of trial may be discharged or varied by a Judge at Chambers, and the order of a Judge by a Divisional Court (*Ord. XXXVI. r.* 1, *supra*); but the Court will not, in general, interfere with the Judge's discretion (*r*).

Where an order has been made to change the venue, the Court will not interfere to set it aside or bring the venue back, unless it is manifest that the Judge who made the order has acted upon a misconception of the facts or that the order is otherwise erroneous (*s*). In one case where a defendant obtained an order to change the venue to a county where the cause of action arose, and retained the only Queen's Counsel and the leading junior on the circuit, and a Judge on the plaintiff's application made an order for changing the venue, the Court set it aside (*t*). The application should be made without delay (*u*).

As to the venue in penal actions, *see Lewis* v. *Davis*, L. R., 10 Ex. 86: *Greenhow* v. *Parker*, 6 H. & N. 882; 31 L. J., Ex. 4; 4 L. T. 473.

As to the prerogative of the Crown with regard to venue, *see Att.-Gen. to P. of W.* v. *Crossman*, L. R., 1 Exch. 381; 35 L. J., Ex. 215.

(*p*) *Ayres* v. *Buston*, 6 Taunt. 408.

(*q*) See *Comerford* v. *Daly*, 11 Ir. L. R. 62, C. P.

(*r*) *Cartwright* v. *Frost*, 3 H. & N. 278; 27 L. J., Ex. 352: *Church* v. *Barnett*, L. R., 6 C. P. 116; 40 L. J., C. P. 138.

(*s*) *Levy* v. *Rice*, L. R., 5 C. P. 119: *Schuster* v. *Wheelwright*, 8 C. B., N. S. 383; 29 L. J., C. P. 221: *Rogers* or *Ross* v. *Napier*, 30 L. J., Ex. 2: *Cartwright* v. *Frost*, 3 H. & N. 278; 27 L. J., Ex. 352: *Penhallow* v. *Mersey Dock, &c. Co.*, 29 L. J., Ex. 21.

(*t*) *Curtis* v. *Lewis*, 12 W. R. 951. See *Brown* v. *Clifton*, 10 W. R. 86.

(*u*) *Durie* v. *Hopwood*, 7 C. B., N. S. 835; 29 L. J., C. P. 151.

CHAPTER LX.

PUTTING OFF THE TRIAL (a).

PART VII.

In what cases.

Absence of material witness, &c.

In what Cases.]—If there be any bonâ fide and unavoidable reason or fact properly shown on affidavit why it is unsafe to proceed to trial, and wherever it appears to be necessary for the purposes of justice, the Court or a Judge will, in general, put off the trial. Thus they will in general do so when a material witness for either party is absent: and they will put it off, either to another day of the same sittings, or to another sittings under particular circumstances (b). The Court refused to put off a trial where the witness was abroad, and it did not appear that there was any likelihood of his return (c); and the same where the witness did not go abroad until after notice of trial was given, and he might consequently have been served with a subpœna in sufficient time (d). In an action for libel, where a justification was pleaded, the Court, on the application of the defendant, put off the trial, to enable him to procure the attendance of witnesses from abroad (the nature of the evidence being particularly pointed out in the affidavit), but imposed the terms of his admitting upon the trial the publication of the alleged libel (e). So, where the copy of a judicial document in the West Indies was stated to be material and necessary evidence for the defendant, the Court put off the trial to give time to procure it, and refused to go into the question of its admissibility (f). The Court will sometimes refuse the order, if the party applying have conducted himself unfairly, or have been the cause of any improper delay (g). They have also refused it upon the application of the plaintiff in a penal action (h); and, in another case, where the evidence of the absent witness was intended to sustain a defence not approved of by the

(a) By Ord. XXXVI. r. 34, "The Judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit."

(b) See *Stratford* v. *Marshall*, Barnes, 440: *Grierson* v. *Aird*, 1 Hodg. 76: *Paine* v. *Bustin*, 1 Stark. 74: *Maspero* v. *Strachan*, 5 Car. & P. 514: *Turquand* v. *Dawson*, 1 C. M. & R. 709: *Ansley* v. *Birch*, 3 Camp. 36.

(c) *Rex* v. *D'Eon*, 1 W. Bl. 515. See *Lord* v. *Cooke*, 1 W. Bl. 436. As to examining a witness abroad on interrogatories, &c., see ante, p. 550 et seq.

(d) *Bourne* v. *Church*, Barnes, 442. And see *Postan* v. *Rose*, 4 Car. & P. 271: *Wright* v. *M'Guffie*, 4 C. B., N. S. 441, where the witness was a captain in the service of the defendant, who applied to postpone the trial.

(e) *Brown* v. *Murray*, 4 D. & R. 830. And see *M'Cauley* v. *Thorpe*, 1 Chit. Rep. 685.

(f) *Mackenzie* v. *Hudson*, 1 D. & R. 159.

(g) *Steuart* v. *Gladstone*, 7 Ch. D. 394; 47 L. J., Ch. 423: *Saunders* v. *Pitman*, 1 B. & P. 33: *Taylor* v. *Gilkes*, 1 Chit. Rep. 730: *Wade* v. *Birmingham*, 2 Chit. Rep. 5; 1 M. & R. 111 (a). See *Turner* v. *Merryweather*, 7 C. B. 251.

(h) Tidd, 771, n.

Court (*i*). Where the defendant, a master mariner, went abroad, in the course of his business, after time obtained to plead, but before issue joined, the Court refused to postpone the trial until his return to England, on the ground that his evidence was material and necessary to make out his defence (*j*).

Other grounds.

There are also other grounds upon which the Court will put off a trial, besides that above mentioned of the absence of a material witness. Where the defendant's solicitor was so ill that he could not attend, the Court, upon application, put off the trial (*k*). And the same where a paper was published immediately before the assizes, with an intent to influence the jury (*l*). And the same where intelligence had been received of the death of the plaintiff abroad, until the Court or a Judge should direct it to be had, the plaintiff's solicitor admitting that some doubts existed as to whether his client was alive or not (*m*). As to putting off the trial of issues in fact, until the determination of issues in law, where there are both to be determined, *see ante*, pp. 325 and 586 (*n*). The Court have refused to put off a trial until a suit concerning the same matter in the Ecclesiastical Court should be determined (*o*). So, they have refused to put off the trial of a cause brought by the assignees of a bankrupt, because a petition was pending against the fiat (*p*). The Court have refused to put off the trial, where the ground of the application was, that an indictment for perjury, founded on the plaintiff's affidavit of debt, was pending (*q*). They have refused it, also, where the application was made merely because counsel was not prepared (*r*). Also where the defendant was arrested as he was coming to Court to attend his cause, the Judge at Nisi Prius refused to put off the trial on that account, unless upon payment of costs (*s*).

Patent cause.

In an old case where notice of trial by proviso was given in an action brought by the assignee of a patent for an infringement, in which action the validity of the patent was put in issue, the Court, at the instance of the plaintiff, postponed the trial, on the ground that in a *scire facias* brought by the defendant to repeal the patent, a rule was pending in the Court of Queen's Bench for entering a verdict for the patentee (*t*). But in an action brought to try the validity of a patent, the Court would not, except under peculiar circumstances, order the trial to be postponed till a *sci. fa.* brought to repeal the same patent had been disposed of (*u*).

(*i*) *Robinson* v. *Smith*, 1 B. & P. 454. See *Wade* v. *Birmingham*, 2 Chit. Rep. 5.

(*j*) *Solomon* v. *Howard*, 12 C. B. 463.

(*k*) *Hayley* v. *Grant*, Sayer, 63.

(*l*) *Rex* v. *Gray*, 1 Burr. 512; 2 Ken. 276: *Rex* v. *Jolliffe*, 4 T. R. 285: *Coster* v. *Merest*, 7 Moore, 87; 2 B. & B. 272: *Willis* v. *Farrer*, 3 Y. & J. 381.

(*m*) *Chesser* v. *Ridgway*, 1 M. & Gr. 955; 9 Dowl. 67.

(*n*) *Beckham* v. *Knight*, 7 Sc. 346: *Carden* v. *General Cemetery Co.*, Id. 348.

(*o*) *Anon.*, 2 Salk. 649: *Salisbury* v. *Proctor*, Id. 646.

(*p*) *Anon.*, 2 Chit. Rep. 411: *Vandersiegen* v. *Withan*, 8 Dowl. 369; 6 M. & W. 457.

(*q*) *Johnson* v. *Wardle*, 3 Dowl. 560; H. & W. 219.

(*r*) *Colebrook* v. *Dobbs*, 3 Burr. 1319.

(*s*) *Solomon* v. *Underhill*, 1 Camp. 229.

(*t*) *Smith* v. *Upton*, 6 M. & Gr. 251; 6 Sc. N. R. 804; 1 D. & L. 942.

(*u*) *Muntz* v. *Foster*, 6 M. & Gr. 1017; 7 Sc. N. R. 898.

PART VII.

Issue.

A judge at Nisi Prius will put off the trial of an issue, for the same reasons and under the same circumstances as in ordinary actions (*y*).

Application for postponement.

Application for Postponement.]—The application should be made in the first instance to a Master at Chambers; or if the assizes at which the action is to be tried have commenced, to a Judge at Nisi Prius. It seems that an application to postpone the trial of an action entered for trial at the sittings for London or Middlesex may be made to the Master before the case has appeared in the day's list of cases for trial; but after such time the application must be made at Nisi Prius. The application should be made promptly after the cause for it is known (*z*). It may be made to a Judge at Nisi Prius before or even after the cause has been called on (*a*).

If the application be made at Nisi Prius, *notice of the intended application, and a copy of the affidavit on which it is founded, should be first given to the solicitor for the opposite party* (*b*); which may have the effect of preventing his incurring the expense of bringing up his witnesses (*c*), if he do not intend to oppose the application; or, if he do oppose it, it affords him an opportunity of showing cause against it in the first instance, which, in practice, is always done. In other cases, it is usual, and seems to be necessary, to make the application on a summons or notice of motion (*d*). The notice should, in general, offer to pay the costs of the postponement (*e*).

The affidavit for.

The application must be founded on an affidavit stating the grounds on which it is made. If made on account of the absence of a material witness, and it is not known where he is, the affidavit in ordinary cases states the time issue was joined, the time for which notice of trial was given, the absence of the witness, that he is a material and necessary one for the party making the application, and that the party cannot safely proceed to trial without him, the endeavours which have been made to find him (*f*), and the time at which he is expected to return (*g*). But if the witness be abroad, or if from the nature of the application it may be suspected that it is made merely for the purpose of delay, the above form will not in general be sufficient, and the Court usually require that the affidavit shall state the cause of action, and the evidence expected from the witness, in order that they may judge if it be material, and that it shall also state circumstances from which they may infer the probability of the witness's return within a reasonable

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(*y*) *Buxton* v. *Lawton*, 4 Camp. 163.

(*z*) *Dark* v. *Dick*, 1 Price, P. C. 38: *Anon.*, 3 Taunt. 315. See *Roberts* v. *Downes*, Barnes, 437: *Roberts* v. *Hillsborough*, Id. 438: *Bourne* v. *Church*, Id. 442: *Sellon* v. *Chamberlayne*, Id. 444.

(*a*) See *Ansley* v. *Birch*, 3 Camp. 333: *Anon.*, 3 Taunt. 315. As to adjourning, &c. a trial, see ante, p. 594, n. (*a*). See *Packham* v. *Newman*, 3 Dowl. 165.

(*b*) Cas. t. Hardw. 128; Tidd, 9th ed. 772. See form of summons, Chit. Forms, p. 346; and of affidavit, Id.

(*c*) See *Att.-Gen.* v. *Hull*, 2 Dowl. 111.

(*d*) Tidd, 9th ed. 772.

(*e*) *Ward* v. *Ducker*, 6 Sc. N. R. 45; 5 M. & Gr. 377.

(*f*) *Anon.*, Lofft, 653: *Dark* v. *Dick*, 1 Price, P. C. 38: *Dale* v. *Heald*, 1 C. & K. 314.

(*g*) See the form, Chit. Forms, p. 346.

time (*h*). It should also, if possible, state where the witness is (*i*). It is, in general, best that it should state, if possible, when he is expected to return (*k*). It is not always necessary to state the name of the witness (*l*). Formerly, it seems, the affidavit must have been made by the party himself (*m*); but the affidavit of the solicitor in the cause (*n*), or of his clerk, if it states that he is particularly acquainted with the circumstances of the cause, and has the management of it (*o*), is now deemed sufficient. The affidavit, if made on the part of the defendant, need not swear to a good defence on the merits (*p*), though in some cases it may be advisable to do so.

In deciding upon an application of this kind, the Court will not, in general, enter into any inquiry as to the admissibility of the evidence required (*q*).

Terms imposed.

On thus putting off the trial the Court or Judge frequently impose terms on the party applying, such as the admission of some matters of formal proof (*r*), or the like. In some cases, where the application is made by the defendant, he will be ordered to bring money into Court (*s*).

Costs.

Costs, &c.]—When the trial is thus put off, it is usually upon the terms of paying any costs the opposite party may have been put to in preparing for trial, and which will be thrown away if the trial is put off (*t*). When the motion is made to the Court, or at Nisi Prius, the costs of the motion may not be given if the notice of motion offers to pay the costs of the postponement (*u*). If the order for putting off the trial be drawn up generally on payment of costs, such payment being a condition precedent, if they be not paid the cause will be tried in the ordinary course (*x*). These costs are taxed upon the order in the usual way. As to enforcing an order for payment of costs, *see Ch. LXVII.* (*y*).

(*h*) See *Rex* v. *D'Eon*, 3 Burr. 1513; 1 W. Bl. 510: *Lord* v. *Cooke*, Id. 436.

(*i*) *Zoffani* v. *Jennings*, Lofft, 187: *Att.-Gen.* v. *Phillips*, M'Clel. 251.

(*k*) 1 Chit. Rep. 730a. See *Anon.*, 2 Chit. 411.

(*l*) *Smith* v. *Dobson*, 2 D. & R. 420: *Buckingham* v. *Banks*, 4 D. & R. 832, n.: *Anon.*, 2 Chit. Rep. 686, n.

(*m*) *Carter* v. *Uppington*, Barnes, 437.

(*n*) *Duberly* v. *Gunning*, Peake, 97.

(*o*) *Sullivan* v. *Magill*, 1 H. Bl. 637.

(*p*) *Attorney-General* v. *Hull*, 2 Dowl. 111: *Hill* v. *Prosser*, 3 Id. 794.

(*q*) See *Mackenzie* v. *Hudson*, 1 D. & R. 159.

(*r*) *Brown* v. *Murray*, 4 D. & R. 830: *Anon.*, Lofft, 769.

(*s*) *Taylor* v. *Gilkes*, 1 Chit. Rep. 730. See Id. 686, n.

(*t*) See *Walker* v. *Lawe*, 1 Gale, 52: *Attorney-General* v. *Hull*, 2 Dowl. 111: *Lydall* v. *Martinson*, 5 Ch. D. 780. The costs are generally the same as if the record had been withdrawn.

(*u*) *Ward* v. *Ducker*, 6 Sc. N. R. 45; 5 M. & G. 377; Tidd, 9th ed. 503.

(*x*) See *Waller* v. *Joy*, 16 M. & W. 60.

(*y*) *Rice* v. *Brown*, 1 B. & P. 39. See *Attorney-General* v. *Hull*, 2 Dowl. 111.

CHAPTER LXI.

ENTRY OF ACTION FOR TRIAL.

PART VII.

Entry for trial.

AFTER notice of trial is given the next step towards the trial of the action is to enter it for trial, or, as the new rules express it, to "enter the trial." This is done by delivering to the proper officer a memorandum in the form provided by the *R. of S. C., App. G., No.* 22 (*a*), together with two copies of the pleadings in the action.

When to be entered.

By *Ord. XXXVI. r.* 15, "Notice of trial shall be given before entering the trial: and the trial may be entered notwithstanding that the pleadings are not closed provided that notice of trial has been given" (*b*).

In London and Middlesex.

In London and Middlesex.]—By *Ord. XXXVI. r.* 16, "In London and Middlesex, unless within six days after notice of trial is given the trial shall be entered by one party or the other, the notice of trial shall be no longer in force."

By party to whom notice of trial given.

By *Ord. XXXVI. r.* 20, "If the party giving notice of trial for London or Middlesex omits to enter the trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last preceding rule [*i. e. r.* 19, *see ante*, p. 580], within four days enter the trial."

In district registry.

Entry in District Registry.]—By *R. of S. C., Ord. XXXVI. r.* 22b (*R. October*, 1884, *r.* 4 (*c*)), "After notice of trial has been given of any cause, matter or issue to be tried elsewhere than in London or Middlesex, either party may, at any time not less than seven days before the commission day appointed for such place, enter the trial at the next assizes in the district registry (if any) of the city or town where the trial is to be had, or with the associate. No later entry shall be allowed, except by leave of a Judge going that circuit, or by order of a Judge at Chambers subject to the consent of a Judge going that circuit."

By *r.* 23, "So long as there is no district registry in the places enumerated in the first of the following columns, entries for trial may be made in the district registries in the second of the following columns, *i. e.*, trials at—

Bodmin	may be entered in the district registry at	Truro.
Carnarvon (*d*)	"	Bangor.
Chelmsford	"	Colchester.
Lancaster	"	Preston.

(*a*) See the form, Chit. F. p. 351.

(*b*) This rule obviates the difficulty that arose in the *Metropolitan Inner Circle R. Co.* v. *Metropolitan R. Co.*, 5 Ex. D. 196; 49 L. J., Ex. 505; 42 L. T. 590.

(*c*) By which the original rule (22), is annulled.

(*d*) There is now a District Registry at Carnarvon.

Lewes .	may be entered in the district registry at	Brighton.
Monmouth .	,,	Newport, Monmouthshire.
Stafford .	,,	Hanley.
Wells . .	,,	Bridgwater.
Warwick .	,,	Birmingham.
Winchester (*e*)	,,	Southampton."

Lists.

By *r.* 24, "The district registrars shall provide two numbered lists for trials with juries and trials without juries respectively. The entry shall be made in the proper list in such vacant number as the party entering shall select, and the lists shall be open for the inspection of all parties interested therein at all times during office hours. At the time of entry two copies of the documents mentioned in rule 30 of this Order shall be delivered as directed by the said rule, one of which shall be duly stamped with the amount of the fee payable on entry of the action or issue for trial."

Notice of withdrawal, &c.

By *r.* 25, "When a trial which has been entered has been postponed or withdrawn under Ord. XXVI. r. 2 [*post*, p. 600], or settled, the party who made the entry shall immediately thereupon give notice thereof to the district registrar, and such entry shall be expunged from the list."

Transmission of lists.

By *r.* 26, "The district registrar shall close the lists and transmit a corrected copy of the said lists, together with the two copies of the documents above referred to, to the associate at the assize town in such time that the same may be received at his office before the opening of the commission."

Entry by associate.

By *r.* 27, "Trials shall be entered by the associate in such vacant numbers in the lists so transmitted as the party entering may select. The lists shall then be re-numbered consecutively, and shall be the cause lists for the assizes."

Double entry.

By *r.* 28, "If a trial be entered by both parties, it shall be tried in the order of the plaintiff's entry, and the defendant's entry shall be vacated."

Default in making entry.

Default in entering Action for Trial.]—If after notice of trial has been given neither party enter the action for trial, the defendant may apply by summons to have the action dismissed for want of prosecution (*f*).

Proceedings on entry.

Pleadings to be left.

Proceedings on the Entry.]—By *Ord. XXXVI. r.* 30, "The party entering the trial shall deliver to the proper officer two copies of the whole of the pleadings, one of which shall be for the use of the Judge at the trial. Such copies shall be in print, except as to such parts (if any) of the documents as are by these rules permitted to be written."

If the pleadings be incorrectly printed or copied, an order may be obtained to amend them at the expense of the party entering the action for trial or his solicitor (*g*) and in some cases they may be amended at the trial if shown to be incorrect.

(*e*) There is now a District Registry at Winchester.

(*f*) *Crick* v. *Hewlett*, 27 Ch. D. 354; 32 W. R. 922. And see ante, p. 328.

(*g*) *Whipple* v. *Manley*, 1 M. & W. 432: *Harvey* v. *O'Meara*, 3 Dowl. 676: *Harper* v. *Phillips*, 8 Sc. N. R. 115; 7 M. & G. 397.

PART VII.

When the action is to be tried at the assizes a panel of the jurors, which can be obtained at the sheriff's office, is also left with the pleadings (*f*).

When the action is to be tried at the assizes it is entered with the district registrar at the registry as pointed out by rule 226. The Judge sitting at Nisi Prius may, in his discretion, allow his marshal to enter the cause for trial after the time allowed for the purpose (*g*). If the cause be made a *remanet* at the assizes, *get the pleadings, &c. from the marshal, and enter your cause again at the next assizes, as directed supra.*

When cause made a remanet.

Fee to be paid on entry.

The fee to be paid on entering the action for trial is 2*l.*, and this is paid by affixing a stamp, impressed or adhesive, for that amount on a copy of the pleadings left at the time of the entry. (*See Orders, post, Vol.* 2, *App.*)

Trial at bar.

As to the mode of entering a cause for trial at bar, *see ante*, p. 587.

Withdrawal after entry.

By *R. of S. C., Ord. XXVI. r.* 2, "When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties."

Lists of actions for trial.

By *Ord. XXXVI. r.* 29, "Separate lists of trials with juries and trials without juries respectively, to be tried at the sittings of the Queen's Bench Division for London and Middlesex respectively, shall be prepared, and the trials on each list shall be allotted without reference to any other list, and shall be tried at such times and in such Courts of the said Division as the Lord Chief Justice of England may arrange."

Special sittings in Liverpool or Manchester.

By *R. of S. C., Ord. XXXVI. r.* 22a (*R., October*, 1884, *r.* 3), "If, when the lists in Ord. XXXVI., Part IV. (*h*), mentioned have been closed for the Autumn and Spring Assizes respectively at Liverpool or Manchester, it shall appear that ten or more witness causes by the principal Act assigned to the Chancery Division are included in the list of trials for such sittings, special sittings for the trial of such causes, commencing on the first day of December or the tenth day of June then next respectively or as near those times as conveniently may be, shall be held before one of the Judges of the High Court (according to such arrangements as may be from time to time determined among themselves): Provided that in any case where at the time aforesaid it shall appear that the number of such causes is less than ten, no special sittings shall take place for that occasion at that place, but such business shall be, subject to any application which may be made for changing the place of trial, transacted at the then current assizes: Provided also that no cause shall be included in the list for any such special sittings in which all the parties are resident within the County Palatine of Lancaster: And provided also that if it shall appear to the Judge holding any such special sittings that any cause appearing in the list for trial thereat ought not to have been included therein, he may order the same to be struck out, and give such directions as he may think fit as to the trial thereof in the High Court."

(*f*) See C. L. P. Act, 1852, ss. 106—108, 110; noticed in Ch. LXIII.

(*g*) Ord. XXXVI. r. 22 b, ante, p. 598. *Doe* v. *Rees*, D. & R. N. P. C. 6: *Pope* v. *Fleming*, 3 C. & K. 146.

(*h*) *I. e.*, rr. 22 b to 28, supra.

CHAPTER LXII.

THE BRIEF.

CHAP. LXII.

The brief.

THE most essential matter to be observed in framing the brief is, that everything in it be stated accurately, and with as much conciseness as is consistent with perspicuity (*a*). The brief should in general commence with a list of the dates of the various proceedings in the action, after which should follow the statement of the case of the party, and such observations on the case of the other side and such materials for cross-examination as may be necessary, and should conclude with the proofs of the witnesses proposed to be called. If counsel's opinion has been taken on the evidence, it should be copied at the end of the statement of the case. Copies of the pleadings and notices to admit and produce, and of any correspondence, opinions, or other necessary documents, should accompany the brief.

Write your brief in a fair engrossing hand on brief paper, on one side only of each sheet. Deliver it to counsel, and pay his fees. It is not necessary to affix a penny receipt stamp on a brief where counsel signs his name acknowledging the payment of the fee (*b*). Solicitors should in all cases insert, at the commencement of the pleadings in the briefs on trials, the date of the issuing of the original writ of summons.

(*a*) See Chit. Forms, p. 353.
(*b*) *Re Beavan*, 23 L. J., Ch. 536.

CHAPTER LXIII.

THE JURY, COMPELLING ATTENDANCE OF; VIEW, ETC.

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PART VI.

THE *Judicature Act*, 1875, *s.* 20, expressly preserves the existing law relating to jurymen and juries, and by sect. 21 saves all forms and methods of procedure not inconsistent with the Acts or rules. The *R. of S. C.*, in repealing the *Reg. Gen. H. T.* 1853, expressly preserve the rules as to juries (*App. O.* (16), *ante*, p. 199, n. (*a*)).

Jury process abolished.

1. *Jury Process abolished.*]—By the *Com. Law Proc. Act*, 1852, *s.* 104, "The several writs of *venire facias juratores*, and *distringas juratores*, or *habeas corpora juratorum*, and the entry *jurata ponitur in respectu*, shall no longer be necessary or used" (*a*).

General power of Courts to make orders for summoning jury.

2. *General Power of the Courts to make Orders for summoning Jury.*]—By the *Com. Law Proc. Act*, 1854, *s.* 59, "The several Courts, or any Judge thereof, may make all such rules or orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury for the trial of any cause or matter depending in such Courts, at such time and place and in such manner as they or he may think fit." (*See also the latter part of s.* 107 *of the C. L. P. Act*, 1852, *post*, p. 604.)

Before the *Com. Law Proc. Act*, 1852, if the sheriff were interested in the event of the cause, or related by blood or affinity to either of the parties, a suggestion to this effect might be entered on the issue, immediately before the award of the *venire;* and the *venire* was then awarded to the other sheriff, if there were two (*b*); or, if there were

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(*a*) As to these writs, which were formerly used for the summoning juries before this Act, see the 8th ed. of this work, p. 342.

(*b*) *Rex* v. *Warrington*, 1 Salk. 152: *Letsom* v. *Bickley*, 5 M. & Sel. 144.

but one, then to the coroner (*c*): or, if the coroner were interested, &c., then to two persons appointed by the Court, called elizors (*d*). Any matter might be thus suggested which would be a good principal challenge in the array of the jury (*e*). As noticed *supra*, the *venire* and other jury process is now abolished, and there is now no issue made up as formerly. In such cases as the above an affidavit of the facts should be made and an order obtained for the proper person to summon the jury, &c., or an order might be obtained for changing the venue.

Where venue changed from town corporate to adjoining county.

Before the *C. L. P. Act*, 1852, in actions depending in any of the Courts at Westminster, where the venue was laid in the county of any city or town corporate in England, the Court, or Judge, upon the application of either party, might if they thought proper, award the *venire*, &c. to the sheriff of the county next adjoining to the county of such city or town corporate, in order that the action might be there tried (*f*). The exceptions as to Bristol, &c., in the 10th section of the Act, are no longer applicable since 5 & 6 *W.* 4, c. 64 (*g*).

Where venire did not run, and was awarded to neighbouring county.

Before the *C. L. P. Act*, 1852, where the venue was laid in a place where the Queen's writ of *venire* did not run, then upon a suggestion that the issue ought to be tried in the next adjoining English county, the *venire* was awarded to the sheriff of such county accordingly (*h*): thus, where the venue was laid in Berwick-upon-Tweed, the *venire*, upon suggestion, might be awarded to the county of Northumberland (*i*) and the like (*k*). As noticed *supra*, the *venire* and jury process are now abolished. Now, in such a case as the above, a Master's order might be obtained to change the venue.

How jury summoned for the assizes.

3. *How Jury summoned for the Assizes.*]—By the *C. L. P. Act*, 1852, *s.* 105, "The precept issued by the Judges of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal which may come on for trial at the assizes; and the jurors shall thereupon be summoned in like manner as at present" (*l*).

(*c*) Fortesc. de Laud. Leg. Ang. c. 25; Litt. 158.

(*d*) Co. Litt. 158: *Holland* v. *Heron*, Barnes, 465: *Mayor of Norwich* v. *Gill*, 8 Bing. 27. In all cases, where either party suggested any special matter as to the summoning of the jury out of the common course, a copy of the suggestion had to be given to the opposite party, and he was allowed a reasonable time to consider of it before a *nient dedire* was entered. *Brocas* v. *City of London*, 1 Str. 235.

(*e*) See post, Ch. LXIV.

(*f*) 38 G. 3, c. 52, s. 1, repealed by 42 & 43 Vict. c. 59. The venire is now abolished, see supra. In such a case as the above an order might be obtained to change the venue.

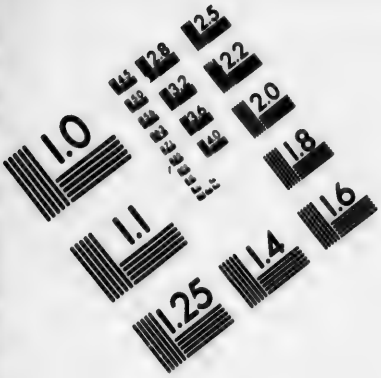
(*g*) See *Cole* v. *Gane*, 3 D. & L. 369: *Bird* v. *Morse*, 7 Taunt. 385.

(*h*) See the former decisions as to when the venue was in Wales: *Goodright* d. *Richards* v. *Williams*, 2 M. & Sel. 270: *Ambrose* v. *Rees*, 11 East, 370: *Rex* v. *Cowle*, 2 Burr. 855.

(*i*) *Mayor of Berwick* v. *Ewart*, 2 W. Bl. 1036.

(*k*) *Wade* v. *Yally*, 2 Salk. 651.

(*l*) As to the mode in which jurors are to be summoned, see the County Juries Act, 1825 (6 Geo. 4, c. 50). See per *Alderson*, B., *Farmer* v. *Mountfort*, 8 M. & W. 266. By 6 Geo. 4, c. 50, s. 22, the justices of assize may direct the sheriff to return two sets of jurors, not exceeding 144 in all, the one to attend for a certain number of days at the beginning of the assizes, the other for the residue of the assizes, and the sheriff shall summon them accordingly. The 6 G. 4, c. 50, is amended by the Juries Act,



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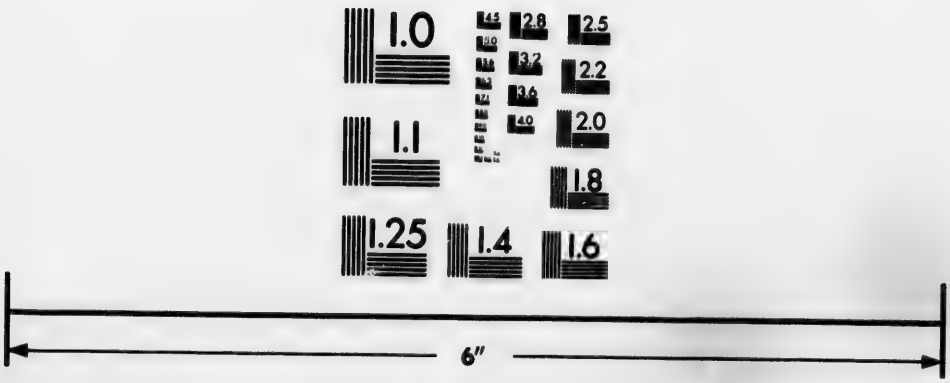

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PART VII.

By *s.* 106, "A printed panel of the jurors summoned shall, seven days before the commission day, be made by the sheriff, and kept in the office for inspection; and a printed copy of such panel shall be delivered by the sheriff to any party requiring the same, on payment of one shilling; and such copy shall be annexed to the Nisi Prius record (*m*).

How in London and Middlesex.

4. *How Jury summoned in London and Middlesex.*]—By the *Com. Law Proc. Act*, 1852, *s.* 107, "The sheriffs of London and Middlesex respectively shall, pursuant to a precept under the hand of a Judge of any of the said superior Courts, and without any other authority, summon a sufficient number of *common* jurors (*n*), for the trial of all issues in the superior Courts of Common Law, in like manner as before this Act; and seven days before the first day of each sittings a printed panel of the jurors so summoned for the trial of causes at such sittings shall be made by such sheriffs, and kept in their offices for public inspection; and a printed copy of such panel shall be delivered by the said sheriffs to any party requiring the same, on payment of one shilling; and such copy shall be annexed to the Nisi Prius record; and the said precept shall and may be in like form as the precept issued by the Judges of assize, and one thereof shall suffice for each term, and for all the superior Courts; and it shall be the duty of the sheriffs respectively to apply for and procure such precept to be issued in sufficient time before each term to enable them to summon the jurors in manner aforesaid; and it shall be lawful for the several Courts, or any Judge thereof, at any time to issue such precept or precepts to summon jurors for disposing of the business pending in such Courts, and to direct the time and place for which such jurors shall be summoned, and all such other matters as to such Judge shall seem requisite."

Special jury—proceedings to have action tried by.

5. *Proceedings to have Action tried with Special Jury* (*o*).]—By *R. of S. C., Ord. XXXVI. r.* 7, "(b) The plaintiff in any cause or matter in which he is entitled to a jury may have the issues tried by a special jury, upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial.

"(c) The defendant, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given.

"(d) Provided that a Judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just."

1862 (25 & 26 V. c. 107), by sect. 11 of which jurors may be summoned by post. By sect. 12, fines may be remitted in the manner therein mentioned. This Act does not affect the mode of procedure in the making out of jury lists, or the summoning of jurors, in the city of London. See also the Juries Act, 1870 (33 & 34 V. c. 77).

(*m*) See 6 G. 4, c. 50, *s.* 19. And see ante, p. 600.

(*n*) As to special jurors in London and Middlesex, see post, p. 606.

(*o*) Sect. 109 of the C. L. P. Act, 1852, is repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 V. c. 49).

Under this rule when an action is to be tried by a jury, a special jury may be obtained by either party on giving notice to the other party of his desire to have one (*p*). If notice has not been given within the time limited by the rule, an application to a Master may be made for an order for a special jury (*q*). The decision on such an application will not ordinarily be interfered with (*r*).

Notice to sheriff.

By the *Com. Law Proc. Act*, 1852, *s.* 112, "Where notice has been given to try by special jury, *either party* may, six days before the first day of the sittings in London or Middlesex, or adjournment day in London, or commission day of the assizes, give notice to the sheriff (*s*) that such cause is to be tried by a special jury; and in case no such notice be given no special jury need be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered by the Court or a Judge."

If not given cause to be tried by common jury.

By *s.* 113, "In all cases where notice is not given to the sheriff that the cause is to be tried by a special jury, and by reason thereof a special jury is not summoned or does not attend, the cause may be tried by a common jury, to be taken from the panel of common jurors, in like manner as if no proceedings had been had to try the cause by a special jury" (*t*).

It seems that if such notice is given, and none of the special jurors attend at the trial, the cause cannot be tried except by consent (*u*).

The subject's right to try a case by a special jury is not affected by any suggestion of the Attorney-General or Solicitor-General, without affidavit that the Crown is interested in the defendant's estate (*x*).

How special jury summoned at the assizes.

6. *How Special Jury summoned at the Assizes* (*y*).]—By the *Com. Law Proc. Act*, 1852, *s.* 108, "The precept issued by the Judges of assize as aforesaid (*z*) shall direct the sheriff to summon a sufficient number of special jurymen, to be mentioned therein, not exceeding forty-eight in all, to try the special jury causes at the assizes; and the persons summoned in pursuance of such precept shall be the

(*p*) See form of notice, Chit. F. p. 347.

(*q*) The application should not be made before issue joined. *Dresser* v. *Norman*, 6 C. B., N. S. 427; 5 Jur., N. S. 1083.

(*r*) *Smith* v. *London and St. Katharine's Dock Co.*, L. R., 2 C. P. 630.

(*s*) A sheriff is not entitled to fees from the party giving notice under this section that a cause is to be tried by a special jury, although the alteration of the system as to special juries has deprived the sheriff of the fees by which he formerly was remunerated by the party for summoning special jurors. *Bennett* v. *Thompson*, 6 E. & B. 683; 2 Jur., N. S. 613.

(*t*) See *Cawley* v. *Knowles*, 16 C. B., N. S. 107: *Hague* v. *Hall*, 1 D. & L. 83; 6 Sc. N. R. 705, a case decided before this Act. As to *Cawley* v. *Knowles*, see *Landet* v. *Prince*, 36 L. J., Q. B. 196.

(*u*) *Holt* v. *Meddowcroft*, 4 M. & Sel. 467.

(*x*) *Dunn* v. *Cox*, 16 M. & W. 439.

(*y*) As to when the costs of a special jury will be allowed, see Ch. LXV. See the 6 Geo. 4, c. 50, *s.* 30.

(*z*) See sect. 105, ante, p. 603. As to the sheriff summoning the jury, see ante, p. 604. The sheriff has no right to charge the fees in the table authorized by the Judges by virtue of 7 W. 4 & 1 V. c. 55 for the jury process, in special jury causes, since the alteration in the mode of summoning special juries by the above 108th section. *Bennett* v. *Thompson*, 6 E. & B. 683; 2 Jur., N. S. 612. See ante, n. (*s*).

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jury for trying the special jury causes at the assizes, subject to such right of challenge as the parties are now by law entitled to (*a*); and a printed panel of the special jurors so summoned shall be made, kept, delivered and annexed to the Nisi Prius record, in like time and manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors (*b*); and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors: provided that the Court or a Judge, in such a case as they or he may think fit, may order that a special jury be struck according to the present practice (*c*), and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause."

By *r.* 47, *H. T.* 1853 (*d*), "Sheriffs, *other than the sheriffs of London and Middlesex* (*e*), shall seven days before the commission day, make and keep at their offices, for inspection, a printed copy of the panel of the special jurymen to try the special jury causes at the assizes, as directed by the *Com. Law Proc. Act*, 1852; but such special jury need not be summoned, except notice be given as provided for by the 112th section of the said Act."

How special jury nominated, &c., in London and Middlesex.

7. *How Special Jury nominated, &c. in London and Middlesex* (*f*).] —By "The Juries Act, 1870," 33 & 34 *V.* c. 77 (*g*), *s.* 16, "In London and Middlesex, on the occasion of any sittings of the superior Courts, or any of them, for the trial of issues, a sufficient number of special jurymen, not less than thirty for each Court, shall be summoned to try the special jury causes triable at such sittings.

"The said jurymen shall be summoned in pursuance of a precept under the hand of any one of the [illegible]ces of the said superior Courts, in the same manner in all re[illegible] in which special jurymen are summoned in pursuance of [illegible]pts issued by the Judges of assize.

"The persons summoned in pursuance of such precept shall be the jury for the trial of special jury causes at such sittings in the said Courts respectively, subject to such right of challenge as the parties shall be entitled to.

"A printed panel of the jurors so summoned shall be made and kept, and a copy thereof delivered and annexed to the Nisi Prius record at the like time, in the same manner, and upon the same terms as are by law prescribed with reference to the panel of common jurors, in the case of London and Middlesex.

"Upon the trial the special jury shall be balloted for and

(*a*) See Ch. LXIV. as to the right of challenge.

(*b*) See sect. 106, ante, p. 604.

(*c*) As to the mode of striking a special jury, see post, p. 607.

(*d*) The Rules of H. T. 1853, as to juries, are expressly excepted from the repeal effected by the R. of S. C., 1883, App. (O.).

(*e*) This exception is, in effect, repealed by 33 & 34 V. c. 77, s. 18, post, p. 607.

(*f*) As to when the costs of a special jury will be allowed, see Ch. LXV.

(*g*) By sect. 4, "This Act shall be construed as one with the County Juries Act, 1825, and any Act amending the same; and such parts of the said Act and of any other Act or Acts as are inconsistent with this Act are hereby repealed.

called in the order in which they are drawn from the box, in the same manner as common jurors.

"Any special jurymen summoned to serve in any one of the said superior Courts shall be qualified and be liable, in case of necessity to serve in any other of the said Courts, as if he had been originally summoned as one of the jurymen for the trial of special jury causes in such last-mentioned Court."

Sect. 17. "The present practice of nominating and reducing special jurors in London and Middlesex shall cease to be followed as regards the trial of any cause at any of the said sittings of the said Courts, subject to this proviso, that any of the said superior Courts, or any Judge thereof, may, if it seem expedient, order that a special jury be struck according to the present practice (*h*), and such order shall be a sufficient warrant for striking such jury, and making a panel thereof for the trial of the particular cause."

Sect. 18. "In London and Middlesex, subject to any rules which may be made by any of the superior Courts in that behalf, any party to any action triable at any of the aforesaid sittings of the superior Courts shall be entitled to have the cause tried by a special jury, upon the same conditions as would entitle him to have it so tried in any county other than London and Middlesex.

"In London and Middlesex every Court or Judge shall have the same power of ordering that a cause be tried by a special jury, as the like Court or Judge would have if the cause were tried in any county other than London and Middlesex."

Summoning special jury.

No express power is given by the *Com. Law Proc. Act*, 1852, to the sheriffs of London and Middlesex to summon special juries; but it seems they have this power under *ss.* 107 and 108, *ante*, pp. 604—5. The sheriff, before 1 *V. c.* 55, was not allowed extra expenses of summoning special jurors, on account of their residing at a distance from each other (*i*). Since that statute this is otherwise (*k*).

Costs of special jury.

As to the costs of the special jury, *see Ch. LXV.*

Striking jury under old practice.

8. *Striking Jury under Old Practice.*]—It will be observed, that 33 & 34 *V. c.* 77, *s.* 17, expressly reserves power to the Court or a Judge to order a special jury to be struck according to the then "present practice."

By the *Com. Law Proc. Act*, 1852, *s.* 110, "In London and Middlesex special jurors shall be nominated and reduced by and before the under-sheriff and secondary respectively, in like manner as by the Master before this Act, upon the application of either party entitled to a special jury, and his obtaining a rule for such purpose (*l*); and the names of the jurors so struck shall be placed

(*h*) As to this, see infra.

(*i*) *Lane* v. *Sewell*, 1 Chit. Rep. 175. See R. T., 8 W. 3, r. 3a.

(*k*) See ante, p. 605, nn. (*s*) and (*z*); and see the table of fees in the Appendix, post, Vol. 2.

(*l*) See 6 Geo. 4, c. 50, s. 30, by which, upon the motion of either the plaintiff or defendant in any cause pending in any of the Courts at Westminster or the counties palatine, such Court may order a special jury to be struck before the proper officer, in the same manner as they have usually ordered the same; and the jury so struck shall be the jury to be returned for the trial of the issue. See *Irwin* v. *Grey*, 35 L. J., C. P. 43.

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upon a panel, which shall be delivered and annexed to the Nisi Prius record, in like manner and upon the same terms as hereinbefore (*m*) provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors."

Under the present practice either party may have a special jury by giving a notice, and an order is only necessary when the notice is not given within a limited time (*see ante*, p. 604). But under the former practice, by *r.* 44, *H. T.* 1853, "No rule for a special jury shall be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given (*n*); and in the latter case, no such rule is to be granted unless such application is made for it more than six days before that day, provided (*o*) that a Judge may, on summons, order a rule for a special jury to be drawn up at any time" (*p*).

The application that a special jury be struck according to the old practice should, in general, be made on summons to a Master at Chambers (*q*).

Having obtained the order, serve a copy of it on the under-sheriff or secondary, and get an appointment on it from him, and serve a copy of the order and appointment without delay upon the opposite solicitor or agent (*r*). If the order is not served upon the opposite party, he may treat it as a nullity (*s*). By *r.* 45, *H. T.* 1853, "No cause shall be tried by a special jury in Middlesex or London, unless the rule for such special jury be served, and the cause marked in the associate's book as a special jury cause, on or before the day preceding the day appointed in Middlesex and London respectively for the trial of special juries."

As to giving notice to the sheriff that the cause is to be tried by a special jury, *see the Com. Law Proc. Act*, 1852, *ss.* 112, 113, *ante*, p. 605.

By the *Com. Law Proc. Act*, 1852, *s.* 110, special jurors in London and Middlesex are to be nominated and reduced before the under-sheriff or secondary, instead of the Master.

How jury struck under old practice.

At the time appointed on the order, attend before the under-sheriff or secondary, when the jurors' book will be produced, and the special jurors' list, and numbers written on pieces of parchment or card

(*m*) See s. 106, ante, p. 604.

(*n*) By making this affidavit and so obtaining a rule for a special jury the defendant waived any irregularity in the notice of trial. *Beresford* v. *Geddes*, 36 L. J., C. P. 115; L. R., 2 C. P. 285.

(*o*) This proviso did not enable a judge to order a rule for a special jury before issue joined. *Sayer* v. *Dufaur*, 9 Q. B. 800. See *Dresser* v. *Norman*, 6 C. B., N. S. 427.

(*p*) See *Dresser* v. *Norman*, 6 C. B., N. S. 427: *Thorne* v. *Marquis of Londonderry*, 8 Bing. 26: *Phelps* v. *Keily*, 4 Sc. N. R. 376: *Chuck* v. *Harris*, 2 Sc. N. R. 82: *Smith* v. *London and St. Katharine's Dock Co.*, L. R., 2 C. P. 630.

(*q*) See *Phelps* v. *Keily*, infra: and *Chuck* v. *Harris*, 2 Sc. N. R. 82.

(*r*) *Phelps* v. *Keily*, 4 Sc. N. R. 376; 3 M. & G. 883; 1 Dowl., N. S. 501: *Gurney* v. *Gurney*, 3 D. & L. 734.

(*s*) See *Gunn* v. *Honeyman*, 2 B. & Ald. 400; 1 Chit. Rep. 234: *Chuck* v. *Harris*, 2 Sc. N. R. 82.

corresponding with the names in such list; the under-sheriff or secondary then puts the numbers into a box, and, having shaken them together, draws out forty-eight of them one after another, and, as each number is drawn, refers to the corresponding number in the special jurors' list, and reads aloud the name designated by such number. At the time of reading each name, either party or his solicitor may object to such person named as being incapacitated from serving on the jury; and if he prove the same to the satisfaction of the under-sheriff or secondary, such name shall be set aside and another number drawn instead thereof, which may in like manner be challenged; and so on until forty-eight names shall be chosen. If the whole of the forty-eight names cannot be obtained in this way, the under-sheriff or secondary may nominate the remaindor (*u*). By consent of the parties, the jury may be nominated according to the mode used and accustomed before the passing of the 6 *G.* 4, *c.* 50 (*x*). The practice under that mode of nomination is as follows:—*The clerk to the under-sheriff or secondary will furnish each party with a list of the names of the forty-eight jurors, their additions, and places of abode. He will also give another appointment for the purpose of striking them, which should be served on the opposite solicitor or agent. Attend at the time appointed, and the under-sheriff or secondary will strike out twelve names for each party, at their desire, beginning with the plaintiff; or, if either the solicitors or agents do not attend, the under-sheriff or secondary shall proceed ex parte, and strike out twelve names for the party absent* (*y*). *The clerk to the under-sheriff or secondary will then make out lists of the twenty-four names remaining, and give them to the solicitors or agents.* It may be added, that a Judge may make an order to oblige a party to proceed to the striking of a special jury (*z*). It is no objection that there has been a change of sheriffs after the forty-eight were nominated, and before the parties attended to strike the jury (*a*). In a *sci. fa.* by the plaintiffs, as trustees of a banking company, the plaintiffs having obtained a rule for a special jury, the Court made them undertake to strike out of the list any who might be shareholders in the banking company (*b*). In a case before the *Com. Law Proc. Act*, 1852, it was held, that, if the cause went off for default of special jurors, no new jury could, in general, be struck, and the cause must have been tried by the jury first appointed (*c*).

View, in what cases and how obtained.

9. *View, in what Cases and how obtained.*]—By *R. of S. C., Ord. L. r.* 5, an order for inspection of property by the jury may now be made under *Ord. L. r.* 3, and a simple order for such inspection is now often made (*d*). Even before the *Com. Law Proc. Act*, 1852, a rule for a view by six or more of the jury might in some cases be

(*u*) See 6 G. 4, c. 50, s. 32; C. L. P. Act, 1852, s. 100.
(*x*) Id. s. 33.
(*y*) See R. T. 8 W. 3, r. 2: *Anon.*, 1 Salk. 405: *R.* v. *Hart*, Cowp. 412: *White* v. *Eastern Union R. Co.*, 11 C. B. 875; 21 L. J., C. P. 112.
(*z*) *Joseph* v. *Perry*, 3 Dowl. 699.
(*a*) *R.* v. *Hart*, Cowp. 412.
(*b*) *Esdaile* v. *Lund*, 12 M. & W. 734; 1 D. & L. 990.
(*c*) *R.* v. *Perry*, 5 T. R. 453. But see *Mayor of Doncaster* v. *Coe*, 3 Taunt. 404. See *Irwin* v. *Sir G. Grey*, 36 L. J., C. P. 148, where it was alleged that some of the special jurors struck were not summoned.
(*d*) *Pickard* v. *G. North. R. Co.*, W. N. 1883, 194. See ante, pp. 438, 528.

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obtained under 4 *Ann. c.* 16 (*e*), *s.* 8, and 6 *G.* 4, *c.* 50, *s.* 23; as in actions of a local nature, such as trespass *quare clausum fregit*, nuisance, and the like (*f*). The Court cannot, even by consent, under these Acts, order a view in one county by a jury of another; neither can it compel a jury to go out of the limits of a county for such a purpose (*g*).

The practice as to obtaining a view under these Acts is regulated by the following statute and rule.

By the *Com. Law Proc. Act*, 1852, *s.* 114, "A writ of view shall not be necessary or used; but, whether the view is to be had by a common or special jury, it shall be sufficient to obtain a rule of the Court, or Judge's order, directing a view to be had; and the proceedings upon the rule for a view shall be the same as the proceedings heretofore had under a writ of view; and the sheriff, upon request, shall deliver to either party the names of the viewers, and shall also return their names to the associate for the purpose of their being called as jurymen upon the trial."

By *r.* 48, *H. T.* 1853 (*h*), "The rule (*i*) for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without a motion for that purpose." The names of the viewers should be inserted in the rule or order, and the time and place of meeting (*k*): and it is apprehended that the rule or order should contain all the matters contained in the abolished writ of *distringas* or *habeas corpora* directing the sheriff to have the place viewed by the jurors. The solicitors in the cause are frequently made the viewers, and there is no objection to this.

By *r.* 49, *H. T.* 1853 (*h*), "Upon any application for a view, there shall be an affidavit, stating the place at which the view is to be made, and the distance thereof from the office of the under-sheriff; and the sum to be deposited in the hands of the under-sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such attorney to the under-sheriff. And the under-sheriff shall pay and account for the money so deposited according to the scale following; (that is to say),

	£	*s.*	*d.*
For travelling expenses to the under-sheriff, shewers and jurymen, expenses actually paid, *if reasonable.*			
Fee to the under-sheriff, when the distance does not exceed five miles from his office	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he shall be necessarily absent more than one day, then for each day after the first a further fee of .	1	1	0

(*e*) Revised Statutes, c. 3.

(*f*) *Stones* v. *Menhem*, 2 Ex. 382.

(*g*) *Malins* v. *Lord Dunraven*, 9 Jur. 690, Q. B.

(*h*) The rules of H. T. 1853 as to juries are expressly excepted from the repeal effected by R. of S. C. 1883, App. O., ante, p. 199, n. (*c*).

(*i*) See Chit. Forms, p. 349, and see 1 Burr. 253.

(*k*) *Taylor* v. *Thompson*, 7 Bing. 403; 1 Dowl. 218: *Stones* v. *Menhem*, 2 Ex. 382; 17 L. J., Ex. 215.

	£	*s.*	*d.*
Fee to each of the showers the same as the under-sheriff, calculating the distance from their respective places of abode.			
Fee to each common juryman, per diem	0	5	0
For each special juryman, per diem	1	1	0
Allowance for refreshment to the under-sheriff, showers, and jurymen, whether common or special, each per diem	0	5	0
To the bailiff for summoning each juryman whose residence is not more than five miles distant from the office of the under-sheriff	0	2	6
And to each whose residence does exceed five miles of such distance	0	5	0

Make an affidavit as required by the above r. 49, *H. T.* 1853. *Draw up a præcipe or memorandum of the order required. Get from the opposite solicitor a memorandum of the name and place of abode of his shower; and take it, together with a similar memorandum of your own shower, and also of the time and place of meeting, &c. to the proper office, and draw up the order there. If the opposite party will not name a shower, the Master will, on an appointment being obtained for that purpose, name one ex parte. Serve a copy of the order on the opposite solicitor. Leave the original order at the sheriff's office, together with a list of the jury, when it is a special one, and they have been struck, and he will summon them; or, if common, he will summon such as he may think fit. Deposit with him the expenses of the view, according to the above rule of Court of H. T.* 1853.

The rule under which a view is now usually obtained is *Ord. L. r.* 5, which *see ante*, p. 528. The Judge may order such things to be done as may be necessary for the inspection (*l*).

Where after a view had been had the action was before jurymen other than the viewers, the latter being engaged elsewhere, it was held a mis-trial (*m*).

Proceedings before juries as before the C. L. P. Act, 1852.

10. *Proceedings to be had before Juries, as before the Com. Law Proc. Act*, 1852.]—By the *Com. Law Proc. Act*, 1852, *s.* 115, "The juries contained in such panels as aforesaid shall be the jurors to try the causes at the assizes and sittings for which they shall be summoned respectively; and all such proceedings may be had and taken before such juries, in like manner, and with the like consequences in all respects, as before any jury summoned in pursuance of any writ or writs of *venire facias juratores*, *distringas juratores*, or *habeas corpora juratorum*, before this Act."

As to calling the jury on the trial, *see post*, p. 625.

Before the *Com. Law Proc. Act*, 1852, if jury process were awarded to a wrong officer; or upon an insufficient suggestion; or if the *venire* were in some part mis-awarded, or sued out of more or

(*l*) *Bennett* v. *Griffiths*, 30 L. J., Q. B. 98, et per Cur., "We think that as ancillary to the power of inspection given to the Courts of common law, there is the same power given to remove obstructions, with a view to inspection, which was exercised by the Courts of equity as ancillary to their power of ordering inspection." See *Ennor* v. *Barwell*, 8 W. R. 300.

(*m*) *Kingston Union* v. *Landed Estates Co.*, 28 L. T. 644.

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fewer places than it ought to have been, so as some one place were rightly named; or if any of the jury who tried the issue were misnamed, either in the surname (*n*) or addition, in the jury process or return thereto, so as it were proved that it was the same man who was meant to be returned; or if there were no return to the said process, so as the panel of the jurors' names be returned and annexed to it (*o*); or if the returning officer's name were not to the return, so as it were proved that the writ was returned by the returning officer; all these several defects, which would render the trial bad at common law, were aided after verdict by 21 *J.* 1, *c.* 13 (*p*).

(*n*) See *Hill* v. *Yates*, 12 East, 229, post.

(*o*) See 6 G. 4, c. 50, s. 15.

(*p*) See *Gurney* v. *Clere*, Cro. El. 259: *Welsh* v. *Upton*, Id.: *Eliot* v. *Skypp*, Cro. Car. 388; Bull. N. P. 320, 324.

CHAPTER LXIV.

QUALIFICATION, ETC. OF JURORS, AND CHALLENGES.

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1. *Jurors.*

Qualifications of jurors generally.

Qualifications of.]—By "The County Juries Act, 1825," 6 *G.* 4, *c.* 50, *s.* 1, "Every man, between the ages of twenty-one years and sixty, who shall have within the county in which he resides, in his own name, or in trust for him, 10*l.* by the year above reprizes in lands or tenements of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of such lands or tenements, or in lands, tenements, and rents taken together, in fee-simple, fee-tail, or for the life of himself or some other person,—or who shall have within the same county, 20*l.* by the year above reprizes in lands or tenements held by lease for the absolute term of twenty-one years or longer, or for a term of years determinable on any life or lives, *or* who, being a householder, shall be rated or assessed to the poor-rate, or to the inhabited house-duty, in Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*, or who shall occupy a house containing not less than fifteen windows,—shall be qualified and liable to serve on juries" (*a*).

In London.

In London, a juror must be a householder, *or* the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, within the said city, *and* have lands, tenements, or personal estate of the value of 100*l.* (*b*).

In Middlesex.

In Middlesex, no person shall be returned to serve on a jury at Nisi Prius, who has served as a juror in either of the two preceding terms or vacations, and has the sheriff's certificate of having so served; and no person shall be returned to serve on a jury at the assizes who has before served on a jury, in Yorkshire within four years, in Wales, or in the counties of Hereford, Cambridge, Huntingdon, or Rutland, within one year, or in any other county within two years, and has the sheriff's certificate of having so

At assizes.

(*a*) By "The Juries Act, 1870," 33 & 34 V. c. 77, s. 7, the qualification in Wales is the same as in England,

(*b*) 6 G. 4, c. 50, s. 50.

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served (*c*); which certificate the sheriff is bound to give to every common juror, serving or attending as such, but not to grand or special jurors (*d*). And if any sheriff shall return a person as juror within the times above mentioned, the Court on examination and proof of such offence in a summary way may set such fine upon the offender as the Court shall think meet (*e*).

Of special jurors.

As to special jurors:—By "The Juries Act, 1870," 33 & 34 V. c. 77, *s.* 6, "Every man whose name shall be in the jurors' book for any county in England or Wales, or for the county of the city of London, and who shall be legally entitled to be called an esquire, or shall be a person of higher degree, or shall be a banker or merchant, or who shall occupy a private dwelling-house rated or assessed to the poor rate or to the inhabited house duty on a value of not less than 100*l.* in a town containing, according to the census next preceding the preparation of the jury list, 20,000 inhabitants and upwards, or rated or assessed to the poor rate or to the inhabited house duty on a value of not less than 50*l.* elsewhere, or who shall occupy premises other than a farm rated or assessed as aforesaid on a value of not less than 100*l.*, or a farm rated or assessed as aforesaid on a value of not less than 300*l.*, shall be qualified and liable to serve on special juries in every such county in England and Wales and in London respectively."

Aliens.

By sect. 8, "Aliens having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, shall be qualified and liable to serve on juries or inquests in England and Wales as if they had been natural-born subjects of the Queen, but save as aforesaid no man not being a natural-born subject of the Queen shall be qualified to serve on juries or inquests in any Court, or on any occasion whatsoever" (*f*).

Persons exempt.

Sect. 9. "The persons described in the Schedule hereto shall be severally exempt as therein specified from being returned to serve and from serving upon any juries or inquests whatsoever, and their names shall not be inserted in the lists of the persons qualified and liable to serve on the same; but save as aforesaid no man (*g*) otherwise qualified to serve on such juries or inquests shall be exempt from serving thereon, any enactment, prescription, charter, grant or writ to the contrary notwithstanding."

Convicts, outlaws, &c. disqualified.

Sect. 10. "Provided always, that no man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any Court or on any occasion whatsoever."

Overseers to state in list who qualified to be special jurors.

By sect. 11, "In making out the lists of persons within their respective parishes and townships qualified to serve as jurors, the overseers shall specify which of such persons are, in the judgment of such overseers, qualified as special jurors; and shall also specify in every case the nature of the qualification, and also the occupation and the amount of the rating or assessment of every such person."

(*c*) 6 G. 4, c. 50.

(*d*) Id. *s.* 40: *Ex p. Atkinson*, 10 Bing. 399; 2 Dowl. 773; 4 M. & Sc. 160.

(*e*) 6 G. 4, c. 50, *s.* 42.

(*f*) As to challenging a special juror on the ground that he is an alien, see *R.* v. *Despard*, 2 M. & R. 406: *R.* v. *Sutton*, 8 B. & C. 417.

(*g*) By sect. 5, in this Act the word "juror" shall mean male persons only.

And by 6 *G.* 4, *c.* 50, *s.* 31, the sheriff or under-sheriff shall set down their names in alphabetical order, in a list to be called the "Special Jurors' List," and shall prefix to each name a number; which numbers shall also be written out on distinct pieces of parchment or card, and put into a drawer or box, to be kept for the purpose of nominating special juries, as mentioned *ante*, p. 608.

On writs of inquiry.

Upon writs of inquiry executed in London, or in any county in England or Wales, the jurors must be qualified in like manner as jurors at Nisi Prius in the same city, county, &c.; but if executed in any liberty, franchise, city, borough, or town corporate not being a county, or in any city, borough, or town being a county of itself, the jurors may be of the same description as was usual before the passing of this Act (*h*).

Who exempt.

Who are exempt.]—By "The Juries Act, 1870," 33 & 34 *V. c.* 77, which by *s.* 4 is to be "construed as one with 'the County Juries Act, 1825,' and any Act amending the same, and such parts of the said Act and of any other Act or Acts as are inconsistent with this Act are hereby repealed," contains in the schedule the following list of "persons exempt from serving on juries:"—"peers; members of parliament; judges; clergymen; Roman Catholic priests; ministers of any congregation of protestant dissenters, and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation, except that of a schoolmaster; serjeants, barristers-at-law, certificated conveyancers, and special pleaders, if actually practising; members of the Society of Doctors of Law and advocates of the civil law, if actually practising; attornies, solicitors and proctors, if actually practising, and having taken out their annual certificates, and their managing clerks and notaries public in actual practice; officers of the Courts of Law and Equity, and of the Admiralty and Ecclesiastical Courts, including therein the Courts of Probate and Divorce, and the clerks of the peace or their deputies, if actually exercising the duties of their respective offices; coroners; gaolers and keepers of houses of correction, and all subordinate officers of the same; keepers in public lunatic asylums; members and licentiates of the Royal College of Physicians in London, if actually practising as physicians; members of the Royal Colleges of Surgeons in London, Edinburgh and Dublin, if actually practising as surgeons; apothecaries certificated by the Court of Examiners of the Apothecaries Company, and all registered medical practitioners and registered pharmaceutical chemists if actually practising as apothecaries, medical practitioners or pharmaceutical chemists respectively (*i*); officers of the navy, army, militia and yeomanry while on full pay; the members of the Mersey Docks and Harbour Board; the master, wardens and brethren of the corporation of the Trinity House of Deptford Strond; pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed under any Act of Parliament or charter for the regulation of pilots; the household servants of her Majesty, her

Persons exempt.

(*h*) 6 G. 4, c. 50, s. 52. As to a "good jury" on writs of inquiry, see Vol. 2, Ch. CXV.

(*i*) Dentists registered under 40 & 41 Vict. c. 33, are exempted, if they so desire (*s.* 30).

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heirs and successors; officers of the Post-office, commissioners of customs, and officers, clerks, or other persons acting in the management or collection of the customs; commissioners of inland revenue, and officers or persons appointed by the commissioners of inland revenue, or employed by them or under their authority or direction in any way relating to the duties of inland revenue (*i*); sheriffs' officers; officers of the rural and metropolitan police; magistrates of the Metropolitan Police Courts, their clerks, ushers, doorkeepers, and messengers; members of the Council of the Municipal Corporation of any borough, and every justice of the peace assigned to keep the peace therein, and the town clerk and treasurer for the time being of every such borough so far as relates to any jury summoned to serve in the county where such borough is situate; burgesses of every borough in and for which a separate Court of Quarter Sessions shall be holden, so far as relates to any jury summoned for the trial of issues joined in any Court of General or Quarter Sessions of the peace in the county wherein such borough is situate; justices of the peace, so far as relates to any jury summoned to serve at any Sessions of the Peace for the jurisdiction of which he is a justice; officers of the Houses of Lords and Commons."

By sect. 12, "No person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness, not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list."

How punished for non-attendance.

How punished for Non-attendance.]—If any man, summoned to attend on a jury, shall not attend in pursuance of such summons, or being thrice called shall not answer to his name; or if any such man, or any talesman, after being called, shall be present but not appear, or after appearance shall wilfully withdraw himself from the presence of the Court; the Court shall set such fine upon him as it shall think meet, and in the case of a viewer not less than 10*l.*, unless some reasonable excuse shall be proved by oath or affidavit (*k*); or upon such default at the execution of a writ of inquiry, the under-sheriff, &c. may set a fine not exceeding 5*l.* (*l*). The Court will not hear counsel for a juryman who has been fined for a contempt (*m*).

2. *Challenges.*

Challenges.

When a full jury appear (*n*), either party may challenge them for cause (*o*)—as well the talesmen (*p*) as the jurors originally

(*i*) Certificated Income Tax Commissioners are exempted by 34 & 35 V. c. 103, s. 30.

(*k*) 6 G. 4, c. 50, ss. 38, 51. As to remitting fines, see 25 & 26 V. c. 107, s. 12.

(*l*) 6 G. 4, c. 50, s. 53.

(*m*) *Carne* v. *Nicoll*, 1 Scott, 68; 3 Dowl. 115. But they will attend to affidavits stating the circumstances in extenuation of his conduct.

(*n*) See *R.* v. *Edmonds*, 4 B. & Ald. 471.

(*o*) There is no right of peremptory challenge of special jurors summoned at the assizes under the C. L. P. Act, 1852, s. 108: *Creed* v. *Fisher*, 9 Ex. 472; 23 L. J., Ex. 143.

(*p*) 6 G. 4, c. 50, s. 37.

returned (*q*). It seems doubtful whether there was any right of challenge on the trial of a cause under a writ of trial (*r*).

Species of.

Species of.]—Challenges are of two kinds—to the array, or to the polls; and each of these is again subdivided into principal challenges, and challenges to the favour. In this order they will now be considered.

Challenge to the array.

To the Array.]—A challenge to the array is an objection to all the jurors returned by the sheriff, collectively (*s*), not for any defect in them, but for some partiality or default in the sheriff, or his under officer, who arrayed the panel (*t*). This is either a principal challenge, or a challenge to the favour.

Causes of principal challenge to the array.

The causes of principal challenge to the array are such as the following, viz.: that the sheriff or other returning officer is of kindred or affinity to the plaintiff or defendant, if the affinity continue; that one or more of the jury are returned at the nomination of the plaintiff or defendant; that an action of battery is pending at the suit of the plaintiff or defendant against the sheriff, or at the suit of the sheriff against the plaintiff or defendant; that an action of debt is pending at the suit of the plaintiff or defendant against the sheriff, but not if by the sheriff against the plaintiff or defendant; that the sheriff or returning officer holds land depending upon the same title with that in litigation between the parties; that the sheriff, &c. is under the distress of the plaintiff or defendant; that the sheriff, &c. is counsel, solicitor (*u*), officer, servant, or gossip of either party; or is an arbitrator in the same matter, and has treated thereof (*x*). Formerly, where a peer was a party, the array might be challenged if a knight were not returned of the jury; but this has been expressly altered by the stat. 6 *G.* 4, c. 50, *s.* 28; nor will any challenge be now allowed for want of hundredors. (*Id. s.* 13.)

Of challenges to the array for favour.

The causes of challenge to the array for favour are such as imply at least a probability of bias or partiality in the sheriff, but do not amount to a principal challenge. Thus, that the plaintiff or defendant is tenant to the sheriff; or that the son of the sheriff has married the daughter of the plaintiff or defendant; or the like (*x*).

In special jury causes.

What has been said here as to the challenges to the array must, perhaps, be understood as having reference only to common and not to special juries; for it seems very doubtful if the array in special jury causes can be challenged (*y*). Nor, indeed, are challenges to the array very usual in common jury causes; for if there be an objection to the sheriff, a jury summoned by the coroner may be obtained (*z*); besides, this objection would be a good ground for a new trial (*a*).

(*q*) See *Barrett* v. *Long*, 3 H. L. Cas. 395.

(*r*) *Pryme* v. *Titchmarsh*, 10 M. & W. 605; 2 Dowl., N. S. 474. A writ of trial is now abolished.

(*s*) Co. Lit. 156, 158. See *O'Connell's case*, 9 Jur. 25, H. L.

(*t*) 3 Bl. Com. 359. See form, Chit. Forms, p. 356.

(*u*) *Baylis* v. *Lucas*, Cowp. 112.

(*x*) Co. Lit. 156. See *Mayor of Carmarthen* v. *Evans*, 10 M. & W. 274; 2 Dowl., N. S. 296.

(*y*) See 6 G. 4, c. 50, s. 27: *R.* v. *Johnson*, 2 Str. 1000: *R.* v. *Burridge*, 1 Str. 593; 2 Ld. Raym. 1364.

(*z*) See ante, p. 602.

(*a*) *Baylis* v. *Lucas*, Cowp. 112.

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Principal challenges to the polls.

To the Polls.]—A challenge to the polls is an exception to one or more of the jurors who have appeared individually; and this is either a principal challenge, or a challenge to the favour. The causes of principal challenge to the polls may be classed under the following heads:—

Propter honoris respectum.

1. Challenge *propter honoris respectum:* as, if a lord of Parliament be put upon a jury, he may challenge himself, or he may have a writ of privilege for his discharge (*b*); but it is doubtful if either party can challenge him, for he is merely exempt from serving by 6 *G.* 4, *c.* 50, *s.* 2, and 33 *&* 34 *V. c.* 77 (*c*).

For defect in property, person or description.

2. Challenge *propter defectum:* that the juror is not qualified to serve upon a jury, as required by 6 *G.* 4, *c.* 50, *ante*, p. 613, in which case he shall be discharged, if the Court be satisfied of the fact (*d*); but this does not extend to special jurors (*e*); that he is an alien (*f*); that he is within the age of twenty-one (*g*); or that he is an idiot or lunatic (*h*); so if a woman be impanelled she may be challenged *propter defectum sexûs* (*i*); unless impanelled on the writ *de ventre inspiciendo* (*k*). But a matter which merely *exempts* a man from serving on a jury, and does not incapacitate him, can never be a cause of challenge; and it appears (*l*) that if a person thus exempt be summoned, and appear, he cannot excuse himself from serving on a jury, if there be not a sufficient number of jurors without him.

Wrong name.

If a juror be erroneously named in the panel, &c., and sworn by such wrong name—if the error be in the christian name, it amounts only to a matter of challenge, and cannot be objected to after verdict (*m*); if in the surname, the Court, it seems, may set aside the verdict (*n*), and grant a new trial, but they would not do so unless the mistake had been productive of some injustice, *see post, Ch. LXVIII.*

For partiality or bias.

3. Challenge *propter affectum:* by reason of some supposed bias or partiality. Thus, that the juror is of kin to either party within the ninth degree (*o*), or according to Sir Ed. Coke, however remote the kindred (*p*), that there is affinity or alliance by marriage between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive; for otherwise it would be but a challenge to the favour (*p*)—that the juror is godfather to the party's child, or the party godfather to the juror's child;—that the juror has land which depends upon the same title as the land in question; or, in a cause where the parson of a parish is party, and

(*b*) Co. Lit. 156; 2 Hawk. c. 43, s. 11; 3 Bl. Com. 361.
(*c*) Ante, p. 615.
(*d*) 6 G. 4, c. 50, s. 27; Co. Litt. 156.
(*e*) *Semb., R.* v. *Despard*, 2 M. & R. 406; 8 B. & C. 417.
(*f*) Co. Lit. 156. But see now when an alien is qualified, ante, p. 614.
(*g*) Co. Lit. 157. And see 6 G. 4, c. 50, s. 1, ante, p. 613.
(*h*) Gilb. C. B. 95.
(*i*) 3 Bl. Com. 362. See also ante, p. 614, n. (*g*).
(*k*) See *Willoughby's case*, Cro. El. 566; Trial per Pais, 86.
(*l*) 2 Hawk. c. 43, s. 26.
(*m*) *Wray* v. *Thorn*, Willes, 488: *Hill* v. *Yates*, 12 East, 230 a.
(*n*) *Norman* v. *Beaumont*, Willes, 484; Barnes, 453: *Dovey* v. *Hobson*, 6 Taunt. 460; 2 Marsh. 154. And see *Russell* v. *Ball*, Barnes, 455.
(*o*) Finch, L. 401; 3 Bl. Com. 363. See *Barrett* v. *Long*, 3 H. L. Cas. 395.
(*p*) Co. Lit. 157.

the right to the church comes in debate, that the juror is a parishioner, is a good cause of challenge; and so in all other cases where the juror has an interest in the action, direct or collateral (*q*);—that the juror has before given a verdict in the same cause, or upon the same title or matter, though between other parties;—that he was chosen arbitrator in the same cause by one of the parties, and had entered upon an examination of it; but otherwise if he were chosen indifferently by both parties;—that he is counsellor, servant, or of fee, of either party (*r*)—that he is tenant of either party (*s*); that he is of the same society or corporation with either party (*t*); but that he is his fellow-servant is but a challenge to the favour (*r*); that he has taken information of the case before he is sworn (*u*); that he has declared his opinion of the case beforehand (*x*);—that since he has been returned, he has eaten or drunk at the expense of one of the parties (*y*): but that one of the parties has lately been entertained at the juror's house, is only matter of challenge to the favour (*z*);—that one of the parties has laboured the juror, and given him money or other things for giving his verdict; but if the party only labour the juror to appear and act conscientiously, it is no matter of challenge whatever;—that an action implying malice or displeasure, is pending between the juror and one of the parties; but if not implying malice, &c., it is but matter of challenge to the favour (*a*). In an action against an insurance office on a life policy, it is no objection to a special juror being sworn, that he is a director of another insurance office, unless that office has granted a policy on the life in question, and the amount of that policy is unpaid (*b*).

For crime.

4. Challenge *propter delictum*: when for some act of the juror, he has ceased to be, in consideration of law, *probus et legalis homo*. Thus, that he has been attainted of treason or felony, or convicted of any crime that is infamous, of which he has not obtained a free pardon (*c*); or that he is under outlawry (*d*).

Challenge to the polls for favour.

The challenge to the polls *for favour* is of the same nature with the principal challenge *propter affectum*, but of an inferior degree. The general rule of law is, that the juror shall be indifferent; and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favour, according to the degree of probability of his being biassed. The cause of a principal challenge to the polls we have seen, is such matter as carries with it, *primâ facie*, evident marks of suspicion, either of malice or favour.

(*q*) See *Bailey* v. *Macaulay*, 13 Q. B. 815; 19 L. J., Q. B. 73, where it appeared, on the trial of an action against a committee-man of a projected railway company, that one of the jury was also a member of the committee, and had been sued in respect of the claim in question, and the Court granted a new trial upon payment of costs. See *Williams* v. *Great Western R. Co.*, 3 H. & N. 869; 28 L. J., Ex. 2, where one of the jury was a shareholder in the company, and a new trial was refused.

(*r*) Co. Litt. 157.

(*s*) Gilb. C. B. 95.

(*t*) 3 Bl. Com. 363: *Mayor of Carmarthen* v. *Evans*, 10 M. & W. 274; 2 Dowl., N. S. 296.

(*u*) 2 Hale, 306.

(*x*) 2 Hawk. c. 43, s. 28.

(*y*) Co. Lit. 157.

(*z*) *Anon.*, 3 Salk. 81.

(*a*) Co. Lit. 157.

(*b*) *Craig* v. *Fenn*, Car. & M. 43.

(*c*) 6 G. 4, c. 50, s. 3; 33 & 34 V. c. 77, s. 10, ante, p. 614.

(*d*) Id.

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But when, from circumstances, it appears probable that a juror may be biassed in favour of or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favour. The effect of these two species of challenge is the same; the only difference between them is in the mode of trying them.

When to be made.

When and how to be made.]—No challenge, either to the array or to the polls, can be made before a full jury have appeared. It is immaterial which party challenges first; but the party who first begins to challenge must finish all his challenges before the other begins; otherwise he is precluded from making any further challenge. Also the challenges of the party who challenged first shall be first tried (*e*).

How challenge to the polls to be made.

The challenge to the polls is made *ore tenus;* and it is not in general required that the party challenging shall immediately declare his cause of challenge, unless there be not a sufficient number of jurors remaining on the panel, or the other side challenges *touts par avail* (*f*). But if the juror were formerly sworn in the same cause, and be now challenged (in which case the cause of challenge must have arisen since the jury was before sworn); or if, after a challenge to the array is tried and overruled, the party challenge the polls, the party must declare his cause of challenge presently (*g*). If a juror be challenged, and the challenge tried and overruled, he may still be challenged by the opposite party (*g*).

How challenge to array to be made.

The challenge to the array must be in writing. It may be in the following form:—"*And now at this day, to wit, on———, come as well the aforesaid J. S. as the aforesaid J. N. by their respective solicitors; and the jurors of the jury impanelled, being summoned also come, and hereupon the said J. N. challengeth the array of the said panel, because he saith that* [here set forth the matter of challenge with certainty and precision]. *And this he is ready to verify; wherefore he prayeth judgment, and that the said panel may be quashed*" (*h*).

A challenge to the array or to the polls ought to be propounded in such a way at the trial that the other party may either counterplead or deny the matter of challenge (*i*).

Trial of challenge to array.

How tried.]—As to challenges to the array, it lies entirely in the discretion of the Court how they shall be tried; sometimes they are tried by two of the jury (*k*). If the challenge, however, be a prin-

(*e*) Trial per Pais, 144.
(*f*) Id. 143.
(*g*) Co. Lit. 158.
(*h*) See the form of a challenge to the array, Chit. Forms, p. 356;—that the jury were returned at the instance of the party, 2 Burn, J. 868;—that the sheriff is of kin to one of the parties, Ib.;—that the sheriff is an alderman, and interested in the event of the trial, Cr. Cir. Comp. 105;—that the sheriff is a citizen and a freeman, and has paid a sum of money towards defraying the expenses of the suit, Ib.:—and see a counter-plea to this last challenge, and a demurrer to the counter-plea, Ib. See also Tr. per Pais, 159—187; 10 Went. 472; 2 Rich. Prac., C. B. 180; Lil. Ent. 472: *R.* v. *Hughes*, 1 Car. & K. 235.
(*i*) *Mayor of Carmarthen* v. *Evans*, 10 M. & W. 274; 2 Dowl., N. S. 296: and see *R.* v. *Edmonds*, 4 B. & Ald. 471. Before the Jud. Acts the challenge was put upon the Nisi Prius record.
(*k*) 2 Hale, 275.

cipal challenge, it may be tried by the Court itself, without the aid or intervention of triers.

Proceedings if array quashed.

If the array be quashed as to the sheriff, the jury will be summoned by the coroner: if quashed as to the coroner, then the jury will be summoned by persons appointed by the Court for that particular purpose, called elisors, to whose array no challenge is allowed (*l*). If the array be not quashed, the party may then make his challenges to the polls.

Trial of challenges to poll to favour.

Challenges to the polls, if to the favour, are thus tried:—If two jurors have been already sworn, they shall try the challenge; if not, the Court appoint two indifferent persons to try it, and who are thence named triers. If the triers try one juror, and he be found indifferent, he shall be sworn; and then he and the two triers shall try the next. When another is found indifferent the two triers shall be superseded, and the first two so sworn on the jury shall try the next (*m*). The following oath is previously administered to those who try the challenge:—"*You shall well and truly try whether J. S.* [the juror challenged] *stands indifferent between the parties to this issue; so help you God*" (*n*).

Where challenge to polls a principal challenge.

But where the challenge to the polls is a principal challenge, it is tried by the Court without the aid or intervention of triers. And, indeed, in both cases of principal challenge and challenge to the favour, the associate or officer, upon an objection to any particular person on the panel being intimated to him, will in general refrain from calling him.

Juror may be examined.

The juror himself may be examined as to the matter of challenge, provided it do not tend to his dishonour or discredit (*o*).

Result of trial of.

After the challenge is decided, if the juror be found indifferent, he is immediately sworn on the jury; if otherwise, he is desired to quit the jury box, and the officer proceeds to swear the next juror, if not challenged. If a juror be challenged and rejected, he cannot afterwards be sworn as a talesman (*p*).

(*l*) Co. Lit. 158.
(*m*) Ibid.
(*n*) *Anon.*, 1 Salk. 152.
(*o*) Co. Lit. 158: *Anon.*, 1 Salk. 153. See *R.* v. *Edmonds*, 4 B. & Ald. 471; 1 Car. & K. 235.
(*p*) *Parker* v. *Thornton*, 2 Ld. Raym. 1410; 1 Str. 640.

CHAPTER LXV.

THE TRIAL.

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WE have already (*ante*, pp. 582 *et seq.*) discussed the various modes in which an action may be tried; we have now to consider the proceedings at the trial.

1. Where and when.

1. *Where and when, Order of Trial of Causes, &c.*]—In London and Middlesex an action is tried at the sittings which are held as mentioned *ante*, p. 189. In other counties the trial takes place at the assizes, which are held as mentioned *ante*, p. 194. Every trial of any question or issue of fact with a jury is held before a single Judge, unless specially ordered to be held before more (*Ord. XXXVI. r. 9, ante*, p. 586). And it may be here observed that a Judge, or

commissioner on circuit, when engaged in trying an action, constitutes a Court of the High Court of Justice (*a*).

Order of trial of causes.

At Nisi Prius, as a general rule, actions are tried in the order in which they are entered (*b*). However, this course is sometimes, for convenience, deviated from, at the discretion of the presiding Judge (*c*). Actions as to which notice has been given that they will be taken as undefended (*d*), are tried before defended actions.

At the assizes, days are usually appointed on the first business day of the assizes for taking the special jury actions. *Remanets* are generally taken before fresh actions.

Cause lists.

In London and Middlesex, and also on circuit, a printed list of the actions is made out, giving the name of each action in the order in which it was entered, with the names of the solicitor for each party. During the sittings at Nisi Prius for Middlesex and London, lists of the actions, to be tried each day, are exhibited at the entrances to the Royal Courts, and the fact of an action being in such list is deemed notice to the solicitors concerned in it that it may be tried at any time during the day (*e*).

Advancing and deferring causes (*f*).

The presiding Judge will sometimes, for convenience, try an action out of its order, or postpone the trial of it, upon such terms as he thinks fit (*g*). Before the *Com. Law Proc. Act*, 1852, the Judge could not take an action earlier, out of its turn, so as to secure a trial in the same sittings, on the ground that defendant had died pending such sittings, so as to prevent an abatement of the suit (*h*). But when 9 *G.* 4, c. 14, was coming into operation, on 1st January, 1829, after which parol evidence of a promise, to take the case out of the Statute of Limitations, would be inadmissible, the Court tried the cause in December, out of its turn, and the plaintiff obtained a verdict, when he must otherwise have failed (*i*).

(*a*) See Jud. Act, 1873, s. 29, ante, p. 197. By sect. 37 of the same Act it is provided that, "Subject to any arrangements which may be from time to time made by mutual agreement between the judges of the said High Court, the sittings for trials by jury in London and Middlesex, and the sittings of judges of the said High Court under commissions of assize, oyer and terminer, and gaol delivery, shall be held by or before judges of the Queen's Bench Division of the said High Court; provided that it shall be lawful for her Majesty, if she shall think fit, to include in any such commission any ordinary judge of the Court of Appeal or any judge of the Chancery Division to be appointed after the commencement of this Act, or any serjeant-at-law, or any of her Majesty's counsel learned in the law, who, for the purposes of such commission, shall have all the power, authority, and jurisdiction of a judge of the said High Court."

(*b*) *R.* v. *Halse*, R. & M., N. P. C. 20.

(*c*) See *Cottam* v. *Banks*, 1 B. C. R. 302.

(*d*) See *Lett* v. *Watkins*, 27 L. J., Ex. 319, where the notice was given on the commission day.

(*e*) *Fourdrinier* v. *Bradbury*, 3 B. & Ald. 328. Before the Jud. Acts it was considered that the Court in banco or a judge at chambers had no jurisdiction over this list. See *Jacob* v. *Rule*, 1 Dowl. 349.

(*f*) See as to when the Court will put off the trial, and as to making an application for that purpose, ante, p. 594. As to when the Court will grant a new trial, upon the ground that the cause was tried out of its turn, as an undefended one, see post, Ch. LXVIII.

(*g*) Ord. XXXVI. r. 34. See *Dunn* v. *Coutts*, 17 Jur. 347, B. C.

(*h*) *Isard* v. *Milner*, 4 C. & P. 285. As to when an action does not now abate by the death of a party to it, see Vol. 2, Ch. LXXXVIII.

(*i*) Chit. Sum. Pract. 180.

As to the power of a Judge, at the trial of an action, to adjourn the same, *see post*, p. 647.

Frivolous causes.

As to its being discretionary with a Judge to try an idle or frivolous cause, see *Robinson* v. *Mearns*, 6 D. & R. 26 (*j*).

2. Withdrawing record.

2. *Withdrawing Record.*]—By *Ord. XXVI. r.* 1 (*ante*, p. 337), "Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw (*k*) the record, or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave." See the commencement of this rule, *ante*, p. 337.

As to signing judgment for costs in case of a discontinuance, &c., *see ante*, p. 340.

By *Ord. XXVI. r.* 2, "When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing signed by the parties."

The counsel for either party, it seems, has a right, upon the action being called on, to request the swearing of the jury to be suspended until a necessary witness has been called upon his subpœna (*l*), and it has been ascertained whether he be present; and upon finding he is absent, application may be made to the Judge at the trial for leave to withdraw the record, or postpone the trial, &c. (*m*).

3. Re-entry of record.

3. *Re-entry of Record.*]—As a general rule, if the record is withdrawn after the assizes have commenced, it cannot be re-entered (*n*). Under particular circumstances, if witnesses have not been dismissed, a re-entry might be allowed by the Judge at the assizes (*o*).

4. Attendance of the parties at trial.

4. *Attendance of the Parties at Trial.*]—The solicitors for plaintiff and defendant should take care to be in Court, with their evidence and witnesses in readiness when the cause is called on.

(*j*) See *Thornton* v. *Thackray*, 2 Y. & J. 156: *Egerton* v. *Furzman*, R. & M. N. P. C. 213; 1 C. & P. 613: *Kennedy* v. *Gad*, 3 C. & P. 376; 1 M. & M. 225: *Walpole* v. *Saunders*, 7 D. & R. 130. As to the effect of its appearing that a felony that has not been prosecuted is involved, see *Wells* v. *Abrahams*, L. R., 7 Q. B. 554; 41 L. J., Q. B. 306: *Osborn* v. *Gillett*, L. R., 8 Exch. 88: *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561: *Ex p. Leslie, In re Guerrier*, 20 Ch. D. 131: *Roope* v. *D'Avigdor*, 10 Q. B. D. 412; 48 L. T. 761.

(*k*) Before the Jud. Acts, the party who entered the cause for trial might withdraw the record at any time before the jury were sworn to try the cause: in which case the cause could not be tried, and he had in general to pay certain costs; but now see ante, p. 337.

(*l*) See ante, p. 569.

(*m*) *Hopper* v. *Smith*, 1 M. & M. 115.

(*n*) See *Pope* v. *Fleming*, 5 Ex. 249; 19 L. J., Ex. 268, where a *ne recipiatur* was entered. See *Hall* v. *Milligan*, 8 C. & P. 314; and see Bitt. vi. per *Lush*, J.

(*o*) *Lean* v. *Smith*, 2 M. & Rob. 126.

By *Ord. XXXVI. r.* 31, "If, when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him."

By *Ord. XXXVI. r.* 32, "If, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action, but if he has a counterclaim, then he may prove such counterclaim so far as the burden of proof lies upon him."

Where the defendant does not appear at the trial, it is not the practice of the Queen's Bench Division to require proof of the service of notice of trial (*p*). Where the plaintiff does not appear (*q*), or refuses to proceed (*r*), the defendant, if he has no counterclaim, is entitled to judgment dismissing the action with costs, without proof of service of notice of trial (*s*). In this case the jury should not be sworn (*t*).

In actions for recovery of land, it has been held that the old practice still prevails, and that if the defendant does not appear, the plaintiff is entitled to a verdict without producing any evidence (*u*).

By *Ord. XXXVI. r.* 33, "Any verdict or judgment obtained where one party does not appear at the trial, may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex."

A judgment obtained in default of appearance at the trial may be set aside on an application made on notice of motion, and supported by some explanation of the non-attendance (*x*). The terms usually imposed are payment of the costs of the day, including all costs thrown away, and the costs of the application to set aside and to tax (*y*).

As to moving for a new trial on the ground of the absence of counsel or solicitor, *see post, Ch. LXVIII.*

If neither party be present when the cause is called on, it will be struck out of the list.

5. Jury, how called and sworn.

5. *Jury, how called and sworn, &c.*]—By the *Com. Law Proc. Act*, 1852, *s.* 115, "The jurors contained in such panels as aforesaid (*z*) shall be the jurors to try the causes at the assizes and sittings for which they shall be summoned respectively; and all such proceedings may be had and taken before such juries, in like manner, and with the like consequences in all respects, as before any jury summoned in pursuance of any writ or writs of *venire facias juratores, distringas juratores*, or *habeas corpora juratorum*, before

(*p*) See *Chorlton* v. *Dickie*, 13 Ch. D. 160. See contra, per *Fry*, J., *Cockshott* v. *London General Cab Co.*, W. N. 1877, 214. Cp., however, subsequent decisions, infra.

(*q*) *Farrell* v. *Wale*, 36 L. T. 95.

(*r*) *Robinson* v. *Chadwick*, 7 Ch. D. 881.

(*s*) *Re Palmer, Skipper* v. *Skipper*, 49 L. T. 553; 32 W. R. 83: *James* v. *Crow*, 7 Ch. D. 410; 37 L. T. 749, where *Fry*, J., refused to follow his decision in *Cockle* v. *Joyce*, 7 Ch. D. 56; *Ex p. Lows*, 7 Ch. D. 160.

(*t*) *Lane* v. *Eve*, W. N. 1876, 86, *Denman*, J.

(*u*) See cases cited Roscoe on Evidence, 13th ed., 921, accord. per *Lopes*, J.: *Donna* v. *Pilbrow*, Feb. 12th, 1882: *Russell* v. *Crump*, Mar. 14th, 1882. *Ex rel. edit.*

(*x*) See *Burgoine* v. *Taylor*, 9 Ch. D. 1; 38 L. T. 438.

(*y*) Id.; *Cockle* v. *Joyce*, supra: *Lane* v. *Eve*, supra.

(*z*) See ss. 106—108, ante, p. 604.

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this Act." By 6 *G.* 4, *c.* 50, *s.* 26, the under-sheriff, or in London the secondary, is to cause the name, addition and place of abode of each person summoned and impanelled to serve on the jury to be written on distinct pieces of parchment or card, and to be given to the associate or prothonotary, to be put into a box to be provided for that purpose. And, by the same section, when the cause is called on, such associate, &c. shall draw out twelve (*a*) of these pieces of parchment or card, one after another; and if any of the jurors, whose names are so drawn, do not appear, or are challenged, and the challenge be allowed, then other names shall be drawn, until twelve jurors shall appear, and after all causes of challenge allowed, shall remain as fair and indifferent: and these twelve persons being sworn, on their names being marked in the panel, shall be the jury to try the cause; and their names shall be kept apart until they return their verdict or are discharged, and shall then be returned to the box. But when a jury are once drawn, they may afterwards (if not objected to) be sworn in other causes, without being re-drawn; and if any be challenged or withdrawn by consent, the Court may order them to be set aside, and other names drawn in their stead (*b*). Where a view, however, has been had, the jurors who had it are to be called first, and then other jurors must be called to make a complete jury (*c*). And where two sets of jurors are returned as directed by 6 *G.* 4, *c.* 50, *s.* 22, and a view has been had in any case, the Judge shall order the trial to be had during the attendance of that set of jurors in which the viewers, or the major part of them, are included (*d*).

Viewers.

Special jury.

By the *Com. Law Proc. Act*, 1852, *ss.* 108 and 110 (*e*), upon the trial the special jury shall be balloted for and called in the order in which they shall be drawn from the box, in the same manner as common jurors. As to trying a cause by a common jury, where the special jury does not attend by reason of no proper notice having been given to the sheriff, *see ss.* 112 *and* 113 *of Com. Law Proc. Act*, 1852, *an.*, p. 605. In a case before the *Com. Law Proc. Act*, 1852, where, besides the special jury panel, there was also a common jury panel returned, and, as none of the special jurors appeared, plaintiff proposed to have the cause tried by a common jury, which defendant protested against, but the judge allowed the cause so to be tried, and a verdict was found for plaintiff; the Court set aside the verdict, although it appeared that defendant had made defence at the trial (*f*).

Challenges.

When the jury come to the book to be sworn, either party may challenge them. As to the cause of challenge, the mode of challenging, and the manner in which the challenge is tried and decided, *see Ch. LXIV.*

Tales.

If a sufficient number of jurors do not appear, or if, after

(*a*) See *Muirhead* v. *Evans*, 6 Ex. 447; 20 L. J., Ex. 211, where thirteen by mistake were sworn on the jury, and the judge discharged the jury and had the panel called again.

(*b*) 6 G. 4, c. 50, s. 26.

(*c*) Id. s. 24. See C. L. P. Act, 1852, s. 114, ante, p. 610. See *Kingston Union* v. *Landed Estates Co.*, 28 L. T. 644, Ex.

(*d*) Ante, p. 609.

(*e*) See these sects., ante, pp. 605, 607. As to balloting for and calling the special jury in London and Middlesex, see ante, p. 606. See *Irwin* v. *Sir G. Grey*, 36 L. J., C. P. 148.

(*f*) *Holt* v. *Meddowcroft*, 4 M. & Sel. 467: *Haldane* v. *Beauclerk*, 3 Ex. 660; 6 D. & L. 642; 18 L. J., Ex. 227.

challenge, a sufficient number do not remain to make a jury, then, upon the request of plaintiff or defendant, the Court may command the sheriff to name and appoint so many of such other able men of the same county then present as shall make up a full jury; and the sheriff shall thereupon return such men, duly qualified, as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel (*g*). But if neither of the parties will pray a *tales*, the cause must go off for want of jurors (*h*). A *tales*, however, is seldom necessary, except in special jury causes; and then the number of jurors wanted must be made up by drawing the names of common jurors out of the box, if a sufficient number of common jurors can be found (*i*); if not, the *tales*, if prayed, must be made up in the manner above directed. In a special jury cause, plaintiff may have a *tales* without the consent of defendant (*k*).

Juror not on the panel.

The granting a new trial where a person not on the panel has been sworn on the jury is a matter of discretion (*l*).

Punishment for non-attendance.

If the jurors summoned do not appear, they may be fined by the Judge in such sum as he may think proper (and in case of a viewer not less than 10*l*.), unless a reasonable excuse be made upon oath or affidavit (*m*).

Swearing jury.

After a full jury appears, the cause is called on; and the jurors, if not challenged, are sworn, and the action proceeds.

6. Opening of pleadings, and right to begin, &c. in general.

6. *Opening of Pleadings, and Right to begin, &c.* (*n*).]—The junior counsel for plaintiff opens the pleadings, that is, states shortly the substance of them to the jury, and the points upon which issue has been joined; after which the *senior* counsel of the party entitled to begin states his case to the jury.

When affirmative of issue on plaintiff he is to begin.

If the affirmative of the issue is on the plaintiff, he, as a general rule, has a right to begin. Therefore, on an issue to try whether A. was of sound mind, plaintiff was held entitled to begin, as he affirmed the soundness (*o*). In replevin, also, any issue in which the affirmative is on plaintiff entitles him to begin (*p*). Thus where in replevin defendant made cognizance as bailiff of H. for rent in arrear, plaintiff pleaded in bar, that the distress was not made within twenty years next after the right to distrain accrued, de-

(*g*) 6 G. 4, c. 50, s. 37: *Irwin* v. *Sir G. Grey*, 36 L. J., C. P. 148.

(*h*) *Jenkins* v. *Purcel*, 1 Str. 707; 2 Saund. 349, n. 1. The practice in such cases is, that the party successful gets the costs of the abortive trial. *Holmes* v. *Albright*, 25 L. T. 747.

(*i*) 6 G. 4, c. 50, s. 37.

(*k*) *Gatliff* v. *Bourne*, 2 M. & Rob. 100, per *Tindal*, C. J. And see *Snook* v. *Southwood*, 1 R. & M. 429: *British Museum* v. *White*, 3 C. & P. 289: *Wood* v. *Thompson*, Car. & M. 171.

(*l*) *Wells* v. *Cooper*, 30 L. T. 721: *Doe d. Ashburnham (Earl)* v. *Michael*, 16 Q. B. 620; 20 L. J., Q. B. 276. See post, Ch. LXVIII.

(*m*) 6 G. 4, c. 50, ss. 38, 51. As to remitting fines, see 25 & 26 V. c. 107, s. 12; and see ante, p. 616.

(*n*) As to the right of reply in general, see post, p. 644; and as to the right to reply on objections taken during the trial, see post, p. 645; and as to the summing up of the evidence by counsel, see post, p. 644.

(*o*) *Frank* v. *Frank*, 2 M. & Rob. 314, *Erskine*, J. In such cases it will be presumed, that the party ordered to be plaintiff was intended to begin. Id.

(*p*) *James* v. *Salter*, 1 M. & Rob. 501: *Tunnicliffe* v. *Wilmot*, 2 C. & K. 626: *Curtis* v. *Wheeler*, 4 C. & P. 196; 1 M. & M. 493: *Williams* v. *Thomas*, 4 C. & P. 234.

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fendant replied, that the distress was made within twenty years next after the right to distrain accrued; it was held that plaintiff should begin, inasmuch as the affirmative was involved in his plea (*q*). And if, in replevin, defendant avow for rent in arrear, and plaintiff reply *riens in arrear*, plaintiff must begin (*r*). If the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he is entitled to begin (*s*). The fact of defendant being under an obligation to admit plaintiff's case, does not preclude plaintiff from his right to begin (*t*). Nor does the admission by defendant's counsel, at the trial, of all the facts the proof of which is on plaintiff, do so (*u*).

When the same on defendant, he is to do so.

In general, if the affirmative of the issue lies on defendant, and there is not a judgment by default as to part (*x*), and plaintiff does not seek to recover unascertained damages within the rule on that subject presently noticed (*y*), the defendant is to begin (*z*). Thus, when issue is joined only on a collateral fact, as the execution of a release, or the like, the proof of which rests on defendant, his counsel begins after the pleadings are opened. Where a party gave a cheque for the amount of a deposit on a sale by auction, which sale was void, and in an action on the cheque pleaded that there was no consideration for it, and plaintiff replied that there was consideration, it was ruled that defendant must begin (*a*). The Judges have resolved, "that in cases of *slander*, *libel*, and other actions for *personal* injuries, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may in point of form be with the defendant" (*b*). And this is now decided to be the case in other cases, where plaintiff seeks to recover unascertained damages. Thus, if to an action for improperly dismissing a solicitor's clerk, defendant pleads he was guilty of misconduct in the service, plaintiff is entitled to begin (*c*). But if, in an action for damages, the

Except in certain cases where plaintiff seeks to recover unascertained damages.

(*q*) *Collier* v. *Clerk*, 5 Q. B. 467.

(*r*) *Cooper* v. *Egginton*, 8 C. & P. 748.

(*s*) *Rawlins* v. *Desborough*, 2 M. & R. 328, *Denman*, C. J. See *Cripps* v. *Wells*, Car. & M. 489: *Jackson* v. *Hesketh*, 2 Stark. 521: *Oakley* v. *Ooddeen*, 2 F. & F. 655.

(*t*) See *Thwaites* v. *Sainsbury*, 5 C. & P. 69: *Tuberville* v. *Patrick*, 4 Id. 557.

(*u*) *Pontifex* v. *Jolly*, 9 C. & P. 202. See post, p. 629, as to when defendant in an action for the recovery of land by admitting plaintiff's case, is entitled to begin.

(*x*) *Wood* v. *Pringle*, 1 M. & Rob. 277.

(*y*) Per Lord *Tenterden*, *Cotton* v. *James*, 1 M. & M. 273; 3 C. & P. 505. See *Rowland* v. *Bernes*, 1 C. & K. 46: *Hogarth* v. *Penny*, 1 C. & K. 608; 14 L. J., Ex. 345, which was an action of replevin: *Woodgate* v. *Potts*, 2 C. & K. 457.

(*z*) *Coxhead* v. *Huish*, 7 C. & P. 63: *Lambert* v. *Hale*, 9 C. & P. 506, where defendant pleaded his discharge under the Insolvent Act, it was held he was entitled to begin. *Faith* v. *M'Intyre*, 7 C. & P. 44: *Smith* v. *Martin*, 9 M. & W. 304; 1 Dowl., N. S. 418: *Warner* v. *Haines*, 6 C. & P. 666. *Hill* v. *Fox*, 1 F. & F. 136, where to an action on a covenant for payment of money defendant pleaded that the deed was given to secure money lost by gambling, and it was ruled that defendant was entitled to begin.

(*a*) *Mills* v. *Oddy*, 6 C. & P. 728.

(*b*) *Carter* v. *Jones*, 6 C. & P. 64; 1 M. & Rob. 211. And see *Atkinson* v. *Warne*, 6 C. & P. 687: *Harrison* v. *Gould*, 7 Id. 580: *Silk* v. *Humfrey*, Id. 14: *Burrell* v. *Nicholson*, 6 Id. 202; 1 M. & Rob. 304.

(*c*) *Mercer* v. *Whall*, 5 Q. B. 447; 14 L. J., Q. B. 267. This case overrules several Nisi Prius decisions. See *Pim* v. *Eastern Counties R. Co.*, 2 F. & F. 133.

damages are ascertained, and plaintiff has a *primâ facie* case on which he must recover that amount, and no more, unless defendant proves what he has affirmed in pleading, then defendant begins (*d*). In an action on a promissory note, when plaintiff seeks to recover interest on it, the damages are ascertained (*e*). In an action of trespass, *qu. cl. fr.*, where the proof of the issue was on defendant, and the counsel for plaintiff, in answer to a question from the Judge, refused to undertake to proceed for substantial damages, it was held, that defendant was entitled to begin (*f*). Where the affirmative of the issue is on defendant, it is for the Judge to decide whether the assessment of damages is a substantial question (*g*).

In considering which party is to begin, substance of issue is to be considered.

In considering, however, which party ought to begin, it is not so much the form of the issue which is to be considered as the substance and effect of it; and the Judge will consider what is the substantial fact to be made out, and on whom it lies to make it out (*h*). And it seems, that as a general rule, the party entitled to begin is he who would have a verdict against him if no evidence were given on either side (*i*). If, in an action on a policy of insurance, which was to be void if a certain statement made by the assured as to the state of his health was untrue, the statement of claim avers that such statement was true, which is denied by defendant to be true in some particular, plaintiff is entitled to begin (*k*). In an action on a life policy, to be cancelled in case of suicide on return of the premiums, defendant pleaded that deceased died by suicide and that the premiums were ready to be returned; it was ruled that defendant was entitled to begin (*l*).

In actions for recovery of land.

In an action for the recovery of land by heir at law against devisee, the latter, admitting the seisin of the ancestor and that plaintiff is heir, is entitled to begin (*m*). But where in ejectment

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(*d*) *Mercer* v. *Whall*, supra.

(*e*) *Cannam* v. *Farmer*, 3 Ex. 698.

(*f*) *Chapman* v. *Rawson*, 8 Q. B. 673; 15 L. J., Q. B. 225.

(*g*) *Hogget* v. *Oxley*, 9 C. & P. 324; 2 M. & R. 251.

(*h*) *Ashby* v. *Bates*, 15 M. & W. 589; 15 L. J., Ex. 349, an action on a life policy: *Soward* v. *Leggatt*, 7 C. & P. 613: *Ridgway* v. *Ewbank*, 2 M. & Rob. 217.

(*i*) *Belcher* v. *M'Intosh*, 8 C. & P. 720: *Doe* d. *Worcester Trustees* v. *Rowland*, 9 C. & P. 734. And see *Osborn* v. *Thompson*, 9 C. & P. 337; 2 M. & Rob. 254: *Cooper* v. *Egginton*, 8 C. & P. 748: *Hudson* v. *Brown*, 8 C. & P. 774: *Amos* v. *Hughes*, 1 M. & Rob. 464: *Birt* v. *Leigh*, 1 C. & K. 611: *Ridgway* v. *Ewbank*, supra: *Geach* v. *Ingall*, 14 M. & W. 95; 16 L. J., Ex. 37, per *Alderson*, B.: *Leete* v. *Gresham Life Insurance Society*, 15 Jur. 1161, Ex.: *Booth* v. *Millns*, 15 M. & W. 669, where there was a replication of damages *ultra* to a plea of payment into Court, and it was held that plaintiff was entitled to begin.

(*k*) *Geach* v. *Ingall*, supra: *Ashby* v. *Bates*, 15 M. & W. 589; 15 L. J., Ex. 349. See *Pole* v. *Rogers*, 2 M. & R. 287. See *Craig* v. *Fenn*, Car. & M. 43: *Rawlins* v. *Desborough*, 6 C. & P. 321.

(*l*) *Stormont* v. *Waterloo Life and Casualty Ass. Co.*, 1 F. & F. 22, *Channell*, B. See *Davies* v. *Evans*, 6 C. & P. 619.

(*m*) See *Doe* d. *Bather* v. *Brayne*, 5 C. B. 665; 17 L. J., C. P. 127: *Mercer* v. *Whall*, 5 Q. B. 464, per Cur.: *Martin* v. *Johnston*, 1 F. & F. 122, *Erle*, C. J.: *Sutton* v. *Sadler*, 3 C. B., N. S. 87: *Handley* v. *Stacey*, 1 F. & F. 253. And see *Doe* d. *Smith* v. *Smart*, 1 M. & Rob. 476, where *Gurney*, B., after consulting with *Patteson*, J., held that, where plaintiff in ejectment claims as heir-at-law, and defendant as devisee, and the heirship is admitted, defendant is entitled to begin, though plaintiff professes to set up an outstanding term as to part of the property.

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the lessor of plaintiff claimed as devisee under a will of S., and at the trial defendants admitted the seisin of S. and the due execution of that will, and that plaintiff was *primâ facie* entitled under it, but proposed to set up a subsequent will revoking the first; it was held that plaintiff was entitled to begin (*n*). And in a case where the lessor of plaintiff claimed as heir of T., and defendant claimed under a conveyance made by T., the counsel for defendant offered to admit the heirship of the lessor of plaintiff, and claimed the right to begin; but the counsel for plaintiff contended, that unless defendant admitted that T. died seised of the estate, defendant did not admit the lessor of plaintiff's *whole title* as heir, a part of which was that the ancestor died seised; and that, unless defendant admitted the lessor of the plaintiff's whole title, he was not entitled to begin: *Bolland*, B., held that the plaintiff was entitled to begin, as defendant did not admit the whole case of the lessor of plaintiff (*o*). And where in ejectment the lessor of plaintiff claimed as heir of L., and defendant claimed the whole property as devisee under the will of L., and part of it also under the marriage settlement made on her marriage with L.: it was held, that defendant's admitting at the trial that the lessor of plaintiff was the heir of L., did not entitle defendant to begin; but that, if defendant had claimed title under the will only, and had admitted the title of the lessor of plaintiff as heir, it would have been otherwise (*p*). And where in ejectment each party claimed as heir at law, and the real question was as to the legitimacy of defendant, who was clearly heir if legitimate, and proposed to admit that, unless he were legitimate, the lessor of plaintiff was the heir at law; it was held that this admission did not give him the right to begin (*q*).

On petition to repeal letters patent.

By 46 & 47 *V. c.* 57, *s.* 26 (7), on the trial of a petition to repeal a patent, the defendant is entitled to begin, and to give evidence in support of such patent; and in case the plaintiff gives evidence impeaching the validity of such patent, the defendant shall be entitled to reply.

New trial when wrongly decided who to begin.

A new trial will not be granted because a Judge has wrongly ruled at Nisi Prius as to which party was entitled to begin, unless such ruling did clear and manifest injustice (*r*).

7. Statement of case by counsel.

7. *Statement of the Case, &c. by Counsel.*]—The senior counsel for the party who has the right to begin, after the opening of the

(*n*) *Doe* d. *Bather* v. *Brayne*, 5 C. B. 655, et per *Coltman*, J., "Here the lessor of the plaintiff claims as devisee under a will, that is, under a will that was a good and valid will at the time of the testator's death. The defendants proposed to admit *a part* only of the plaintiff's case, and in fact set up a case that denies that the plaintiff is devisee. The rule, therefore, is altogether inapplicable." This case overruled some Nisi Prius decisions.

(*o*) *Doe* d. *Tucker* v. *Tucker*, M. & M. 536. And see *Doe* d. *Pile* v. *Wilson*, 6 C. & P. 301; 1 M. & Rob. 323.

(*p*) *Doe* d. *Lewis* v. *Lewis*, 1 C. & K. 122.

(*q*) *Doe* d. *Warren* v. *Bray*, 1 M. & M. 166. See ante, p. 628, as to the admission, by defendant's counsel at the trial of all the facts, the proof of which is on plaintiff, not giving defendant a right to begin.

(*r*) *Blandford* v. *Freeman*, 5 Ex. 734; 20 L. J., Ex. 36: *Leete* v. *Gresham Life Insurance Society*, 16 Jur. 1161, Ex.: *Doe* d. *Bather* v. *Brayne*, 5 C. B. 655; 17 L. J., C. P. 127: *Edwards* v. *Matthews*, 4 D. & L. 721; 16 L. J., Ex. 291: *Geach* v. *Ingall*, 14 M. & W. 95; 16 L. J., Ex. 37: *Huckman* v. *Fernie*, 3 M. & W. 505.

pleadings by the junior counsel for plaintiff, states the facts and circumstances of the case to the jury, the substance of the evidence he has to adduce, and its effects in proving the case stated, and he remarks upon any point of law on which, together with the matters of fact, the jury will have to found their verdict (*s*). Counsel should not state facts which he cannot go into evidence to prove (*t*). He is not generally very strictly confined to the case opened by him (*u*); though, of course, any misstatements made by him may prejudice his case with the jury.

Entering into whole case.

The plaintiff's counsel also sometimes, in opening his case, states the matter of defence and the evidence by which he can disprove it (*x*). He is at liberty, whether the defence be known or not, either at once to enter into the whole of his case, or to make out a *primâ facie* case only, and to reserve his answer to defendant's case; but, as a general rule, he cannot answer part of defendant's case in his opening, and then afterwards call evidence in reply to defendant's case (*y*). But the Judge in his discretion may allow this to be done (*z*).

Comments of counsel not actionable.

Counsel are privileged in commenting on the circumstances of the case, and in making observations not only on the parties concerned, but also on the conduct of their agents in bringing the cause into Court (*a*).

No action will lie against an advocate for defamatory words spoken with reference to and in the course of an inquiry before a judicial tribunal although they are uttered by the advocate maliciously and not with the object of supporting the case of his client, and are uttered without any justification or even excuse, and from personal ill-will or anger towards the person defamed arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal (*b*).

Party to a suit may act as advocate and be a witness.

A party to a suit may address the jury and afterwards give evidence in support of his case, though such a proceeding is very objectionable (*c*). But the wife of a plaintiff cannot claim to manage the cause for him at Nisi Prius, he being absent and in custody (*d*).

(*s*) See *Plunkett* v. *Cobbett*, 5 Esp. 136; 2 Selw. N. P. 142.

(*t*) *Howard* v. *Gossett*, Car. & M. 383, *Denman*, C. J. As to counsel in his address to the jury referring to matter of history, &c., see *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227.

(*u*) *Kirkman* v. *Jervis*, 7 Dowl. 678: *Murray* v. *Butler*, 3 Esp. 105: *Penson* v. *Lee*, 2 B. & P. 330. See *Paterson* v. *Zachariah*, 1 Stark. Rep. 72: *Duncomb* v. *Daniel*, 8 C. & P. 222. See *Stante* v. *Pricket*, 1 Camp. 473, an action for an assault.

(*x*) See *Delauney* v. *Mitchell*, 1 Stark. 439.

(*y*) *Williams* v. *Davies*, 1 C. & M. 464; 3 Tyr. 383; 1 Dowl. 647: *Browne* v. *Murray*, R. & M. 254: *Sylvester* v. *Hall*, Id 255, n.: *Rees* v. *Smith*, 2 Stark. Rep. 31; R. & M. 255, n.: *Rowlandson* v. *Fenton*, 17 Jur. 606, Ex.: *Smith* v. *Marrable*, Car. & M. 479: *Shaw* v. *Beck*, 8 Ex. 392, where it appeared from the cross-examination what the defence was.

(*z*) See *Wright* v. *Willcox*, 9 C. B. 650; 19 L. J., C. P. 333. See further as to calling witnesses in reply, post, p. 643.

(*a*) *Hodgson* v. *Scarlett*, 1 B. & Ald. 232. A solicitor acting as advocate is entitled to this privilege. *Mackay* v. *Forde*, 5 H. & N. 792; 29 L. J., Ex. 404.

(*b*) *Munster* v. *Lamb* (C. A.), 11 Q. B. D. 588, 605; 52 L. J., Q. B. 726; 49 L. T. 252; 32 W. R. 344.

(*c*) *Cobbett* v. *Hudson*, 22 L. J., Q. B. 11.

(*d*) *Cobbett* v. *Hudson*, 15 Q. B. 988.

8. Competency of witnesses.

8. *Competency and Swearing of Witnesses.*]—It is as well here to make some remarks respecting the competency of witnesses, and to refer to some of the recent enactments as to swearing and cross-examining them, &c. Persons are not now incompetent as witnesses in an action by reason of their being interested in the result of it, or having been convicted of any offence. Parties to an action, and the persons on whose behalf it is brought or defended, are admissible as witnesses.

Parties to suit, &c.

The husbands and wives of parties to the suit are also competent witnesses (6 & 7 *V. c.* 85; 14 & 15 *V. c.* 99; 16 & 17 *V. c.* 83; 32 & 33 *V. c.* 68, *s.* 1). But by 16 & 17 *V. c.* 83, *s.* 3, "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage."

By 32 & 33 *V. c.* 68, *s.* 2, "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material (*e*) evidence in support of such promise."

By sect. 3, "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Children.

With respect to children the rule now seems to be, that their competency does not depend on their age, but that a child of any age may be examined as a witness, if capable of distinguishing between good and evil (*f*); but whatever be its age, it cannot be examined without being sworn (*g*). Whether the infant be competent or not is a question for the discretion of the Court (*h*). Before a child is examined the Judge must be satisfied that the child feels the binding obligation of an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, recently communicated to it for the purposes of a trial (*i*).

(*e*) *Bessela* v. *Stern* (C. A.), 2 C. P. D. 265; 46 L. J., C. P. 467; 37 L. T. 88; 25 W. R. 561: *Wilcox* v. *Gotfrey*, 26 L. T. 281, 328: *Hickley* v. *Campion*, 20 W. R. 752.

(*f*) By such capability must be understood a belief in God, or in a future state of rewards and punishments, from which the Court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood. See *R.* v. *Hill*, 2 Den. C. C. 254: *White's case*, 1 Leach, 430, 431, "It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn." Per *Alderson*, B., *Reg.* v. *Perkins*, 2 Moo. C. C. R. 135. As to the rule in former times, see *R.* v. *Travers*, 1 Str. 700: *R.* v. *Dunnel*, 1 East, P. C. c. 10, s. 5, pp. 443, 444; 1 Hale, 302; 2 Hale, 278.

(*g*) *Brazier's case*, Reading Spring Ass. 1779; 1 East, P. C. c. 10, s. 5, pp. 443, 444; 1 Leach, 199: *S. C.*, *Powell's case*, 1 Leach, 113; Bull. N. P. 293.

(*h*) 1 Stark. Ev. 94.

(*i*) See 3 Russ. on Crimes, by Prentice, p. 612.

Lunatics.

If a lunatic be tendered as a witness, it is for the Judge to examine whether the lunatic be of competent understanding to give rational evidence, and is aware of the nature and obligation of an oath. If the Judge is satisfied on these points, he should admit the lunatic as a witness (*i*). Before being sworn the lunatic may be examined, and witnesses may be called as to his competency. If he be admitted, it is for the jury to judge whether his evidence be tainted by his insanity, and to decide upon the degree of credit to be attached to it (*k*).

When a witness is discovered to be incompetent during his examination, the Judge strikes the evidence which he has given out of his notes (*l*).

Swearing witnesses.

By the *Com. Law Proc. Act*, 1854, *s.* 20, "If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, *videlicet*—

—Affirmation.

'I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare,' &c.

Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form."

By *s.* 21, a person wilfully making a false affirmation incurs the same penalties as if he had committed perjury.

By 32 & 33 *V. c.* 68, *s.* 4 ("Evidence Further Amendment Act, 1869"), "If any person called to give evidence in any Court of justice (*m*), whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding Judge (*m*) is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration:—

'I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.'

And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath."

9. Ordering witnesses out of Court.

9. *Ordering Witnesses out of Court.*]—It may sometimes be advisable to examine witnesses out of the hearing of each other. In such a case it is usual to order the witnesses out of Court (*n*). Either

(*i*) See 3 Russ. on Crimes, by Prentice, p. 612.

(*k*) *Reg.* v. *Hill*, 2 Den. C. C. R. 254; 20 L. J., M. C. 222.

(*l*) *Jacobs* v. *Layborn*, 11 M. & W. 685; 1 D. & L. 352, per *Abinger*, C. B.

(*m*) By "The Evidence Amendment Act, 1870," 33 & 34 V. c. 49, the words "Court of justice" and "presiding judge" in the Act of 1869, "shall be deemed to include any person or persons having by law authority to administer an oath for the taking of evidence." They therefore include an arbitrator.

(*n*) *R.* v. *Colley*, 1 M. & M. 329.

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party, at any period of the cause, has a right to require that the unexamined witnesses should be out of Court (*o*). But where a witness remains in Court, after an order for the witnesses to withdraw, it seems that the Judge cannot refuse to allow him to be examined, although the witness may be fined for his contempt (*p*). If the solicitor in the cause is a witness, he will in general be suffered to remain, his assistance being absolutely necessary to the proper conduct of the cause (*q*). And, as a general rule, a party to the cause who is to be examined as a witness will be allowed to remain (*r*).

10. Examination of witnesses.

10. *Examination of Witnesses.*]—In the absence of any agreement (*s*) between the parties, and subject to the rules, the witnesses at the trial, or at any assessment of damages, are examined *viva voce* and in open Court (*Ord. XXXVII. r.* 1). We have already noticed *ante, Part VI.*, when affidavits may be read at the trial, and the provisions as to examining witnesses before trial, and as to their examinations being read in evidence on the trial. The rules of evidence are not affected by the Judicature Acts (*Jud. Act*, 1875, *s.* 20). As to an affidavit of a signature to an admission made in pursuance of notice to admit being evidence of such admission, *see Ord. XXXII. r.* 7, *ante*, p. 482.

After the senior counsel has stated the case as above, the witnesses to prove it are next called and examined, in their order; as a general rule, the first is examined by the counsel next in rank to the senior, the second by the junior, if there be three counsel engaged on that side, the third by the senior; each barrister examining a witness in the order of his precedence. Whilst a witness, however, is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but, after one counsel has brought his examination to a close, no other counsel on the same side can, without leave, put a question to the witness (*t*).

Where parties defend separately.

Where there are several defendants who appear by separate solicitors, and have separate counsel, if their defences be different or distinct from each other, the counsel of each has a right to address the jury and examine witnesses; but, in general, if they rely on the same ground of defence, only one counsel can be heard to address the jury, and one counsel only can examine each witness upon the part of all the defendants, in the same manner as if they had appeared and defended jointly (*u*). So, in an action for the

(*o*) *Southey* v. *Nash*, 7 C. & P. 632.

(*p*) See *Cobbett* v. *Hudson*, 22 L. J., Q. B. 11; 1 E. & B. 14: *Parker* v. *M'William*, 4 M. & P. 480; 6 Bing. 683: *R.* v. *Wylde*, 6 C. & P. 380: *Chandler* v. *Horne*, 2 M. & Rob. 423: *Beamon* v. *Ellice*, 4 C. & P. 585: *Attorney-General* v. *Bulpit*, 9 Price, 4, a revenue case.

(*q*) *Pomeroy* v. *Baddeley*, R. & M. 430. But see *R.* v. *Webb*, 4 Stark. Ev. 1733.

(*r*) See *Constance* v. *Brain*, 2 Jur., N. S. 1145, Ex.: *Charnock* v. *Dowing*, 3 C. & K. 373: *R.* v. *Newman*, C. & K. 252, where, on the trial of an information for libel, the prosecutor was ordered out of Court.

(*s*) *New Westminster, &c. Co.* v. *Hannah*, L. R., 1 Ch. 278.

(*t*) *Doe* v. *Roe*, 2 Camp. 280.

(*u*) See *Chippendale* v. *Masson*, 4 Camp. 174: *Sparkes* v. *Barrett*, 8 C. & P. 442: *Massey* v. *Goyder*, 4 C. & P. 162: *Doe* d. *Fox* v. *Bromley*, 6 D. & R. 292: *Ridgway* v. *Phillips*, 3 Dowl. 154; 1 C. M. & R. 415: *King* v. *Williamson*, 3 Stark. 162; D. & R.

recovery of land, if a landlord and tenant defend by different solicitors, and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord, the Judge, at the trial, will only allow one counsel to address the jury for the defence, but the party's counsel who does not address the jury will be at liberty to cross-examine, and also to call witnesses (*x*). Where two defendants appear and plead by the same solicitor, but at the trial counsel appears for one defendant only, and the other defendant appears in person, the counsel only will be allowed to address the jury; but the defendant who has no counsel may cross-examine the witnesses (*y*). In general, where several defendants defend separately at the trial, each defendant will be allowed to cross-examine the plaintiff's witnesses; but where the defendants all rely on one ground of defence, one counsel only will be allowed to address the jury on behalf of all of them.

Leading questions.

In the examination in chief of a witness, he must not, in general, be asked *leading questions* (*z*). If, however, the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, in the same manner as in cross-examination, having first obtained permission of the Judge to do so (*a*).

Witness must only speak to facts within his own knowledge and recollection.

A witness can be allowed only to speak of facts within his own knowledge and recollection (*b*). He cannot, therefore, be permitted to read his evidence (*c*); but he will be allowed to refresh his memory from an entry in a book or on paper (*d*), made by himself or which he has seen made (*e*), contemporaneously with, or shortly after, the occurrence of the fact referred to (*f*), if he can afterwards swear to the fact from his recollection (*g*). If the document was written by another, and the witness examined it soon after it was written and while the facts stated in it were fresh in his recollection, he may refresh his memory by referring to it as if he had written it himself. Where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book; but, seeing my initials, I have no doubt that I received the money;" this was held sufficient evidence (*h*). Where a witness had been examined before com-

N. P. 35: *Nicholson* v. *Brooke*, 2 Ex. 213. See *Child* v. *Stenning*, 47 L. J., Ch. 371, where plaintiff sought alternative inconsistent relief against different defendants.

(*x*) *Doe* d. *Hogg* v. *Tindale*, 3 C. & P. 565; 1 M. & M. 314.

(*y*) *Perring* v. *Tucker*, 4 C. & P. 70; 1 M. & M. 391. And see *Massey* v. *Goyder*, 4 C. & P. 162, n. (*a*).

(*z*) Rosc. on Ev. And see *Nicholls* v. *Dowding*, 1 Stark. 81: *Courteen* v. *Touse*, 1 Camp. 43.

(*a*) Peake, 198; Rosc. 147, per *Abbott*, C. J., in *Bastin* v. *Carew*, R. & M. 127: *Clarke* v. *Saffrey*, R. & M. 126: *Bowman* v. *Bowman*, 2 M. & Rob. 501. And see post, 636, how far a party may discredit his own witness.

(*b*) *Friedlander* v. *London Assurance Co.*, 4 B. & Ad. 193; 1 N. & M. 30.

(*c*) 5 St. Tr. 455.

(*d*) *Doe* v. *Perkins*, 3 T. R. 749. See Rosc. on Ev.

(*e*) *Reg.* v. *Langton*, 2 Q. B. D. 296; 46 L. J., M. C. 136.

(*f*) *Steinkeller* v. *Newton*, 9 C. & P. 13.

(*g*) *Henry* v. *Lee*, 2 Chit. Rep. 124: *Burrough* v. *Martin*, 2 Camp. 112: *Doe* v. *Perkins*, 3 T. R. 749. See *Cator* v. *Croydon Canal Co.*, 4 Y. & C. 405.

(*h*) *Maugham* v. *Hubbard*, 8 B. & C. 14; 2 M. & R. 5. See *Trentham* v. *Deveril*, 3 Bing. N. C. 397; 4 Sc. 128. As to the posting of a letter, see *Trotter* v. *Maclean*, 13 Ch. D. 575; 49 L. J., Ch. 256.

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missioners of bankrupt shortly after the act of bankruptcy, he was allowed to refer to the deposition he then made, for the purpose of refreshing his memory as to the date (*i*). But a witness will not in general be allowed to refresh his memory with the copy of an instrument, which might itself be used for refreshing his memory (*k*). Where a paper is put into the hands of a witness to refresh his memory, the opposite counsel has a right to inspect it, without being forced to read it in evidence (*l*). When a book is put into the hands of a witness to refresh his recollection, and questions are asked upon it in cross-examination, the book is not thereby made evidence for the party producing it, though it may be so for the opposite party (*m*).

Opinion admissible on questions of science.

In questions of science a witness may be examined as to his *opinion*, upon facts previously stated; thus, although a physician may have never seen the patient, he may swear to his opinion of the disease, &c., upon facts stated by others.

Comparison of disputed writing.

By the *Com. Law Proc. Act*, 1854, *s.* 27, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute" (*n*).

This section allows documents proved to be genuine but not relevant to the issue to be put in for the purpose of comparison (*o*). The genuineness of such documents must be decided by the judge (*p*). It seems that a person may write something in Court for the express purposes of comparison under this section. A document, however, written under such circumstances, cannot altogether be relied on as representing the writer's ordinary handwriting (*q*).

How far a party may discredit his own witness (*r*).

By *s.* 22, "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may in case the witness shall in the opinion of the Judge prove adverse (*s*), contradict him by other evidence, or, by leave of the

(*i*) *Smith* v. *Morgan*, 2 M. & Rob. 257: *Wood* v. *Cooper*, 1 C. & K. 645: *Whitfield* v. *Aland*, 2 C. & K. 1015. See *Vaughan* v. *Martin*, 1 Esp. 440. But a witness cannot refresh his memory by a deposition if not made contemporaneously or nearly so with the matters to which it relates. *Whitfield* v. *Aland*, 2 C. & K. 1015.

(*k*) *Burton* v. *Plummer*, 4 N. & M. 315; 2 A. & E. 341: *Jones* v. *Stroud*, 2 C. & P. 196: *Horne* v. *M'Kenzie*, 6 Cl. & F. 628: *Topham* v. *M'Gregor*, 1 C. & K. 320. Perhaps a copy may be used where the original is lost.

(*l*) *Sinclair* v. *Stevenson*, 10 Moore, 46; 1 C. & P. 582; 2 Bing. 514: *R.* v. *Ramsden*, 2 C. & P. 603.

(*m*) *Payne* v. *Ibbotson*, 27 L. J., Ex. 341.

(*n*) See 28 & 29 V. c. 18, s. 8, a similar clause. By sect. 1 of this Act, "the provisions of sects. from 3 to 8, inclusive, of this Act shall apply to all Courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive and examine evidence."

(*o*) *Birch* v. *Ridgway*, 1 F. & F. 270: *Cresswell* v. *Jackson*, 2 F. & F. 24.

(*p*) *Cooper* v. *Dawson*, 1 F. & F. 550: *Bartlett* v. *Smith*, 11 M. & W. 483.

(*q*) See *Cobbett* v. *Kilminster*, 4 F. & F. 490: *Arbon* v. *Fussell*, 3 F. & F. 152: *R.* v. *Aldriage*, 3 F. & F. 781: *Williams' case*, 1 Lew. 137: *R.* v. *Taylor*, 6 Cox, C. C. 58.

(*r*) See 28 & 29 V. c. 18, s. 3, a similar clause, and sect. 1, supra, n. (*n*).

(*s*) A witness is not "adverse" within the meaning of this section, merely because his testimony is unfavourable to the party calling him. To be "adverse," so as to entitle the party calling the witness to prove that he has made at another time a

Judge, prove that he has made at other times a statement inconsistent (*t*) with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Before the above enactment, neither the plaintiff nor defendant was allowed to give evidence for the sole purpose of discrediting his own witness (*u*). Nor could he put questions to him, the answers to which might tend to discredit him (*x*). But a witness who gave evidence adverse to the party calling him, might be asked whether he had not given a different account of the same matter before the trial: but it seems that, in the event of a denial by the witness, another witness could not be called to contradict him in that respect (*y*). A party might give evidence to prove facts denied by one of his witnesses, and thus incidentally contradict him (*z*).

Witness refusing to answer.

A witness may be committed for contempt in not answering a question (*a*). As to what questions a witness may refuse to answer *see post*, p. 640.

No action will lie for defamatory words spoken by a witness in the course of his evidence in a judicial proceeding (*b*).

11. Cross-examination.

11. *Cross-examination.*]—When the examination-in-chief is finished, the witness may be cross-examined by the counsel for the opposite party. But if the party calling a witness do not think proper to examine him after he is called and sworn, he may, nevertheless, be cross-examined by the counsel for the opposite party (*c*), unless he was merely called to produce a document (*d*), or by mistake of counsel, and no question was put to him (*e*).

By *Ord. XXXVI. r.* 38, "The Judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter" (*f*).

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statement inconsistent with his present testimony, he must in the opinion of the Judge be "hostile." *Greenough* v. *Eccles*, 5 C. B., N. S. 786; 28 L. J., C. P. 160. See *Martin* v. *Travellers' Insurance Co.*, 1 F. & F. 505.

(*t*) See *Jackson* v. *Thomason*, 1 B. & S. 745; 31 L. J., Q. B. 11: *Ryberg* v. *Ryberg*, 32 L. J., Mat. Ca. 112.

(*u*) 5 St. Tr. 2, 764, 792: *Ewer* v. *Ambrose*, 3 B. & C. 746; 5 D. & R. 629: *Elton* v. *Larkins*, 5 C. & P. 385: *Holdsworth* v. *Dartmouth* (*Mayor*), 2 M. & Rob. 153, *Parke*, B.: Rosc. on Ev.

(*x*) See *Winter* v. *Butt*, 2 M. & Rob. 357: *Allay* v. *Hutchins*, Id. 358, n.

(*y*) *Melhuish* v. *Collier*, 15 Q. B. 878; Taylor on Ev. 950; 19 L. J., Q. B. 493.

(*z*) See *Alexander* v. *Gibson*, 2 Camp. 556: *Richardson* v. *Allan*, 2 Stark. 334; 2 Chit. 657: *R.* v. *Ball*, 8 C. & P. 745.

(*a*) See *Ex p. Fernandez*, 30 L. J., C. P. 321. And see the form of the warrant of commitment in this case.

(*b*) *Seaman* v. *Netherclift*, 2 C. P. D. 53; 46 L. J., C. P. 128, C. A.: *Dawkins* v. *Lord Rokeby*, L. R., 7 H. L. 744; 45 L. J., Q. B. 8: *Griffin* v. *Donnelly*, 6 Q. B. D. 307; 44 L. T. 141; 29 W. R. 440.

(*c*) *Phillips* v. *Eamer*, 1 Esp. 357: *R.* v. *Brooke*, 2 Stark. 472.

(*d*) *Rush* v. *Smith*, 1 C. M. & R. 94: *Summers* v. *Mosely*, Id. 96, n., and cases there cited.

(*e*) *Wood* v. *Mackinson*, 2 M. & Rob. 273.

(*f*) Cp. *In re Mundell*, *Fenton* v. *Cumberledge*, 52 L. J., Ch. 756.

In cross-examining a witness, counsel may ask him leading questions (*g*). He may even be cross-examined as to a fact irrelevant to the issue, for the purpose of discrediting his testimony by what he himself may state in evidence (*h*). In an action for goods sold and delivered, to which the defence was, that plaintiff had sold them to defendant on certain terms; the Court inclined to the opinion that plaintiff could be asked, on cross-examination, for the purpose of pressing his memory or testing his credit, whether he had not sold the same quality of goods to other persons on the same terms (*i*). In trespass for false imprisonment on a criminal charge, defendant cannot cross-examine a witness for plaintiff as to the bad character of plaintiff, nor as to previous charges made against him (*k*). In such an action, if plaintiff's counsel ask his witness what was said by defendant when the parties were before the magistrate, defendant's counsel may ask, on cross-examination, what was said by the magistrates (*l*). It is not allowable upon cross-examination to ask a witness, though he be a party to the action (*m*), as to the contents of a written instrument (*n*), except with respect to previous statements in writing made by him as presently mentioned, or where the party cross-examining is in a position to give secondary evidence of its contents.

As to previous statements in writing.

By the *Com. Law Proc. Act*, 1854, *s.* 24 (*o*), "A witness may be cross-examined as to previous statements made by him in

(*g*) See Rosc. Ev. And see *Dickenson* v. *Shee*, 4 Esp. 68.

(*h*) *Harris* v. *Tippett*, 2 Camp. 637. The credit of a witness may be impeached by giving evidence of statements made by him relevant to the matters in issue in the action at variance and inconsistent with his testimony on the trial. *De Sully* v. *Morgan*, 2 Esp. N. P. C. 691, post, p. 639. But in order to lay a foundation for such discrediting evidence, it is necessary first, to ask the witness, whom it is proposed to discredit by proof of contradictory *verbal* statements, upon cross-examination, whether he has made the statement or declaration, or held the conversation which it is intended to prove. *The Queen's case*, 2 B. & B. 299: *Carpenter* v. *Wall*, 11 A. & E. 803. And it is not enough to ask the general question, whether the witness has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having said so; but the witness must be asked as to the time, place and person involved in the supposed contradiction; because, when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. *Angus* v. *Smith*, M. & M. 473. As to cross-examining a witness, for the purpose of discrediting him as to his having used certain expressions, before calling witnesses to prove that he made them, see post, p. 639, *Spenceley* v. *De Willott*, 7 East, 108.

(*i*) *Hollingham* v. *Head*, 4 C. B., N. S. 388; 27 L. J., C. P. 241.

(*k*) *Downing* v. *Butcher*, 2 M. & Rob. 374.

(*l*) *Richards* v. *Turner*, 1 Car. & M. 414.

(*m*) *Henman* v. *Lester*, 12 C. B., N. S. 776; 31 L. J., C. P. 366. Where a party to the cause gave evidence himself in support of his case, it was held by *Willes*, J., and *Keating*, J. (*Byles*, J., dissenting), that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not been brought against him by another person in the County Court, in respect of a similar claim, upon which he had given evidence, and had had notwithstanding a verdict of the jury against him: and that he might be so examined without production and proof of the record of the proceedings in such County Court.

(*n*) *Sainthill* v. *Bound*, 4 Esp. 74: *Graham* v. *Dyster*, 2 Stark. N. P. C. 23.

(*o*) See 28 & 29 V. c. 18, *s.* 5, a similar clause, and sect. 1, ante, p. 636, n. (*n*); 3 Russ. on Crimes, by Prentice, 581.

writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him (*p*); but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit" (*q*).

Before this Act, it was held, that the mere fact of counsel, whilst cross-examining a witness, putting a document into the witness's hand, and asking him whether it is in his handwriting, does not entitle the opposite party to see such document. But the opposite counsel has a right to see the document before the cross-examining counsel proceeds to found any question on the document itself (*r*). Parties are not entitled to put in, as part of their case, documents handed to a witness, on cross-examination by the opposite party, to depose to their nature (*s*).

Proof of contradictory statements of adverse witness (*t*).

By the *Com. Law Proc. Act*, 1854, *s.* 23, "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Witnesses may be called for the purpose of impeaching the credit of an adverse witness to prove acts done or contradict statements made by him if they are relevant to the matter in issue, and he has been previously cross-examined as to such acts or statements (*u*), and a witness who has already been examined may be recalled for this purpose (*x*). Witnesses cannot be called for the purpose of contradicting an adverse witness concerning a distinct collateral fact wholly irrelevant to the matter in issue: therefore, though questions may be asked on cross-examination which are irrelevant to the matter in issue, and which go to the credit of the witness, evidence cannot be given to contradict the answers given unless they are connected with the subject-matter of the inquiry (*y*). Where a witness,

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(*p*) See *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227, where it was held that the plaintiff could not be asked, on cross-examination, whether his name was inscribed in a certain book.

(*q*) As to the practice before this enactment, see per *Tindal*, C. J., *The Queen's case*, 2 B. & B. 292: *Bastard* v. *Smith*, 10 A. & E. 213: *Davies* v. *Davies*, 9 C. & P. 252: *M'Donnell* v. *Evans*, 21 L. J., C. P. 141; 11 C. B. 930.

(*r*) *Cope* v. *Thames Haven Dock Co.*, 2 C. & K. 757. But see *Reg.* v. *Duncombe*, 8 C. & P. 369: *Collier* v. *Nokes*, 2 C. & K. 1012.

(*s*) *Collier* v. *Nokes*, supra.

(*t*) See 28 & 29 V. c. 18, s. 4, a similar clause, and sect. 1, ante, p. 636, n. (*n*).

(*u*) *The Queen's case*, 2 B. & B. 311: *Carpenter* v. *Wall*, 11 A. & E. 803; 3 P. & D. 457. See *R.* v. *St. George*, 9 C. & P. 483.

(*x*) *Sykes* v. *Haig*, 44 L. T. 57, *Fry*, J.

(*y*) *Tenant* v. *Hamilton*, 1 Rob. 821; 7 Cl. & Fin. 122: *Attorney-General* v. *Hitchcock*, 1 Ex. 91; 16 L. J., Ex. 259: *Palmer* v. *Trower*, 22 L. J., Ex. 32; 8 Ex. 277: *Tolman* v. *Johnstone*, 2 F. & F. 66.

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on cross-examination, denies having used particular expressions in the presence of the parties, the opposite counsel, examining a person to contradict the witness, is not at liberty to lead him by reading from his brief the words denied, if the conversation spoken to by the first witness is evidence in itself (*z*).

Questions imputing an offence to witness, or for purpose of degrading him.

A witness is not bound to answer questions the answer to which may expose him to punishment, or to a penalty, or to a criminal charge, or tend so to do (*a*). Such questions may be put (*b*). By the 46 *G.* 3, *c.* 37, a witness cannot by law refuse to answer any question relevant to the matter in issue (the answering of which has no *tendency* to expose him to a penalty *or forfeiture of any nature whatsoever*), by reason only, and on the sole ground that the answering such questions may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or any other person (*c*). It seems a witness is still privileged from answering any question, the answer to which might subject him to a forfeiture of his estate (*d*). If a witness claims the protection of the Court, on the ground that his answer would tend to criminate him, and there appears to be reasonable ground to believe that it would do so, he is not compellable to answer (*e*). The mere declaration of the witness, that he believes that his answer would tend to criminate him, will not be sufficient to protect him from answering, unless the Judge is satisfied from all the circumstances that the answer would tend to criminate the witness (*f*). It makes no difference as to the right of the witness to protection, that he has answered in part, as he is entitled to claim the privilege at any stage of his examination (*f*). The refusal of a witness to answer a question which he is not bound to answer ought not, legally, to have any effect with the jury (*g*).

A party to a suit may be put into the box by his opponent and sworn, although the counsel for such party objects that the questions intended to be put to him will criminate him, and that he will object to answer them: it is for the party himself to make such objections (*h*).

(*z*) *Hallett* v. *Cousens*, 2 M. & Rob. 238; 3 Russ. by Prentice, 559.

(*a*) *Cates* v. *Hardacre*, 3 Taunt. 424. See as to witnesses before election judges, &c., 26 & 27 V. c. 29, s. 7; as to the effect of a pardon, see *R.* v. *Boyes*, 1 B. & S. 311; and see cases cited ante, p. 522.

(*b*) See *The Queen's case*, 2 B. & B. 311: *R.* v. *Watson*, 2 Stark. 149; 3 Russ. on Crimes, by Prentice, 573. The privilege is that of the witness alone. *R.* v. *Kinglake*, 22 L. T. 335; 18 W. R. 805.

(*c*) See *R.* v. *Woburn*, 10 East, 395.

(*d*) *May* v. *Hawkins*, 24 L. J., Ex. 309; 11 Ex. 210: *Chester* v. *Wortley*, 25 L. J., C. P. 117.

(*e*) *R.* v. *Garbett*, 2 C. & K. 474. See *Fisher* v. *Ronalds*, 12 C. B. 762; 22 L. J., C. P. 62: *Osborn* v. *London Dock Co.*, 24 L. J., Ex. 140; 10 Exch. 698: *R.* v. *Boyes*, 30 L. J., Q. B. 301; 1 B. & S. 311: *Ex p. Fernandez*, 10 C. B., N. S. 3; 30 L. J., C. P. 321.

(*f*) *Ex p. Reynolds*, *In re Reynolds* (C. A.), 20 Ch. D. 294: 51 L. J., Ch. 756; 46 L. T. 508; 30 W. R. 651.

(*g*) *R.* v. *Watson*, 2 Stark. 157; *Rose* v. *Blakemore*, Ry. & M., N. P. 383: *Lloyd* v. *Passingham*, 16 Ves. 59.

(*h*) *Boyle* v. *Wiseman*, 24 L. J., Ex. 160; 10 Ex. 647: *Osborn* v. *London Dock Co.*, supra: and see *Chester* v. *Wortley*, 25 L. J., C. P. 117: *Bartlett* v. *Lewis*, 31 L. J., C. P. 230: *Bickford* v. *D'Arcy*, L. R., 1 Ex. 354; 35 L. J., Ex. 202: *McFadzen* v. *Mayor of Liverpool*, L. R., 3 Ex. 279; 37 L. J., Ex. 193: *Edmunds* v. *Greenwood*, L. R., 4 C. P. 70; 38 L. J., C. P. 115: *Villesboisnet* v. *Tobin*, L. R., 4 C. P. 134; 38 L. J., C. P. 146.

All other questions, for the purpose of impeaching a witness's character, must be answered (*i*).

Questions impeaching his character.

If general evidence be given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinions, if he think it prudent to do so; or he may call witnesses to speak to the general good conduct of the witness.

General evidence of bad character.

By the *Com. Law Proc. Act*, 1854, *s.* 25 (*k*), "A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor (*l*), and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court, or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same" (*m*).

Proof of previous conviction of a witness may be given.

As to each of several defendants, where they defend separately at the trial, being entitled to cross-examine the plaintiff's witnesses, *see ante*, p. 634.

Where several defendants.

12. *Re-examination.*]—If any new fact arise out of the cross-examination, the witness may be re-examined as to it by the counsel for the party on whose behalf he has been examined. In the same manner he may be re-examined, when necessary, in order to explain any part of his cross-examination (*n*).

12. Re-examination.

A witness of the plaintiff stated, on cross-examination, facts which were not strictly evidence, but might prejudice the plaintiff; it was held that, unless defendant applied to strike them out of the Judge's notes, plaintiff was entitled to re-examine upon them (*o*).

13. *Recalling Witness.*]—It is in the discretion of the Judge whether he will permit a witness to be recalled, and it is not necessary that the opposite side should consent (*p*). The Court

13. Recalling witnesses.

(*i*) See *Cundell* v. *Pratt*, 1 Moo. & M. 108. See 3 Russ. on Crimes, by Prentice, 591.

(*k*) See 28 & 29 V. c. 18, s. 6, a similar clause, and sect. 1, ante, p. 636, n. (*n*).

(*l*) See *Henman* v. *Lester*, 31 L. J., C. P. 366.

(*m*) Before this enactment, if a witness was examined as to an offence imputed to him, and denied it, such denial was conclusive, and witnesses could not afterwards be called, or other evidence given to contradict him, unless the same were evidence in the case. *R.* v. *Watson*, 2 Stark. 149 et seq.: *Harris* v. *Tippett*, 2 Camp. 637: *Henman* v. *Lester*, 31 L. J., C. P. 366.

(*n*) See as to the re-examination of a witness, 3 Russ. on Crimes, by Prentice: *The Queen's case*, 2 B. & B. 297, per *Abbott*, C. J.: *Prince* v. *Samo*, 7 A. & E. 627.

(*o*) *Blewett* v. *Tregoning*, 3 A. & E. 554.

(*p*) *Adams* v. *Bankart*, 1 C. M. & R. 681: *Catlin* v. *Barker*, 5 C. B. 201; 17 L. J., C. P. 62: *Shedden* v. *Att.-Gen.*, 22 L. T. 631, H. L.: *Budd* v. *Davison*, 29 W. R. 192, V.-C. B.

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will not interfere with the Judge's discretion, unless it be very clear that he was wrong (*q*). The Judge will in general allow counsel, after he has closed his case, to recall a witness for the purpose of obviating objections which are beside the justice of the case and little more than mere matter of form (*r*). But, in general, counsel will not be allowed to recall a witness after the case is closed, to remedy a defect in substance, unless it has arisen from inadvertence on his part (*s*).

Further evidence.

The Judge may at any stage of the trial, for his own satisfaction, allow further evidence to be called by either party (*t*).

14. Arguments on objections taken during the trial.

14. *Arguments of Counsel, and Right to reply on Objections taken during the Trial.*]—When points of law arise incidentally during the trial, the counsel on both sides are heard by the Court, and the leading counsel of the party making the objections or submitting the point replies. If defendant's counsel take an objection, and plaintiff's counsel answer it, and, in replying on the objection, defendant's counsel cite a case, plaintiff's counsel will be allowed to observe on the case so cited (*u*). And when defendant relies upon an objection in law, and calls evidence to support it, plaintiff's counsel having answered the objection, defendant is entitled to be heard on the law in reply (*x*). On a question as to which party has the right to begin, one counsel only, in general, is heard on each side (*y*). The objection of a witness to a question which he considers himself not bound to answer is not a point on which counsel are heard (*z*). And a witness has no right to have the question of his liability to produce a document argued by counsel retained for that purpose (*a*). Where a party conducts his case in person, it is questionable how far counsel can be heard for him on a point of law (*b*).

All preliminary questions of fact on which the admissibility of evidence depends are to be decided by the Judge and not by the jury (*c*).

15. The defence.

15. *The Defence.*]—When counsel for the party who opened the case has gone through his evidence and examined all his witnesses, he asks the counsel on the opposite side whether he will call any witnesses or put in any evidence. If the latter says he will not, the counsel who began sums up his evidence (*d*), and the other counsel

(*q*) *Middleton* v. *Barned*, 4 Ex. 241; 18 L. J., Ex. 433: *Shedden* v. *Att.-Gen.*, 22 L. T. 631, H. L.

(*r*) *Aldred* v. *Halliwell*, 1 Stark. 117: *Giles* v. *Powell*, 2 C. & P. 259: *Soulby* v. *Pickford*, 2 M. & P. 545.

(*s*) *Giles* v. *Powell*, 2 C. & P. 259.

(*t*) *Budd* v. *Davison*, 29 W. R. 192, V.-C. B.

(*u*) *Fairlie* v. *Denton*, 3 C. & P. 103. And see *Power* v. *Barham*, 7 C. & P. 356; 4 A. & E. 473. In practice it is not usual for more than two counsel on each side to address the Court on a question of law arising during the trial.

(*x*) *Arden* v. *Tucker*, 1 M. & Rob. 192.

(*y*) *Rawlins* v. *Desborough*, 2 M. & Rob. 70. See *Bastard* v. *Smith*, Id. 132.

(*z*) *R.* v. *Adey*, 1 M. & Rob. 94.

(*a*) Ante, p. 566.

(*b*) *Shuttleworth* v. *Nicholson*, 1 M. & Rob. 254: *Moscati* or *Moscatti* v. *Lawson*, 1 H. & W. 572; 7 Car. & P. 22; 1 M. & Rob. 454.

(*c*) *Bennison* v. *Jervison*, 12 Jur. 485, Ex.: *Boyle* v. *Wiseman*, 11 Exch. 360; 24 L. J., Ex. 284: *Stowe* v. *Querner*, L. R., 5 Ex. 155; 39 L. J., Ex. 60.

(*d*) See post, p. 644.

then makes his speech to the jury. But if he says that he will call witnesses, &c., he addresses the jury and then calls his witnesses. After which he sums up his evidence, and the counsel who began has the general reply (*e*). The witnesses for the defence are examined and cross-examined in the manner already mentioned. Counsel had no right, where formerly a defence was demurred to, to allude to the statements in it in his address to the jury (*f*). But where judgment had been given for plaintiff on a demurrer to one of defendant's pleas, and the award as to the jury process was as well to try the issue in fact as to assess the damages on the issue in law, it was held that, on the trial, defendant's counsel in addressing the jury had a right to refer to the allegations contained in the plea demurred to, and to comment upon them (*g*).

Where there are several defendants.

As to when the counsel of each of several defendants have a right to address the jury and cross-examine plaintiff's witnesses, *see ante*, p. 634. It is in the discretion of the Judge at the trial in what order the counsel for different defendants, having different interests, shall cross-examine, and address the jury (*h*). On the trial of an issue directed by the Court of Chancery, to try whether plaintiff was next of kin to J. S. (with the usual order for indorsing any special matter on the record), one defendant, A. B., claimed to be as nearly related to J. S. as plaintiff was; the other defendant, C. D., set up a claim inconsistent with the cases both of plaintiff and A. B.: it was held, that, at the close of plaintiff's case, C. D. should not only open, but prove his case, and that then A. B. should do the like, the plaintiff having the general reply on both (*i*).

Acquittal of one of several defendants.

It is discretionary in the Judge to direct a verdict for one or more of several defendants in an action for a tort at the end of the plaintiff's case, and that discretion is regulated, not merely by the fact that at the close of plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the case closes (*k*).

16. Calling witnesses to disprove defence.

16. *Calling Witnesses to disprove Defence.*]—As we have seen, *ante*, p. 631, the plaintiff may in the first instance prove only a *primâ facie* case. Where he does so, he may, as a general rule, call witnesses to disprove the defence attempted to be made out by defendant's witnesses. Where there are cross demands between plaintiff and defendant, the plaintiff need not, in the first instance, prove the whole of his account, but need only prove the balance which he claims: and if defendant proves his set-off to a larger amount, plaintiff may then prove other parts of his account so as to overtop defendant's set-off (*l*). The plaintiff, in an action for a tort, gave

(*e*) See C. L. P. Act, 1854, s. 18. And see post, p. 644.

(*f*) *Ingram* v. *Lawson*, 9 Car. & P. 326.

(*g*) *Gregory* v. *Duke of Brunswick*, 1 C. & K. 24.

(*h*) *Fletcher* v. *Crosbie*, 2 M. & Rob. 417. See *R.* v. *Barber*, 1 C. & K. 434.

(*i*) *Phillips* v. *Willetts*, 2 M. & Rob. 319.

(*k*) *Sowell* v. *Champion*, 6 A. & E. 415; 2 N. & P. 627: *White* v. *Hill*, 2 D. & L. 537: *Wakeman* v. *Lindsey*, 15 Jur. 79, Q. B. As to striking out the name of a defendant improperly joined, see post, Ch. LXXXVIII.

(*l*) *Williams* v. *Davis*, 1 Dowl. 647; 1 Cr. & M. 464. But see *Browne* v. *Murray*, R. & M. 254: *Rees* v. *Smith*, 2 Stark. 31.

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as confirmatory evidence of defendant having committed a tort committed at Layton, proof that he was seen near the spot at the time in question; and defendant called witnesses who swore that defendant was at Richmond at the time; plaintiff was allowed to give in reply additional evidence of defendant being at Layton, such evidence being in direct contradiction of the new fact of defendant being at Richmond (*m*). On the trial of an action of debt for the treble value of predial tithes, plaintiff had proved defendant's occupation of the land, the subtraction of the tithe, its single value, and that tithe had been previously paid in respect of land encroached from the same common: defendant called witnesses to prove exemption from tithe, by reason of the barrenness of the land: it was held that, although, in re-examination of a witness for plaintiff, a question had been asked as to the fertility of the land, plaintiff was entitled to adduce evidence in reply to disprove the defence (*n*). In ejectment, before the *Com. Law Proc. Act*, 1852, to recover garden ground, it was proved by plaintiff that defendant had been let into possession of the garden by M., who had paid rent to the lessor of plaintiff; defendant's case was, that M. had rented a part of his garden of the lessor of plaintiff, and that that had been given up, and that defendant had the residue of the garden, which was now in dispute, devised to him by his father's will, in the year 1791; the lessor of plaintiff was allowed to give evidence in reply, to show that, from 1794, the lessor of plaintiff and his father received rent for the piece of ground in question (*o*). It is in the discretion of the Judge whether he will allow plaintiff to give evidence in reply (*p*). Such discretion, it seems, may be reviewed by the Court (*q*). The plaintiff cannot call evidence in reply for the mere purpose of confirming the *primâ facie* case made out by him in the first instance (*r*). A witness may be called in reply to contradict a statement alleged by defendant's witnesses to have been made in plaintiff's presence (*s*), or to rebut a denial made by the defendant in his evidence in chief (*t*). As to counsel's right to address the jury after evidence has been given in reply, *see infra*.

17. Counsel summing up evidence.

17. *Counsel Summing up Evidence—The Reply.*]—By *R. of S. C., Ord. XXXVI. r.* 36, "Upon a trial with a jury the addresses to the jury shall be regulated as follows: The party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any; and the right to reply shall be the same as heretofore."

Where the Judge decides that there is no evidence for the jury in

(*m*) *Briggs* v. *Aynsworth*, 2 M. & Rob. 168, per *Denman*, C. J.

(*n*) *Greswolde* v. *Kemp*, Car. & M. 635.

(*o*) *Doe* d. *Sturt* v. *Mobbs*, Car. & M. 1.

(*p*) *Wright* v. *Wilcox*, 9 C. B. 650; 19 L. J., C. P. 333.

(*q*) See *Wright* v. *Wilcox*, supra.

(*r*) *Jacobs* v. *Tarleton*, 11 Q. B. 421; 17 L. J., Q. B. 194. See *Darch* v. *Tozer*, 13 Jur. 959: *R.* v. *Hilditch*, 5 C. & P. 299.

(*s*) *Cope* v. *Thames Haven Dock Co.*, 2 C. & K. 758: *Jacobs* v. *Tarleton*, supra.

(*t*) *Rogers* v. *Manley*, 42 L. T. 585.

support of plaintiff's case, his counsel has no right to sum up the evidence adduced (*u*). A counsel who has announced his intention not to adduce evidence, in consequence of which the party who began sums up his case, cannot be permitted afterwards to alter his mind and adduce evidence (*x*).

The reply.

If the counsel for the defence have examined any witnesses, or adduced any evidence in support of it, the opposite party is entitled to the reply, as of right; otherwise not, unless when the Queen is a party, and the privilege of replying is claimed by the Attorney-General in right of his office (*y*). But where counsel for defendant opens facts to the jury as to which he calls no witnesses, it is in the discretion of the Judge to permit plaintiff's counsel to reply (*z*). Where defendant proves a payment to plaintiff, by showing the particulars of demand delivered under a Judge's order, in which plaintiff has credited defendant, this is the evidence of defendant, and entitles plaintiff to a reply (*a*). If certain parts of a book are used to refresh the memory of a witness for plaintiff, and defendant's counsel, in his address to the jury, observes upon the general state of the book, and refers to other parts of it, such observations do not give plaintiff's counsel the right of reply (*b*). And if a document is called for, after notice to produce by the plaintiff, the defendant by producing during the plaintiff's case evidence to show that the document is lawfully out of his (the defendant's) possession, does not give plaintiff's counsel a reply to the jury (*c*).

As we have seen, *ante*, p. 643, evidence may in some cases be given in answer to defendant's case. When evidence is so given defendant's counsel does not sum up his evidence at the close of the case; but waits until plaintiff has given his additional evidence, and then addresses the jury, summing up his own evidence, and replying on plaintiff's additional evidence (*d*); after which plaintiff's counsel replies on the whole case.

The reply closes the case on both sides.

18. The summing up by the Judge.

18. *The Summing up by the Judge.*]—When the case is closed on both sides, if plaintiff do not elect, or have not previously elected, to be nonsuit, the Judge sums up the evidence (as it is termed); that is, he states to the jury the matters really in dispute between the parties, calls their attention to such parts of the evidence as he thinks proper, and makes his remarks on it when necessary; he may, if he think it necessary, tell the jury the impression the evidence has left upon his mind (*e*). If any question of law be mixed up with the questions of fact, he states to them the principles of

(*u*) *Hodges* v. *Ancrum*, 11 Ex. 214; 24 L. J., Ex. 257, *Platt*, B., diss.

(*x*) *Darby* v. *Ouseley*, 1 H. & N. 1.

(*y*) *R.* v. *Earl of Abingdon*, Peake, N. P. C. 236; 1 Esp. 226: *R.* v. *Marsden*, 1 M. & M. 439: *R.* v. *Bell*, 1 Id. 440. See *Rowe* v. *Brenton*, 3 M. & R. 304; 8 B. & C. 737.

(*z*) *Crerar* v. *Sodo*, 1 M. & M. 85. See *R.* v. *Bignold*, 4 D. & R. 70: *R.* v. *Horne*, 20 How. St. Tr. 763: *Naish* v. *Browne*, 2 C. & K. 219. See *Faith* v. *M'Intyre*, 7 C. & P. 44.

(*a*) *Rymer* v. *Cook*, 1 M. & M. 86, n.

(*b*) *Pullen* v. *White*, 3 C. & P. 434.

(*c*) *Harvey* v. *Mitchell*, 2 M. & Rob. 366, per *Parke*, B.

(*d*) See Ord. XXXVI., ante, p. 644; Stark. Ev. 384: *Meagoe* v. *Simmons*, M. & M. 121; 3 C. & P. 76: *Doe* d. *Goslee* v. *Goslee*, 9 C. & P. 46; Ross. 174: *Furze* v. *Asker*, 3 C. & K. 73.

(*e*) *Davidson* v. *Stanley*, 3 Sc. N. R. 49.

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law upon which the case must be decided, and the manner in which they must be applied to the case and their effect upon it (*f*); and, lastly, he states to them, if necessary, the form in which they are to give their verdict. As all this, however, is intended merely as an assistance to the jury, the Judge, in his discretion, will omit any part of it he may think unnecessary. Where the case is very clear both in point of law and fact, and it is apparent that the jury have already determined on a verdict according with the justice and merits of the case, the Judge will omit the summing up altogether. The Judge may inform the jury what amount of damages will carry costs (*g*), though most Judges decline to do so.

Reservation of point or case.

The Judge may reserve any case, or any point in a case, for the consideration of a Divisional Court, or may direct any case or point in a case to be argued before a Divisional Court (*h*). But this does not take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same comes for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues (*i*).

Right to verdict of jury.

19. Amendments at the trial.

19. *Amendments at the Trial.*]—It may at the trial become necessary to amend a pleading by reason of there being a variance between it and the evidence, or for some other reason. The Judge at the trial has power to make such amendments in the pleadings as may be necessary for the purpose of determining the real (*k*) question in controversy between the parties, or, in fact, almost any other amendment. The amendment will be allowed upon such terms as to costs or otherwise as may seem just. (*See Ord. XXVIII. r.* 12, *ante*, p. 442.)

As to the cases in which amendments at the trial will be allowed, *see ante*, p. 317.

Striking out or adding parties.

The Judge at the trial has also power to amend by striking out or adding plaintiffs or defendants in case of misjoinder or nonjoinder (*see Ord. XVI. r.* 11, *post*, *Ch. LXXXVIII.*). And as to substituting other persons instead of plaintiffs, and as to judgment being given in favour of or against one or more of several plaintiffs or defendants without any amendment, *see Ord. XVI. r.* 11, *post*, *Ch. LXXXVIII.* (*l*).

(*f*) See *Parmiter* v. *Coupland*, 6 M. & W. 105: *Baylis* v. *Lawrence*, 11 A. & E. 920; 3 P. & D. 526: *Panton* v. *Williams*, 2 Q. B. 169.

(*g*) *Kilmore* v. *Abdoolah*, 27 L. J., Ex. 307.

(*h*) Jud. Act, 1873, s. 46, ante, p. 17.

(*i*) Jud. Act, 1875, s. 22, ante, p. 17; and see App. Jur. Act, 1876, s. 17, ante, p. 16, n. (*o*).

(*k*) *Cargill* v. *Bower*, 47 L. J., Ch. 649.

(*l*) See the previous enactments, C. L. P. Act, 1852, ss. 35, 37; C. L. P. Act, 1860, s. 19. Where a misjoinder of defendants appeared at the trial, an amendment might be made under the C. L. P. Act, 1852, by striking out the name of a defendant improperly joined, against whom judgment by default had been signed: *Greaves* v. *Humphreys*, 4 E. & B. 851; 24 L. J., Q. B. 190: *Johnson* v. *Goslett*, 3 C. B., N. S. 569; 25 L. J., C. P. 274: *Mulford* v. *Griffin*, 1 F. & F. 145. A judge at the trial had no power under that Act to amend the proceedings by adding defendant's wife as a defendant in an action where the husband had been sued alone for a debt incurred by the wife *dum sola*. *Garrard* v. *Gubilei*, 31 L. J., C. P. 131, 270; 13 C. B., N. S. 832.

20. *Stamping Documents.*]—By the Stamp Act, 1870 (*m*), (33 & 34 *V. c.* 97), *s.* 16, "(1) Upon the production of an instrument (*n*) chargeable with any duty as evidence in any Court of civil judicature in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the attention of the Judge to any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof (*o*), it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of 1*l.*, be received in evidence, saving all just exceptions on other grounds. 20. Stamping documents.

(2) The officer receiving the said duty and penalty shall give a receipt for the same and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the cause or proceeding in which and of the party from whom he received the said duty and penalty and the date and description of the instrument, and shall pay over to the Receiver General of Inland Revenue, or to such other person as the commissioners may appoint, the money received by him for the said duty and penalty.

(3) Upon production to the commissioners of any instrument in respect of which any duty or penalty has been paid as aforesaid, together with the receipt of the said officer, the payment of such duty and penalty shall be denoted on such instrument accordingly."

By *R. of S. C., Ord. XXXIX. r.* 8, "A new trial shall not be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp" (*p*). No new trial for ruling as to stamp.

21. *Adjourning the Trial.*]—By *Ord. XXXVI. r.* 34 (*q*), "The Judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time and to such place, and upon such terms, if any, as he shall think fit." 21. Adjourning the trial.

If any point of law requiring argument is involved in the case, the Judge will often adjourn the argument of such point for further consideration, so as to avoid the delay and inconvenience of a legal argument at Nisi Prius or the assizes (*see Ord. XXXVI. r.* 39, *post*, p. 653). When the case is tried at the assizes, the further consideration may be held in town. Notice of the day on which the Further consideration.

(*m*) This section is substantially the same as the C. L. P. Act, 1854, ss. 28, 29, which were repealed by "The Inland Revenue Repeal Act, 1870," 33 & 34 V. c. 99.

(*n*) By s. 2, "instrument" means and includes every written document.

(*o*) By s. 15, except where express provision to the contrary is made by this or any other Act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of 10*l.*, and, also, by way of further penalty where the unpaid duty exceeds 10*l.*, of interest on such duty at the rate of 5*l.* per cent. per annum from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty.

(*p*) *Siordet* v. *Kuczinski*, 17 C. B. 251; 25 L. J., C. P. 2: *Kaiser* v. *Grout*, 29 L. J., Ex. 20: *Heiser* v. *Grout, S. C.* 5 H. & N. 35: *Cory* v. *Davis*, 14 C. B., N. S. 370: *Rutty* v. *Benthall*, L. R., 2 C. P. 488.

(*q*) See C. L. P. Act, 1854, s. 19, the former enactment on this subject.

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further consideration will be taken is given in the daily cause list.

22. Ordering reference of the action.

22. *Ordering Reference of the Action.*]—The Judge at the trial has power to refer questions arising in an action which cannot be conveniently tried before the jury, such as questions involving a prolonged examination of accounts. This power to refer is treated of at length in *post, Vol.* 2, *Part XVIII.* (*t*). Some of the questions between the parties may be fit for trial by the jury, and others not. In such a case the Judge may order the latter to be referred, and try the former.

23. Withdrawing a juror.

23. *Withdrawing a Juror.*]—During the trial, after the jury are sworn, the parties sometimes agree to withdraw a juror. This is usually done at the recommendation of the Judge, in cases where it is doubtful whether the action will lie, or where the Judge intimates an opinion, that, under the peculiar circumstances of the case, the action should proceed no further. The withdrawal of a juror by consent of the parties always puts an end to the cause: and if the action be afterwards proceeded with, the defendant may apply to stay the proceedings, and the same if a second action is brought (*u*). But if a second action is brought after the withdrawal of a juror, and defendant, instead of applying to the Court to stay proceedings, allows the action to proceed, he cannot at the trial avail himself of the withdrawal of a juror as a defence (*x*). When a juror is withdrawn, each party has to pay his own costs (*y*). Where a demurrer to one plea was decided in favour of plaintiff, and he afterwards took down the cause for trial upon another, when a juror was withdrawn by consent, *Coleridge*, J., refused an application to enter up judgment, so as to enable plaintiff to obtain his costs of the demurrer (*z*). Discharging a jury by consent does not terminate the suit, and in this respect is not like withdrawing a juror (*a*).

24. Improper admission, &c. of evidence.

24. *Improper Admission, &c. of Evidence.*]—If the Judge improperly receive or reject evidence, the objection should be formally raised at the trial, and the Judge should be requested to take a note of it (*b*), otherwise it will be waived, and cannot be raised before the Court upon a motion for a new trial, &c. See further as to this, *Ch. LXVIII.*

(*t*) And see Ord. XXXIII.

(*u*) *Gibbs* v. *Ralph*, 15 L. J., Ex. 7; 14 M. & W. 804. The solicitors are in the hands of their counsel, and when by the advice of counsel a juror is withdrawn, the parties are bound by it. See *Moscati* (or *Moscatti*) v. *Lawson*, 1 H. & W. 572; 7 Car. & P. 32; 1 M. & Rob. 454: *Thomas* v. *Lewis*, 5 Dowl. 395: *Strauss* v. *Francis*, L. R., 1 Q. B. 379; 35 L. J., Q. B. 133.

(*x*) *Saunderson* v. *Nestor*, R. & M. 402.

(*y*) *Stodhard* v. *Johnson*, 3 T. R. 657.

(*z*) *Burdon* v. *Flower*, 7 Dowl. 786. See *Norburn* v. *Hilliman*, L. R., 6 C. P. 129; 39 L. J., C. P. 183, where a juror was withdrawn and it was left to the judge to say what ought to be done.

(*a*) *Everett* v. *Youells*, 3 B. & Ad. 349. Cp. *Scott* v. *Bennett*, L. R., 5 H. L. 234; 20 W. R. 686.

(*b*) See *G[illegible]s* v. *Pike*, 9 M. & W. 351.

25. *Nonsuit.*]—Before the Judicature Acts the plaintiff, when in the course of the trial he perceived that the case was going against him, frequently elected, as he might do, to be nonsuited, *i.e.* he declined further to prosecute his suit. In practice, when the plaintiff so elected, he was called in Court, and not answering when so called, he was nonsuited. Upon judgment of nonsuit, the plaintiff was, and still is, liable to pay the defendant's costs. But there was this advantage obtained, that he could bring another action for the same cause as that for which he had brought the action in which he had been nonsuited, which he could not do if there had been a verdict for the defendant. A verdict for the defendant would have estopped him from bringing another action for the same cause, but a nonsuit did not.

A plaintiff may still be nonsuited, but there is now no difference in the effect between a verdict for the defendant and a nonsuit.

It is optional with the plaintiff whether he will submit to a nonsuit or not (*c*). He may elect to be nonsuited at any time before the jury have delivered their verdict (*d*). The plaintiff may be nonsuited in an undefended cause (*e*), and in a *qui tam* action (*f*). Where one of two defendants allows judgment to go by default, and the other goes to trial, the plaintiff may be nonsuited (*g*). So, after a plea of tender (*h*), or after payment of money into Court (*i*), or where there are issues in law and in fact, and the defendant has obtained judgment on the former, the plaintiff may be nonsuited (*k*). Before the Judicature Acts a plaintiff might be nonsuited on demurrer (*l*).

(*c*) *Watkins* v. *Towers*, 2 T. R. 275—281: *Minchin* v. *Clement*, 1 B. & Ald. 252: *Corsar* v. *Reed*, 17 Q. B. 540; 21 L. J., Q. B. 18.

(*d*) *Stancliffe* v. *Clarke*, 7 Ex. 439; 21 L. J., Ex. 129: *Outhwaite* v. *Hudson*, 7 Ex. 980; 21 L. J., Ex. 151.

(*e*) *Halhead* v. *Abrahams*, 3 Taunt. 81. And see *Treacher* v. *Hinton*, 4 B. & Ald. 413; 1 M. & R. 261 (*a*): *Stancliffe* v. *Clarke*, supra.

(*f*) *Stowell* v. *Brown*, 1 F. & F. 256.

(*g*) *Murphy* v. *Donlan* or *Tomlan*, 5 B. & C. 178; 7 D. & R. 619: *Jones* v. *Gibson*, 5 B. & C. 768; 8 D. & R. 592: *Stuart* v. *Rogers*, 7 Dowl. 185: but see *Hannay* v. *Smith*, 3 T. R. 662: *Weller* v. *Goyton*, 1 Burr. 358: *Harris* v. *Butterley*, Cowp. 485.

(*h*) *Anderson* v. *Shaw*, 11 Moore, 44; 3 Bing. 290; 2 Car. & P. 85.

(*i*) *Gutteridge* v. *Smith*, 2 H. Bl. 374: *Schreger* v. *Carden*, 11 C. B. 851. And see 2 Esp. 482, n.: *Burstall* v. *Horner*, 7 T. R. 572: *Rogers* v. *M'Carthy*, 3 Esp. 106: *Perren* v. *Monmouthshire R. & Canal Co.*, 11 C. B. 855.

(*k*) *Paxton* v. *Popham*, 10 East, 366: *Martin* v. *Stone*, 6 Jur. 372, B. C.; Saund. 356 b: *Mann* v. *Lovejoy*, R. & M. 357: *Symes* v. *Larby*, 2 Car. & P. 358.

(*l*) Co. Lit. 139 b: per *Tindal*, C. J., in *Nesbit* v. *Rishton*, 11 A. & E. 246. See *Lord Howard's case*, 1 Sid. 84: *Vernon and Vernon's case*, 3 Leon. 28. Before the Jud. Acts a nonsuit could be recorded only at Nisi Prius, and not by the Court in banc. See *Gardener* v. *Davies*, 1 Wils. 301: *Hicks* v. *Young*, Barnes, 458. Frequently, however, before those Acts, at Nisi Prius, when it was doubtful whether the action would lie, or the like, the Court would allow plaintiff to take a verdict, with liberty to defendant to enter a nonsuit if the Court above should, upon application, be of opinion that the action would not lie. But, without such leave, the Court above had no authority to order a nonsuit to be entered. *Minchin* v. *Clement*, 1 B. & Ald. 252: Arch. Pr. 12th ed. p. 445. Where defendant had obtained a rule to enter a nonsuit, the Court, upon plaintiff showing cause against it, would in some cases remodel it, and grant a new

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Costs on nonsuit.

Upon being nonsuited, the plaintiff is liable to costs (*m*). The Judge may certify for the costs of a special jury (*n*).

How set aside and on what conditions.

If the Judge at Nisi Prius improperly nonsuit plaintiff, the Court, upon application, will set aside the nonsuit, and grant a new trial (*o*). But not so where plaintiff of his own accord elected to be nonsuited (*p*), unless he submitted to the nonsuit in deference to the opinion of the Judge, such opinion being incorrect (*q*). Where plaintiff had elected to be nonsuited because the Judge directed the jury to give only nominal damages, the Court refused to grant a new trial (*r*). Nor will the Court set a nonsuit aside on the ground that the case ought to have been submitted to the jury, unless this were desired on the part of the plaintiff at the trial of the cause (*s*). If set aside upon payment of costs, such payment is a condition precedent to the setting aside of the nonsuit; and until it be made, the plaintiff cannot proceed to another trial (*t*). See further as to setting aside a nonsuit and granting a new trial, *post*, *Ch. LXVIII.*

26. Verdict, how given. Jury to be kept together.

26. *Verdict, how given, &c.*]—The jury, after the Judge has summed up the evidence, proceed to consider their verdict. After the evidence is given, and the case closed on both sides, the jury must be kept together, without meat, drink, or fire (candle-light only excepted), until they have delivered their verdict, unless otherwise ordered by the Judge (*u*). Also they must not be allowed to speak with any person whatever until they have *agreed* upon their verdict; between which time and the time of delivering their verdict they may speak with the bailiff who keeps them, but with no other person. And before the jury retire, the bailiff is sworn in open Court to keep them thus. If they eat or drink at their own expense, without the leave of the Judge, or at the expense of either of the parties, they subject themselves to be fined; and if at the expense of the party for whom they afterwards give their verdict, it also avoids the verdict (*v*). Where two of the jury, during the progress of a trial which lasted two days, dined and slept at the house of

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trial. See *Wilkins* v. *Bromhead*, 7 Sc. N. R. 921: *Higgins* v. *Nicholls*, 7 Dowl. 553: *Winterbottom* v. *Lord Derby*, L. R., 2 Ex. 316.

(*m*) *Cameron* v. *Reynolds*, Cowp. 407; 2 B. & P. 376: *Davila* v. *Herring*, 1 Stir. 300. In actions *qui tam*, see *Wilkinson* v. *Allot*, Cowp. 336.

(*n*) 3 & 4 W. 4, c. 42, s. 35.

(*o*) *Sadler* v. *Evans*, 4 Burr. 1984. See *Alexander* v. *Barker*, 2 C. & J. 133: *Elsworthy* v. *Bird*, M'Cl. 69: *Rice* v. *Shute*, 5 Burr. 2612: *Buscall* v. *Hogg*, 3 Wils. 146: *Rackham* v. *Jesup*, Id. 338. As to granting a new trial, see post, Ch. LXVIII.

(*p*) *Barnes* v. *Whiteman*, 9 Dowl. 181. And see *Hutchinson* v. *Brice*, 5 Burr. 2692: *Austin* v. *Evans*, 2 M. & G. 430: *Simpson* v. *Clayton*, 2 Bing. N. C. 467.

(*q*) *Sweet* v. *Lee*, 4 Sc. N. R. 86; 3 M. & G. 452: *Alexander* v. *Barker*, 2 C. & J. 133: *Simpson* v. *Clayton*, 2 Sc. 700. And see *Wilkinson* v. *Whalley*, 6 Sc. N. R. 631; 5 M. & G. 590; 1 D. & L. 9: *Vacher* v. *Cocks*, 1 B. & Ad. 145.

(*r*) *Butler* v. *Dorant*, 3 Taunt. 229; *Simpson* v. *Clayton*, 2 Bing. N. C. 467.

(*s*) *Kindred* v. *Bagg*, 1 Taunt. 10. See *Law* v. *Wilkins*, 1 N. & P. 697: *Ward* v. *Mason*, 9 Price, 291.

(*t*) *Nicholls* v. *Bozon*, 13 East, 185.

(*u*) By 33 & 34 V. c. 77, s. 23, jurors after having been sworn, may, in the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of Court, and be allowed reasonable refreshment, such refreshment to be procured at their own expense.

(*v*) See *Everett* v. *Youells*, 4 B. & Ad. 681: *Mounson* v. *West*, 1 Leon. 132: *Gee* v. *Swann*, 9 M. & W. 686, per *Parke*, B. See *Cooksey* v. *Haynes*, 27 L. J., Ex. 371.

defendant on the evening of the first day, and consequently before the summing up, it was held, that this did not avoid a verdict found for defendant (*x*).

Casting lots for their verdict.

If the jury determine their verdict by lots, the verdict may be set aside, and the jurors fined (*y*).

Withdrawing and receiving further evidence, &c. (*z*).

The jury either give their verdict without quitting the jury-box, or in cases of difficulty, or where there is a difference of opinion among them, they may withdraw to a room provided for the purpose, in order to deliberate on their verdict (*a*). When the jury withdraw, they may take with them documents put in evidence in the cause (*b*). But the jury cannot take with them documents which have not been proved (*c*); and if the party, for whom the verdict is afterwards given, deliver such documents to the jury after they have left the box, it will avoid the verdict; but if delivered by the opposite party, or produced by one of the jurors without having received it from the parties, it will not (*d*). Also, if the jury examine witnesses after they have left the box, even to the same points to which the same witnesses were before examined in Court, it will avoid the verdict (*e*). But they may return into Court to hear evidence as to any matter of which they are in doubt (*f*), or to ask any question of the Court (*g*). And, after the jury have had the case summed up to them, and have retired, the Judge will not allow them to see a treatise on the law of the subject, even with the consent of the parties; they should state their difficulty to the Judge, and receive his direction as to the law (*h*).

Calling on another cause where jury long absent.

If the jury are likely to be absent any considerable time, another cause will be called on, and another jury drawn and sworn, in the manner stated *ante*, p. 625; and when the first jury return to deliver their verdict, or for any other purpose, the Court for awhile suspends the proceedings in the second action.

Verdict, when, where and how delivered.

When the jury return to the bar, they are asked if they have agreed upon their verdict, and whether they find for the plaintiff or the defendant (*i*). The foreman of the jury, in the presence and hearing of the remainder of the jurors (*k*), then delivers the verdict, and it is recorded. The verdict is either general or special:—general, when the jury find generally for the plaintiff and state the damages, or for the defendant; special,

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(*x*) *Morris* v. *Vivian*, 10 M. & W. 137; 2 Dowl., N. S. 235; 11 L. J., Ex. 367: *R.* v. *Kinnear*, 2 B. & Ald. 462; 3 Price, 536: *R.* v. *Fowler*, 4 B. & Ald. 273; Co. Litt. 227.

(*y*) *Fry* v. *Hordy*, T. Jones, 83: *R.* v. *Lord Fitzwater*, 2 Lev. 140: *Foster* v. *Hawden*, Id. 205: *Hale* v. *Cove*, 1 Stra. 642. As to granting a new trial in such a case, see post, Ch. LXVIII. *Burgess* v. *Langley*, 1 D. & L. 21; 12 L. J., C. P. 257.

(*z*) When the jury retire to consider their verdict the solicitors of the parties ought to remain in Court to hear it delivered. *Dauntley* v. *Hyde*, 6 Jur. 133, Ex.

(*a*) See note (*u*), *supra*.

(*b*) *Vicary* v. *Farthing*, Cro. El. 411: *R.* v. *Burdett*, 1 L. Raym. 148; Co. Litt. 227 b.

(*c*) 2 Ro. Abr. 686.

(*d*) *Graves* v. *Short*, Cro. El. 616.

(*e*) *Vicary* v. *Farthing*, Cro. El. 411, 412. See *R.* v. *Fowler*, 4 B. & Ald. 273.

(*f*) 2 Ro. Abr. 676.

(*g*) 2 Hale, 296.

(*h*) *Burrows* v. *Unwin*, 3 C. & P. 310.

(*i*) It is not now the practice to call their names over. See, as to this, *Torbock* v. *Lamy*, 6 Jur. 318, Q. B.

(*k*) See *R.* v. *Wooller*, 2 Stark. 111: *Cogan* v. *Ebden*, 1 Bur. 383; 2 Ld. Ken. 24.

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when they find the facts of the case specially, as proved (*l*). The jury also sometimes, instead of finding a verdict as above, answer certain questions raised by the pleadings (*m*) and put to them by the Judge. The verdict is also either public or privy. A public verdict is that which is given by the jury in open Court, whilst the Court is sitting. A privy verdict is given before one of the Judges of the Court, after the Court has risen; but it must be observed that, if the Judge adjourn the Court to his lodgings, and the jury there deliver their verdict, this will be a public and not a privy verdict (*n*). A privy verdict also must be confirmed by the jury in open Court, before it can be recorded; before which time the jury may vary from it if they think proper (*o*); but after a verdict is recorded, no alteration, however slight, can be made in it (*o*). Also, before the verdict is recorded, a jury is at liberty to vary from the first offer of their verdict, and to tender a new verdict; and that verdict which is recorded shall stand (*p*). It is not often that a privy verdict is now delivered. The practice now is, if the jury are not ready to deliver their verdict before the Judge leaves the Court, for the jury to deliver their verdict in open Court, in the presence of the associate (*q*).

Verdict founded on juror's own knowledge of the case.

It is said that a jury may ground their verdict on their own knowledge of the facts of the case (*r*); but this doctrine appears to be questionable. It seems to be contrary to these words in the jurors' oath, "and a true verdict give *according to the evidence*." If a juror knows anything respecting the case, the proper course to pursue seems to be, for the juror to state to the Court that he has such knowledge, and thereupon to be examined and cross-examined as a witness (*s*).

Verdict against evidence.

If the jury find a verdict manifestly against evidence, the Court may send them back to reconsider it, before it is recorded, but not afterwards (*t*). This, however, is very unusual. The Court or Judge cannot punish a jury for their verdict, however erroneous (*u*). If the verdict is against the evidence, a new trial may be moved for, as mentioned *post*, *Ch. LXVIII.*

Discharging jury.

If the jury cannot agree upon their verdict they may be discharged. Where there are several distinct issues to be tried in one action, it is competent to the Judge, in his discretion, and without the consent of the parties, to accept the verdict of the jury upon those issues on which they are able to agree, and discharge them upon the others, without invalidating the trial, and judgment may be given on the matters decided. The Court may, if necessary, send down the undecided issues for a new trial (*x*). If one of the

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(*l*) As to the verdict in general, and the difference between a general and special verdict, see Ch. LXVI.

(*m*) *Ellison* v. *Isles*, 11 A. & E. 665, per *Paterson*, J.

(*n*) 3 Bl. Com. 377 a. And see *Dawson* v. *Howard*, 1 Ld. Raym. 129.

(*o*) Co. Litt. 227.

(*p*) Co. Litt. 227 b: *Napier* v. *Daniel*, 3 Bing. N. C. 77; 3 Sc. 417.

(*q*) *Doe* d. *Lewis* v. *Baster*, 5 A. & E. 129. See *Bentley* v. *Fleming*, 1 C. B. 479.

(*r*) Trial per Pais, 279, 289: *Smith's case*, 1 Vent. 67: *Anon.*, 1 Salk. 405.

(*s*) 6 Howell's State Trials, 1012, n.: *Manley* v. *Shaw*, Car. & M. 361, per *Tindal*, C. J.: *Anon.*, 1 Salk. 405.

(*t*) 2 Hawk. c. 47, s. 11. See *Napier* v. *Daniel*, 3 Bing. N. C. 77.

(*u*) *Bushell's case*, Vaughan, 135; 2 Hale, 315.

(*x*) *Marsh* v. *Isaacs*, 45 L. J., C. P. 505.

jury happen to be taken suddenly ill, so as to be incapable of remaining until the verdict is agreed on, the Court may discharge that jury, and charge another with the cause (*y*).

27. Certificate for costs, &c.

27. *Certificate for Costs, &c.*]—In some cases it is necessary or advisable to apply to the Judge at the trial after the verdict for an order or certificate respecting the costs of the action, as mentioned in *post, Ch. LXVII.* Thus, if the plaintiff recover a sum less than 20*l.* in an action founded on contract, or less than 10*l.* in an action founded on tort, an application should be made by the plaintiff to the Judge at the trial for a certificate that there was sufficient reason for bringing the action in the High Court of Justice, or for an order for costs. *See* 30 & 31 *V. c.* 142, *s.* 5, *post, p.* 680.

Where the plaintiff in an action of contract recovers less than 50*l.*, *see Ord. LXV. r.* 12, *post*, p. 685.

If a cause has been tried by a special jury, and the party who obtained the order for such jury succeeds, he should *immediately* after the trial apply to the Judge who tried the action for a certificate that the cause was one fit to be tried by a special jury, otherwise he will not obtain the costs of it. 6 *G.* 4, *c.* 50, *s.* 34, *post*, p. 717.

As to the Judge on the hearing of a cause directing that the costs of unnecessary evidence, &c. shall not be allowed, *see post*, p. 705.

Sometimes, also, it is necessary to apply for a certificate that a refusal to admit documents or facts was reasonable. As to this, *see ante*, p. 717.

Where the unsuccessful party is desirous of moving for a new trial, it may sometimes be necessary for him to apply to the Judge to extend the time for moving. *See post, Ch. LXVIII.*

28. Judgment.

28. *Judgment.*]—By *Ord. XXXVI. r.* 39, "The Judge may, at or after a trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge."

Under this rule the Judge at or after the trial may abstain from ordering any judgment to be entered, and leave the parties to move for judgment under *Ord. XL. r.* 3 (*z*). But in this case the Judge must be asked to order judgment to be entered, otherwise, it appears, he cannot be said to abstain from doing so (*a*).

29. Entry of findings, certificate, &c.

29. *Entry of Findings, Certificate, &c.*]—By *Ord. XXXVI. r.* 41, "Upon every trial at the assizes, or at the sittings of the Queen's Bench Division for London and Middlesex, where the officer present at the trial is not the officer by whom judgments ought to be entered, the Associate or Master shall enter all such findings of fact as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, in a book to be kept for the purpose."

By *r.* 42, "If the Judge shall direct that any judgment be entered

(*y*) *R.* v. *Edwards*, 4 Taunt. 309; 3 Camp. 207: *R.* v. *Scalbert*, 2 Leach. 620.

(*z*) See *Benscher* v. *Coley*, 51 L. J., Q. B. 398; 48 L. T. 533. See the rule, Ord. XL. r. 2, post, Ch. LXIX.

(*a*) *Davenport* v. *Ward*, 47 L. T. 348.

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for any party absolutely, the certificate of the Associate or Master to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate shall be in the Form No. 17 in Appendix B., with such variations as circumstances may require" (*b*).

The fee for the certificate is 1*l.*, which is paid by means of a stamp impressed or affixed on the certificate; *see Orders in Appendix, post, Vol.* 2.

This certificate is in place of the postea, which was an indorsement on the Nisi Prius record of what had been done at the trial. It should accord with the finding of the jury (*c*). It will be given to the party substantially (*d*) succeeding in the action when he is in a position to sign judgment.

If plaintiff succeeds and recovers damages as to any part of his cause of action, he is entitled to the certificate, even though he is not entitled to recover costs, and in such a case he is entitled to the certificate though the costs due to the defendant will exceed those of the plaintiff (*e*). An amendment may in general be allowed where there has been any error, mistake or ambiguity in entering the verdict or drawing up the certificate (*f*); the amendment being ordered to be made by the Judge who tried the cause, and, in case of dispute as to the facts, from his notes (*g*). The Court of Appeal may order an amendment of the certificate (*h*).

Note as to time of commencement, &c. of trial.

By *Ord. XXXVI. r.* 40, "The registrar, master, or other proper officer present at any hearing or trial, shall make a note of the times at which such hearing or trial shall commence and terminate respectively, on each day on which the same shall take place, for communication to the taxing officer if required."

Postponing execution.

By *Ord. XLII. r.* 17 (*post, Ch. LXXIV.*), the Judge at the time of giving judgment, or afterwards, may shorten or extend the time for issuing execution (*i*). If the party against whom the verdict is obtained is desirous that execution should be postponed, he should apply to the Judge, at the time of giving judgment or afterwards, for an order to stay execution until some future day. Such an order will not be made except under special circumstances. If the Judge is of opinion that there is ground for moving for a new trial, he may postpone giving judgment, or on giving same may stay execution, in order to give an opportunity of moving for a new trial. Sometimes, on making such an order, terms may be imposed, as that money shall be paid into the Court or the like. An affidavit of the special circumstances will, as a general rule, be required, unless they appear from the facts proved in evidence at the trial.

(*b*) See the form, Chit. F. p. 360.

(*c*) *Doe* d. *Haxby* v. *Preston*, 5 D. & L. 7.

(*d*) *Staley* v. *Long*, 3 Bing. N. C. 781; 4 Sc. 481. And see *Grout* v. *Glasier*, 1 Dowl., N. S. 58: *Empson* v. *Fairfax*, 3 N. & P. 385: *Dignam* v. *Bailey*, 39 L. J., Q. B. 13.

(*e*) *Smith* v. *Edwards*, 4 Dowl. 621.

(*f*) *Abbott* v. *Andrews*, 8 Q. B. D. 648.

(*g*) *Dayrell* v. *Bridge*, 2 Str. 1264, where the postea was lost.

(*h*) *Clack* v. *Wood*, 9 Q. B. D. 276.

(*i*) See the former enactment and rule, C. L. P. Act, 1852, s. 120; r. 57, H. T., 1853.

CHAPTER LXVI.

THE VERDICT (*a*).

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Nature of verdicts in general.

THE verdict is either general or special. A general verdict is where the jury find the point in issue generally (*b*). A special verdict is where the jury find the facts of the case specially, leaving to the Court the application of the law to the facts thus found (*c*). The jury may in all cases give a general verdict (*d*). Where there are doubtful questions of law arising in the case, the jury may give a special verdict, or they may find a general verdict, subject to a special case; but since the Judicature Acts a special verdict, or a verdict subject to a special case, is seldom, if ever, given.

1. General verdict. How given.

1. *General Verdict.*]—A general verdict is usually given *vivâ voce* by the jury, thus:—"*We find for the plaintiff, damages* [20*l.*];" or if for the defendant, then, "*We find for the defendant*" (*e*). This verdict is afterwards entered in form by the associate or other proper officer present at the trial in a book kept for that purpose (*Ord. XXXVI. r.* 41, *ante*, p. 653).

(*a*) As to the meaning of the term "verdict," see *Reed* v. *Shrubsole*, 7 C. B. 630; 18 L. J., C. P. 225.

(*b*) Co. Lit. 226: *Davies* v. *Lowndes*, 1 Sc. N. R. 328.

(*c*) Co. Lit. 227 b, 228. And see Stat. Westm. 2 (13 Edw. 1), c. 30, s. 2: *Davies* v. *Lowndes*, supra. It does not follow merely because a jury choose to return their verdict only in particular words, instead of saying aye or no, that the verdict is a special one. See per *Patteson*, J., in *Scales* v. *Key*, 11 A. & E. 819. Accordingly, where, upon an issue bringing into question the existence of a custom, the jury found "that the custom existed to 1689;" it was held, that this was a verdict for the defendants, who alleged the custom.

(*d*) *Mayor of Devizes* v. *Clark*, 3 A. & E. 506.

(*e*) As to the verdict in an action for the recovery of land and in replevin, see Vol. 2, Chs. CVI. and CVII.

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Where it must be on all the issues (*f*).

The verdict should be given on all material issues to be tried by the jury (*f*); however, as noticed *ante*, p. 652, the Judge may in his discretion discharge the jury from giving a verdict as to one or more of the issues. Some issues may be found for the plaintiff and some for the defendant.

Inconsistent issues.

As inconsistent defences may be pleaded, there may sometimes be an apparent inconsistency in the finding on several issues. Where in an action for a libel the defendant pleaded not guilty, and also a justification, that the supposed libel was true; upon which issue was joined: it was held that a verdict might be found for defendant on the first issue, and for plaintiff on the second (*g*). And so where, to *assumpsit* on a building agreement, defendant pleaded *non assumpsit*, together with a plea that before breach the contract was rescinded by mutual agreement, and judgment was entered on both issues for defendant, it was held, on error, that there was no inconsistency on the record (*h*).

Effect of misjoinder and nonjoinder (*i*).

As to the effect of misjoinder and nonjoinder of plaintiffs, *see post, Vol.* 2, *Ch. LXXXVII.* Misjoinder of defendants does not now in any case defeat an action, and the Judge at the trial may at any stage of the proceedings, on such terms as may seem just, order the names of any defendants improperly joined to be struck out (*Ord. XVI. rr.* 11, 12, *post, Ch. LXXXVII.*). Even before the Judicature Acts, in an action of contract against several defendants as executors, with a plea of *ne unques executor*, the plaintiff might have a verdict against the real executor on that part of the declaration which laid the promises by the testator; and the other defendants might be discharged (*k*). On a plea by several executors, that they have fully administered, if some are shown to have assets in their hands, and the others not, the latter are entitled to a verdict (*l*).

Where several

Where there are several claims (*m*) on the same cause of action,

(*f*) *Miller* v. *Trets*, 1 Ld. Raym. 324: *Cattle* v. *Andrews*, 3 Salk. 372. See *Bentley* v. *Fleming*, 1 C. B. 479: *Hadley* v. *Stiles*, 2 Salk. 664.

(*g*) *Empson* v. *Fairfax*, 8 Ad. & E. 296; 3 N. & P. 385; *Duke of Beaufort* v. *Welch*, 10 Ad. & E. 527.

(*h*) *Cooper* v. *Langdon*, 2 Dowl., N. S. 836. See *Warwick* v. *Cox*, 8 Jur. 713, Ex.; 12 M. & W. 774; 1 D. & L. 986.

(*i*) At the time the Jud. Acts took effect, misjoinder of plaintiffs was not fatal, and judgment might be given in favour of one or more of several plaintiffs. C. L. P. Act, 1860, s. 19. But at the above time nonjoinder of plaintiffs was fatal unless, as might be done under certain circumstances, an amendment was allowed, by adding the person who ought to have been joined. C. L. P. Act, 1852, s. 35.

Before the Jud. Acts, in actions *ex contractû* against several defendants the verdict must in general have been found against all the defendants; though in some cases the name of a defendant improperly joined might have been struck out by order of the Judge at the trial.

Before the Jud. Acts, in actions *ex delicto*, a verdict might be found against one or more of several defendants, unless the plea of one of them (which was proved) showed that the plaintiff had no cause of action against any of them.

Before the Jud. Acts, in actions *ex contractû*, misjoinder of defendants, where a defence, must have been pleaded in abatement and in actions *ex delicto* nonjoinder of defendants was of no importance.

(*k*) *Griffiths* v. *Franklin*, 1 M. & M. 146; 1 Saund. 207 a.

(*l*) *Parsons* v. *Hancock*, 1 M. & M. 330.

(*m*) *Mutrie* v. *Harris*, 1 M. & M. 322: *Powell* v. *Sonnett*, 3 Bing. 381; 11 Moore, 330: *Cossey* v. *Diggons*, 2 B. & Ald. 546: *Pozzi* v. *Shipton*, 8 Ad. & E. 963; 1 P. & D. 4.

and only one cause of action is proved, plaintiff is entitled to a verdict for the amount of one claim only (*n*). Where a declaration in trespass contained two counts, and defendant pleaded to one, and suffered judgment by default on the other, and, on the trial of the former, plaintiff could only prove one act of trespass, which was covered by the second count, the Court held, that defendant was entitled to a verdict on the first count (*o*).

claims for same cause of action.

Before the Judicature Acts a plea of a right of way to bring water and goods (*p*), or a plea of *liberum tenementum* as to several closes (*q*), might be construed distributively. In an action on the case for disturbing the enjoyment of an ancient ferry, the declaration stated that plaintiffs were possessed of an ancient ferry across the Thames, to and from the Isle of Dogs and to Greenwich: the only pleas were, not possessed, and that there was no such ancient ferry: the only right proved was an ancient right of ferry from the Isle of Dogs to Greenwich: it was held, that the right alleged was divisible, and that the plaintiffs were entitled, under the repealed rule of *H. T.* 4 *W.* 4, to have the verdict entered for so much of the right as was proved (*r*).

Where pleadings can be construed distributively.

2. *Special Verdict.*]—Before the Judicature Acts a special verdict was sometimes taken, but this mode of proceeding seems now wholly unnecessary. Where it is intended that a special verdict shall be taken, evidence should be given at the trial by each party to prove the facts upon which he relies; and if there is any disputed question of fact, the same should be determined by the jury (*s*). *After the trial let the plaintiff's solicitor get the special verdict drawn by his junior counsel; then deliver it to the solicitor of the defendant, who, after getting it settled by his counsel, will redeliver it to you.* If the counsel differ in the mode of settling it, the Judge who tried the cause, being attended by counsel, upon summons, will settle it according to his notes (*t*). It is usual to get the special verdict signed by the junior counsel for the plaintiff and defendant.

2. Special verdict.

How taken and settled.

A special verdict must state the facts proved at the trial, and not merely the evidence given to prove those facts (*u*). But deeds should not be set out *in hæc verba*, but merely the substance of them stated, unless the question in dispute rest on their construction (*x*).

What it should state.

(*n*) *Ward* v. *Bell*, 1 C. & M. 848: *Jackson* v. *Galloway*, 2 D. & L. 839; 14 L. J., C. P. 141: *Holford* v. *Dunnett*, 7 M. & W. 348.

(*o*) See *Compere* v. *Hicks*, 7 T. R. 727.

(*p*) *Knight* v. *Woore*, 5 Dowl. 201. See *Cawkwell* v. *Russell*, 26 L. J., Ex. 34, where the right to the use of a drain was in question, and the right was not proved as laid.

(*q*) *Phythian* v. *White*, 1 M. & W. 216. See *Higham* v. *Rabett*, 7 Sc. 827, where it was held that if the plea set up a general right of way for all purposes, and the jury find a qualified right only, as to cart timber, the verdict could not be entered for the defendant for this qualified right, the rule of H. T. 4 W. 4, not extending to such a case. *Ivatt* v. *Mann*, 4 Sc. N. R. 342, a case of a feigned issue.

(*r*) *Giles* v. *Groves*, 12 Q. B. 721; 17 L. J., Q. B. 323.

(*s*) 1 Bur. in Pref. iv. And see R. M. 1654, sect. 20: *Hill* v. *Yates*, 8 Taunt. 183.

(*t*) See post, Ch. CXVII., as to the mode of settling a special case.

(*u*) *Bird* v. *Appleton*, 1 East, 111; 8 T. R. 562: *Hubbard* v. *Johnstone*, 3 Taunt. 209.

(*x*) See R. M. 1654, s. 20.

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Yet, if the verdict state the contents of a deed, and also set out the deed *in hæc verba*, the Court will not regard the collection the jury have made of the substance of the deed, but the deed itself as set forth (*z*). Also a negative need not be found in a special verdict, unless when necessary to show that some matter therein mentioned does not come within a particular exception (*a*). As to the construction of a special verdict, *see infra*. It should be divided into paragraphs, which as nearly as may be should be confined to a distinct portion of the subject, and every paragraph should be numbered consecutively (*b*).

Setting down for argument.

When settled, set the case down for argument, and forthwith give notice thereof to the opposite party's solicitor.

Argument of.

On the argument, which should take place before the Judge who tried the cause, the plaintiff's counsel states such part of the pleadings and the special verdict as he may consider necessary to make the case intelligible, and then argues the case. The defendant's counsel is next heard in answer; and, lastly, the plaintiff's counsel is heard in reply. Only one counsel on each side can be heard.

Construction of.

The Court will intend nothing in a special verdict but what is found by the jury (*c*); therefore, where a verdict found a recovery, the Court would not presume a writ of seisin executed, although the recovery would be ineffectual without it (*d*). Yet the Court will, in general, construe a special verdict in such a manner as to give effect to it, if possible. Therefore, where a special verdict stated that the defendant by his deed "*granted*" to the plaintiff the property in question, in a case where a *release* would have been the only effective conveyance, the Court construed the special verdict as if it had stated a release; although it would have been otherwise had the point arisen upon the construction of the pleadings (*e*). So, where a verdict found that A. was the son of B., without stating that he was the heir also, the Court said, that, as it was in a verdict, they would intend A. to be the son and heir of B., no other person being therein found to be the heir (*f*). Where a verdict stated an offence to have been committed *contra formam statuti*, where it could not have been so, the Court rejected the words *contra formam statuti* altogether as surplusage (*g*). Also, where the verdict found that J. S., being seised of land in fee, being upon the land, "demised" it to plaintiff for life, and afterwards stated that there had been no other livery of seisin, the Court rejected the matter of conclusion as surplusage, and held that there had been no demise (*h*).

Judgment, &c. on.

In cases where the special verdict cannot be amended, and is so

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(*z*) *Rowe* v. *Huntingdon*, Vaugh. 77.

(*a*) *Mayor of Nottingham* v. *Lambert*, Willes, 117. See form of a special verdict, Chit. Forms, p. 358.

(*b*) Evidence and documents set out at length in an appendix to a special case should thus be numbered, the costs will not be allowed. *Hadley* v. *Perks*, L. R., 1 Q. B. 445, 450. See fully Ord. XXXIV., post, Ch. CXVII.

(*c*) *Duncombe* v. *Wingfield*, Hob. 262. See *Doe* v. *Crisp*, 8 A. & E. 779: *Tancred* v. *Christy*, 12 M. & W. 316: *Downman* v. *Williams*, 7 Q. B. 109, per Cur.

(*d*) *Witham* v. *Earl of Derby*, Wils. 55.

(*e*) 2 Saund. 97.

(*f*) *Lynch* v. *Spencer*, Cro. El. 515.

(*g*) 1 Hawk. c. 30, s. 9.

(*h*) *Sharp* v. *Sharp*, Cro. El. 482.

defective that the Court cannot give judgment on it, a new trial must be awarded (*i*).

3. Verdict subject to a special case.

3. *Verdict subject to a Special Case.*]—Before the Judicature Acts, where a difficulty in point of law arose, the jury might, instead of finding a special verdict, find a general verdict for the plaintiff, subject to a special case, stating the facts for the opinion of the Court. There appears to be no reason why a verdict should not still be taken subject to a special case which, in general, would have to be determined by the Judge who tried the cause, after argument before him (*ante*, p. 658) (*k*).

How framed and settled.

Where it is intended that a verdict shall be taken subject to a case, evidence should be given at the trial by each party to prove the facts upon which he relies, and if there is any disputed question of fact, the same should be determined by the jury (*l*). After the trial the case is drawn by the junior counsel for the plaintiff, and settled by the junior counsel for the defendant, in the same manner as a special verdict; and if any difference arise between them as to the form of the case, the Judge who tried the case will, upon summons, and being attended by the junior counsel on both sides, settle the case from his notes. As to the form of a special case, and dividing the case into paragraphs, *see Ord. XXXIV. r.* 1, *Ch. CXVII.* The special case may be settled after the death of one of the parties (*m*). Where a special case was stated as to whether or not the plaintiffs were entitled to recover from defendants a sum due on an alleged contract of insurance; but it appeared from the case that no stamped policy had been issued, and that the covering note or memorandum of insurance was also unstamped, the Court of Exchequer refused to hear the case argued (*n*). The case should be signed by counsel or the solicitors; though this is not absolutely necessary; anything which shows consent to a case as stated, is sufficient (*o*); therefore, where at the trial a verdict was taken for plaintiff, subject to a case for the opinion of the Court, and it was referred to a barrister to settle the special case, which being done, it was signed by him and by plaintiff's counsel; but defendant's counsel refused to sign it, because certain

(*i*) *Bird* v. *Appleton*, 1 East, 111: *Witham* v. *Earl of Derby*, Wils. 55. See *Goodtitle* v. *Jones*, 7 T. R. 47—52: *Buckle* v. *Hollis*, 2 Chit. Rep. 398: *Sanders* v. *Vanzeller*, 4 Q. B. 260: *Tancred* v. *Christy*, 12 M. & W. 316: *Foot* v. *Hudson*, 10 Ir. Com. Law Rep. 509.

(*k*) It seems that at the trial a special case may be stated by consent of the parties or by order of the Judge, under Ord. XXXIV. rr. 1, 2, post, Ch. CXVII.

(*l*) See 1 Burr. in Pref. iv. Sometimes, instead of leaving any question to the jury, a verdict was taken subject to a special case, to be settled, if the *parties* could not agree on it, by a barrister, who had power given to him to examine witnesses, &c.

(*m*) See *James* v. *Crane*, 15 M. & W. 379; 15 L. J., Ex. 232: *Doe* d. *Earl of Egremont* v. *Stephens*, 2 D. & L. 993; 14 L. J., Q. B. 258. As to entering judgment *nunc pro tunc* in such a case, see post, Ch. LXX.

(*n*) *Nixon* v. *Albion Marine Insurance Co.*, L. R., 2 Ex. 338; 36 L. J., Ex. 180.

(*o*) *Price* v. *Quarrell*, 6 Jur. 604; 11 L. J., Q. B. 84: *Udney* v. *East India Co.*, 13 C. B. 733; 22 L. J., C. P. 211; where the plaintiff signed the case himself. See *Jackson* v. *Hall*, 8 Taunt. 421; 2 Moore, 478: *Doe* d. *Phillips* v. *Rollins*, 2 C. B. 842; 15 L. J., C. P. 186.

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documents were omitted, and plaintiff having set the case down for argument, a rule was obtained for striking it out of the paper for irregularity; the Court held, that the case might be set down in the special paper without the signature of counsel (*p*). If, after the verdict is taken, either of the parties refuse to proceed with the settlement of the special case, the proper course, in general, for the party desirous of proceeding to pursue is, *to prepare the special case, and serve a copy of it on the other side, then, on his refusal or neglect to proceed with the settlement of it, a summons should be taken out, returnable before the Judge who tried the cause, calling on such party to show cause why the Judge should not settle the case. Attend such summons, and the Judge will settle the case, and in the absence of the opposite party if he does not attend.* The above course cannot, however, always be adopted. Where a verdict was found for plaintiff, with nominal damages, subject to a special case to be prepared by plaintiff, and he refused to prepare it, the Court held, that plaintiff could not be compelled to complete it, but that defendant might apply to set aside the verdict and have a new trial (*q*).

Argument, &c. of.

The case will be argued in general before the Judge who tried the cause, as mentioned *ante*, p. 659. In arguing it, counsel will not be allowed to state any extrinsic matter; but the Court must judge of the case as it is stated (*r*). As to the Courts drawing inferences of fact, *see Ord. XXXIV. r.* 1, *post*, *Vol.* 2, *Ch. CXVII.* (*s*).

Amendment of.

If the case be misstated, the parties may before argument have leave to amend it (*t*). But if it do not admit of amendment, and be so defectively stated that the Court cannot give judgment upon it, a new trial will be granted (*u*). A term in a special case, that the Court shall be at liberty to amend any part of the pleadings as they may think proper, gives no additional power beyond that possessed by a Judge at Nisi Prius (*x*).

Verdict, how entered on.

When it has been agreed that an appeal shall not be brought, a verdict and judgment is entered according to the agreement in the special case, without noticing the special case. Where there is no such agreement that appeal shall not be brought, the special case must be entered of record with the judgment of the Court thereon.

As to the mode of appealing to the Court of Appeal, *see post*, *Vol.* 2, *Ch. LXXXV.*

Special case before trial.

As to the proceedings on a special case stated and agreed on between the parties *before* trial, *see post*, *Vol.* 2, *Ch. CXVII.*

(*p*) See note (*o*), ante, p. 659.

(*q*) *Medley* v. *Smith*, 6 Moore, 53. See *Hawkins* v. *Bennet*, 6 C. B., N. S. 386: *Cottam* v. *Partridge*, 3 Sc. N. R. 174; 2 M. & G. 843: *Seymour* v. *Corporation of Brecon*, 29 L. J., Ex. 296: *R.* v. *Smith*, 2 Chit. Rep. 398, a case of a *quo warranto*.

(*r*) *Doe* v. *Lewis*, 1 Burr. 614. And see *Pike* v. *Carter*, 10 Moore, 376; 3 Bing. 85: *Gibson* v. *Overbury*, 7 M. & W. 555.

(*s*) *Doe* v. *Crisp*, 8 A. & E. 779; 1 P. & D. 37: *Brockbank* v. *Anderson*, 7 Sc. N. R. 813; 13 L. J., C. P. 102: *Latter* v. *White*, 41 L. J., Q. B. 342; L. R., 6 Q. B. 474.

(*t*) *Doe* v. *Lewis*, 1 Burr. 617: *Notman* v. *Anchor Ass. Co.*, 6 C. B., N. S. 536.

(*u*) *Davila* v. *Herring*, 1 Str. 300. See *Hankey* v. *Smith*, 3 T. R. 507, n.: *Buckle* v. *Hollis*, 2 Chit. Rep. 398: post, Ch. LXVIII.

(*x*) *Chapman* v. *Sutton*, 3 D. & L. 646. See *Carpenter* v. *Parker*, 27 L. J., C. P. 78; 3 C. B., N. S. 206. See *Sanderson* v. *Piper*, 7 Sc. 418; 7 Dowl. 632. As to the costs of endeavouring to settle a special case not agreed upon, see *Foley* v. *Botfield*, 16 M. & W. 65.

4. Damages.

4. *Damages.*]—In an action where damages are claimed by the plaintiff, if the jury find a verdict for him they should assess the damages. Whenever a legal right is infringed, the law will presume some damage (*y*). It is not within the province of this work to treat of the measure of damages in each particular action (*z*). It may be as well, however, to remark, that, in an action on contract for non-payment of money, the measure of damages is the sum agreed to be paid by the plaintiff; or, if not ascertained by the contract, the sum proved to be due to him at the time of bringing the action, with or without interest, according to the nature of the demand, and the manner in which it arose (*a*). When the contract is not for the payment of money, but for the doing or forbearing of some other act, the damages depend on the nature of the contract, and whether it relates to the person or to real or personal property (*b*). In an action on an agreement for a penalty (*c*); or on bonds within the statute of 8 & 9 *W.* 3, *c.* 11 (*d*), as a bond for the payment of money by instalments (*e*); or for the payment of an annuity (*f*); or for the performance of any other specific act, not being a bond for the payment of a sum of money in gross at a certain time (*g*); or bond for the payment of money provided for by 4 *Anne*, *c.* 16, *s.* 13 (*h*); or a replevin bond, &c. (*i*): where, in pursuance of 8 & 9 *W.* 3, *c.* 11, *s.* 8, one or more breaches of the condition are assigned upon record, the jury assess the damages upon the breaches assigned (*k*): the damages are limited to the amount of the penalty (*l*). As to recovering interest as damages, *see post*, p. 663. As to assessing damages where the action is brought for breach of contract to deliver specific goods for a price in money, *see* 19 & 20 *V. c.* 97, *s.* 2, noticed *Ch. LXXVIII.*

In actions on contract.

If defendant has pleaded a set-off, but at the trial fails to prove it, or offers no evidence in support of it, the plaintiff, if he think proper, may deduct the amount of it from the sum he proves to be due to him and take a verdict for the balance. But there is no necessity for him to do this: and though no such reduction be made, the defendant is ever after estopped from bringing an action for the demand included in his plea of set-off (*m*). If defendant has not

Where a set-off pleaded.

(*y*) *Embrey* v. *Owen*, 6 Ex. 353; 20 L. J., Ex. 212.

(*z*) See Sedgwick on Damages, 7th ed. (1881); Mayne on Damages; Rosc. on Evid., Index, "Damages."

(*a*) Tidd, New Pract. 521; Tidd, Prac., 9th ed. 871.

(*b*) Tidd, New Pract. 523; and see the cases and decisions there collected. And see *Hey* v. *Wyche*, 2 G. & D. 569.

(*c*) *Drage* v. *Brand*, 2 Wils. 377.

(*d*) See Vol. 2, Ch. CX.

(*e*) *Willoughby* v. *Swinton*, 6 East, 550; 2 Smith, 663.

(*f*) *Walcot* v. *Goulding*, 8 T. R. 126.

(*g*) *Murray* v. *Earl Stair*, 2 B. & C. 82, 89; 3 D. & R. 278: *Wardell* v. *Fermor*, 2 Camp. 285, n.

(*h*) *Cardozo* v. *Hardy*, 2 Moore, 220.

(*i*) 2 Saund. 187. And see *Moody* v. *Pheasant*, 2 B. & P. 446: *Smith* v. *Broomhead*, 7 T. R. 300: *Smithey* v. *Edmondson*, 3 East, 22. And see *Savile* v. *Jackson*, 13 Price, 715: *Smith* v. *Bond*, 3 M. & Sc. 528; 10 Bing. 125.

(*k*) See 1 Saund. 58; 2 Id. 187. And see *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 257; Chit. Forms. As to this, see Vol. 2, Ch. CX.

(*l*) *Branscombe* v. *Scarborough*, 6 Q. B. 13; 13 L. J., Q. B. 247.

(*m*) *Eastmure* v. *Lawes*, 7 Sc. 461; 5 Bing. N. C. 444. See *Laing* v. *Chatham*, 1 Camp. 252; 1 Chit. Rep. 178, n.

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pleaded a set-off, no deduction should be allowed for any demand which he may have against plaintiff. If defendant prove part of a plea of set-off, the jury should allow the part proved in reduction of damages (*n*).

In detinue.

In *detinue*, the damages are in general merely nominal; but the jury in general find the value of the articles detained (*o*). Special damages may also, it would seem, be recoverable for the detention, if laid in the statement of claim (*p*). Where there are several parcels of goods, it is sometimes advisable for the jury to find the value of each; for the defendant may, perhaps, give up some and not others (*q*). A writ of delivery may now be issued for the recovery of the specific property (*r*).

In trover.

In an action for the wrongful conversion of goods, formerly called and still sometimes called an action of trover, the general rule is, that the damages should be the value at the time of the conversion of the thing converted (*s*). Where defendant wrongfully detained from plaintiff a bill for 1,000*l.*, and got 800*l.* upon it, it was held, that plaintiff was entitled to the full amount of the bill as damages (*t*). In trover for a guarantee plaintiff is entitled to the sum recoverable on it by him, though it has been mutilated by defendant; and if unstamped, the expense of stamping must be deducted (*u*). In trover for title deeds, the jury may give the full value of the estate to which they belong by way of damages, although they are generally reduced to 40*s.* on the deeds being given up (*x*). Where defendant, a sheriff, who held goods taken in execution, delivered them to plaintiffs, assignees of a bankrupt, after trover brought against him by plaintiffs, and plaintiffs accepted them without condition, it was held, that they could not recover more than nominal damages; at all events, not without alleging special damage (*y*). The jury need not find the damages subject to reduction upon defendant giving up the thing converted (*z*). Special damages are not recoverable in trover, unless laid in the statement of claim (*a*), and then they may be (*b*).

(*n*) *Eastmure* v. *Lawes*, supra: *Moore* v. *Butlin*, 2 N. & P. 436; 7 Ad. & E. 595: *Barnes* v. *Butcher*, 9 Car. & P. 725: *Lord* v. *Ferrand*, 1 Dowl. & L. 630.

(*o*) See *Phillips* v. *Jones*, 15 Q. B. 859; 19 L. J., Q. B. 374. As to the judgment when the jury so find, see Ch. LXX.; and as to the execution in such a case, see Ch. LXXVIII.

(*p*) See *Phillips* v. *Hayward*, 3 Dowl. 362: *Archer* v. *Williams*, 2 C. & K. 26: *Williams* v. *Archer*, 5 C. B. 318; 17 L. J., C. P. 82, where the railway scrip for which the action was brought was delivered up to plaintiff after action brought. And see *Crossfield* v. *Such*, 22 L. J., Ex. 65: *Chilton* v. *Carrington*, 15 C. B. 95; 24 L. J., C. P. 78.

(*q*) *Pawley* v. *Holly*, 3 W. Bla. 853: *Sandford* v. *Alcock*, 10 M. & W. 689.

(*r*) See post, Ch. LXXVIII.

(*s*) *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280; 34 L. J., C. P. 102: *Finch* v. *Blount*, 7 C. & P. 478: *Cook* v. *Hartle*, 8 C. & P. 568: *Wormer* v. *Biggs*, 2 C. & K. 31: *France* v. *Gaudet*, L. R., 6 Q. B. 199; 40 L. J., Q. B. 121.

(*t*) *Alsager* v. *Close*, 10 M. & W. 576.

(*u*) *M'Leod* v. *M'Ghie*, 2 M. & G. 326; 2 Sc. N. R. 604.

(*x*) *Loosemore* v. *Radford*, 9 M. & W. 657, per *Alderson*, B.

(*y*) *Moon* v. *Raphael*, 2 Bing. N. C. 310. See *Wood* v. *Morewood*, 3 Q. B. 440, where an action of trover for coals was brought to try the right to a mine.

(*z*) *M'Leod* v. *M'Ghie*, supra. See *Wintle* v. *Rudge*, 5 Jur. 274.

(*a*) *Evans* v. *Lewis*, 8 Dowl. 820.

(*b*) *Davis* v. *Oswell*, 7 C. & P. 804:

Judgment in trover and payment of damages vests the property in the goods in the person against whom the judgment was recovered (*c*), but judgment only without satisfaction does not (*d*).

In replevin, &c.

As to damages in an action of replevin, *see Vol. 2, Ch. CVII.*; as to damages in an action for recovery of land and for mesne profits, *see Vol. 2, Ch. CVI.*

Interest as damages.

The 3 & 4 *W.* 4, *c.* 42, *s.* 28 (*e*), enacts, "That, upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit (*f*), allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time (*g*), or, if payable otherwise, then from the time when the demand of payment shall have been made in writing (*g*), so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: Provided that interest shall be payable in all cases in which it is now payable by law." By sect. 29, "The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act." In an action on a solicitor's bill, where plaintiff gave notice, pur-

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Bodley v. *Reynolds*, 8 Q. B. 779; 15 L. J., Q. B. 219: *Wood* v. *Bell*, 5 E. & B. 789: *France* v. *Gaudet*, L. R., 6 Q. B. 199; 40 L. J., Q. B. 121.

(*c*) *Cooper* v. *Shepherd*, 3 C. B. 266: *Brinsmead* v. *Harrison*, L. R., 6 C. P. 584; L. R., 7 C. P. 574; 40 L. J., C. P. 281; 41 L. J., C. P. 190.

(*d*) *Brinsmead* v. *Harrison*, supra: *Ex p. Drake*, 5 Ch. D. 866.

(*e*) As to when interest was recoverable before this Act, and generally upon this subject, see Chitty on Pleading, Vol. 1, p. 369; Tidd, Pract. 9th ed. 871. As to a surety recovering interest on money paid for his principal, see *Petre* v. *Duncombe*, 20 L. J., Q. B. 242. As to interest on debenture bonds granted by a railway company, see *Price* v. *Great Western R. Co.*, 16 M. & W. 244.

(*f*) *Taylor* v. *Holt*, 34 L. J., Ex. 1, where there was an application in writing for a loan. See *Attwood* v. *Taylor*, 1 Sc. N. R. 611; 1 M. & G. 279, where it was left for the jury, under the statute, to exercise their discretion in the matter, with very strong expressions of opinion on the part of the Judge; they declined to allow such interest, and the Court refused to interfere. See 1 M. & G. 332, as to interest upon interest.

(*g*) It is not necessary in order to enable a jury, under this section, to allow interest upon a debt not payable at a certain time, that the demand, in writing, should be of a specific sum; it is sufficient to satisfy that enactment, that the demand be of what is due, with notice that the debtor is required to pay interest thereon. *Geak* v. *Ross*, 44 L. J., C. P. 315; 32 L. T. 666; 23 W. R. 658. See *Harper* v. *Williams*, 12 L. J., Q. B. 227: *Mowatt* v. *Lord Londesborough*, 3 El. & Bl. 307; 23 L. J., Q. B. 177, where the demand was held sufficient in point of form. Goods were delivered under a contract contained in a letter of the plaintiff, as follows:—"In the event of my furnishing the hotel, the terms I should require would be one-third cash, and bills at six and twelve months for the balance." These terms were assented to:—Held, by *Mellor*, J., and *Lush*, J. (*Blackburn*, J., dissentiente), that the plaintiff was entitled to recover interest upon the amount of one-third, which was to be paid in cash, inasmuch as that sum was payable by virtue of a written instrument at a certain time, sufficiently to come within this section. *Duncombe* v. *The Brighton Club, &c. Co.*, L. R., 10 Q. B. 371; 44 L. J., Q. B. 216.

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suant to the above Act, that he should claim interest from the date of notice, and after the writ was issued, the bill was referred to taxation at the instance of defendant, no terms being made as to the allowance of interest, the Court held, that plaintiff could not afterwards have an assessment of damages for the purpose of recovering interest (*h*). In an action on a judgment of one of the superior Courts, interest may be recovered as damages (*i*); and in some cases it has been allowed in an action on a foreign judgment; as, for instance, in an action on an Irish judgment on a bond, interest has been allowed beyond the penalty (*k*). A railway Act authorized the company to recover in an action of debt what should be due for calls, including interest on such calls; it was held that interest was recoverable under a count for calls (the damages laid being sufficient to cover the amount), without a count for interest (*l*). In an action by indorsee of a bill against acceptor, defendant pleaded only new matter by way of confession and avoidance, but failed to establish the matter of avoidance; it was held, that plaintiff could not recover interest upon the bill from the date of its maturity, as stated in the declaration, without producing it (*m*). In an action against the drawer of a bill for 200*l.*, with 10*l.* per cent. interest, it was held, that the holder might recover interest at 10*l.* per cent. from the time when the bill became due, as well as for the time during which it was running (*n*). If plaintiff is barred from recovering the principal, he is equally barred from recovering interest, which is an accessory only to the former (*o*).

Must not be for cause of action subsequent to suit.

The jury cannot give damages sustained from *a cause* subsequent to the commencement of the action, or previous to plaintiff's having any right of action (*p*). But the jury may in general give damages sustained after the commencement of the action from *a cause* which took place before (*q*). By *Ord. XXXVI. r.* 58, "Where

(*h*) *Berrington* v. *Phillips*, 1 M. & W. 43; 1 Tyr. & G. 322; 1 Gale, 404; 4 Dowl. 758. As to the Master allowing on taxation interest on disbursements made by a solicitor, see ante, p. 151.

(*i*) *Blackmore* v. *Flemyng*, 7 T. R. 446: *Entwistle* v. *Shepherd*, 2 Id. 78. And see *M'Clure* v. *Dunkin*, 1 East, 436: *Lord Lonsdale* v. *Church*, 2 T. R. 388: *Hillhouse* v. *Davis*, 1 M. & Sel. 169: *Wood* v. *Silleto*, 1 Chit. Rep. 473. See 1 & 2 V. c. 110, s. 17, post, Ch. LXX., as to a judgment debt carrying interest. As to recovering interest in actions on records, see *Ven* v. *Phillips*, 1 Salk. 208: *Fanshaw* v. *Morrison*, 2 Ld. Raym. 1138: on a recognizance of bail, see *Waters* v. *Rees*, 3 Taunt. 503: *Welford* v. *Davidson*, 4 Burr. 2127: as to recovering damages in an action on a statute for a penalty, see *Frederick* v. *Lookup*, 4 Burr. 2018: *Cuming* v. *Sibly*, Id. 2489. See *Powell* v. *Hord*, 1 Stra. 650; 2 Ld. Raym. 1411: *Facy* v. *Lange*, Cro. Car. 559.

(*k*) *M'Clure* v. *Dunkin*, 1 East, 436: *Lord Lonsdale* v. *Church*, 2 T. R. 388. And see M. & M. 228: *Arnott* v. *Redfern*, 11 Moore, 209; 3 Bing. 353. When not so allowed, see *Atkinson* v. *Lord Braybrooke*, 4 Camp. 380; 1 Stark. Rep. 319: *Hillhouse* v. *Davis*, 1 M. & Sel. 173.

(*l*) *London and Brighton R. Co.* v. *Fairclough*, 3 Sc. N. R. 68; 2 M. & G. 674: *Southampton Dock Co.* v. *Richards*, 1 Sc. N. R. 219; 1 M. & G. 448.

(*m*) *Hutton* v. *Ward*, 15 Q. B. 26; 19 L. J., Q. B. 293. This was so decided on the ground that the date of the bill, as stated in the declaration, was not admitted by the pleadings.

(*n*) *Keene* v. *Keene*, 3 C. B., N. S. 144; 27 L. J., C. P. 88.

(*o*) *Clark* v. *Alexander*, 8 Sc. N. R. 147; 13 L. J., C. P. 133.

(*p*) 12 Saund. 174, a, b.

(*q*) *Dugdam* v. *Lawson*, 8 Sc. 471; 9 Car. & P. 326: *Hodsoll* v. *Stallebrass*, 11 Ad. & E. 301; 3 P. & D. 300; 8 Dowl. 482. See *Goslin* v. *Corry*, 8 Sc. N. R. 21.

damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of assessment."

Matters not pleaded not allowed in mitigation.

The jury cannot take into consideration, in mitigation of damages, any fact or circumstance not pleaded, which could and should have been pleaded as a defence to the action (*s*).

Damages when limited.

In actions for torts or breaches of contract, as a general rule, the jury are at liberty to give what damages they may think proportioned to the degree of injury they may judge the plaintiff to have sustained from the tort or breach of contract complained of (*t*).

Where a penalty.

But where there is a penalty expressed for the non-performance of a contract, and it appears evident that such penalty is the precise sum fixed and agreed upon between the parties as liquidated damages for the non-performance of the contract, the jury are confined to that sum (*u*); as in an action on a bond for 1,000*l*., conditioned that defendant should marry plaintiff, the Court held, that if the jury found a verdict for plaintiff, they could not give more or less damages than the 1,000*l*. (*x*). But where it does not appear clear that the parties intended the sum stated in the agreement as liquidated damages to be such, it must then be deemed a mere penalty; in which case, although the jury cannot give a larger amount of damages than that sum, yet they may find a less sum (*y*). As to the damages being limited where breaches are assigned under 8 & 9 *W.* 3, *c.* 11, *s.* 8, in an action on a bond, *see post*, *Ch. CX.*

Damages in excess of amount claimed in statement of claim.

It is also a general rule, that the jury cannot exceed the damages laid in the statement of claim (*z*). If the verdict be for more, the Court or a Judge may allow an amendment of the statement of claim by increasing the amount of damages claimed thereby (*a*).

When increased (*b*).

The Court have refused to amend the verdict by increasing the damages given by the jury, although all the jurymen joined in

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(*s*) *Speck* v. *Phillips*, 5 M. & W. 279; 7 Dowl. 470. See *Watson* v. *Christie*, 2 B. & P. 224. As to pleading matters going to damages only, see *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J., Q. B. 214, and other cases cited ante, p. 282.

(*t*) See *Hey* v. *Wyche*, 2 G. & D. 569; 12 L. J., Q. B. 83.

(*u*) *Wallis* v. *Smith*, 21 Ch. D. 243; 52 L. J., Ch. 145; 47 L. T. 389; 31 W. R. 214.

(*x*) See *Edmondson* v. *Machell*, 2 T. R. 4: *Reynolds* v. *Bridge*, 6 El. & Bl. 528; 26 L. J., Q. B. 12: *Mercer* v. *Irving*, El. Bl. & El. 563: 27 L. J., Q. B. 291.

(*y*) Upon the question, whether the sum is to be considered a penalty or liquidated damages, the rule appears to be now established, that where the same sum is stipulated as recoverable for the breach of every article in an agreement, however minute and unimportant, it shall be regarded as a penalty and not as liquidated damages, notwithstanding the agreement declares not only affirmatively that the same shall be taken as liquidated damages, but negatively also that it shall not be taken as a penalty: *Wallis* v. *Smith*, supra, n. (*u*); 1 Saund. 58 c: *Boys* v. *Ancell*, 5 Bing. N. C. 390: *Davies* v. *Penton*, 6 B. & C. 216: *Kemble* v. *Farren*, 3 Moo. & P. 425; 6 Bing. 141: *Beckham* v. *Drake*, 8 M. & W. 846: *Horner* v. *Flintoff*, 9 M. & W. 678.

(*z*) *Cheveley* v. *Morris*, 2 W. Bl. 1300.

(*a*) Ord. XXVIII. r. 12, ante, p. 442: *Benewith* v. *Evans*, 70 L. T. (Jour.) 426, cor. *Stephen*, J., April 12th, 1881: *Tebbs* v. *Barron*, 5 Sc. N. R. 837: *Tomlinson* v. *Blacksmith*, 7 T. R. 132.

(*b*) As to the power it is said the Courts possess to increase the damages in actions for mayhem and atrocious battery, see *Brown* v. *Seymour*, 1 Wils. 5: *Cook* v. *Beal*, 1 Ld. Raym. 176; 3 Salk. 115: *Austin* v. *Hilliers*, Hardres, 408: *Cook* v. *Beal*, 1 Ld. Raym. 176; 3 Salk. 115.

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an affidavit stating their intention to have given such increased damages, and that they conceived their verdict was calculated to give them (*d*). In an undefended cause on a mortgage deed, plaintiff's counsel inadvertently took a verdict for the principal only, omitting to include interest; the Court refused to increase the verdict (*e*). As to granting a new trial upon the ground of the damages being too small, *see post, Ch. LXVIII.*

When reduced.

The Court cannot reduce the damages, except by consent: all they can do if the damages are excessive, is to grant a new trial (*f*). They may, however, where the plaintiff consents to the damages being reduced to such a sum as the Court thinks reasonable, refuse a new trial on their being so reduced, although the defendant does not consent (*g*). Where damages found by the jury have been calculated upon a value assented to by counsel on both sides, the Court will not in general interfere to reduce the amount of the verdict, on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation (*h*). The proper time for explanations of this kind is at the trial (*i*).

Where several defendants.

We have already shortly pointed out that the verdict may be against one or more of several defendants (*k*). If several defendants in trespass are found guilty of a joint trespass, the jury cannot sever the damages (*l*). Where there are different acts, not being joint acts, complained of against several defendants, the damages may, and generally must, be severed (*Ord. XVI. rr.* 3, 4, *post, Ch. LXXXVII.*).

Where several claims, issues, &c.

Where the statement of claim contains several distinct claims, claimed by the same plaintiff, the jury may assess either entire damages upon all or any of them, or several damages upon each (*m*). If one of the claims be bad, the plaintiff should take care that the latter be done, for in such a case, if a verdict be entered generally and entire damages given, the Court will award a new trial, or a new assessment of damages, *see post, Ch. LXVIII.* But in some cases an amendment will be allowed to be made in the manner mentioned *post*, p. 668, by confining the damages to the good claims. If a verdict is found for defendant on one of several defences going to the whole cause of action, it is not necessary for the jury to assess

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(*d*) *Jackson* v. *Williamson*, 2 T. R. 281. And see *Cann* v. *Facey*, 5 N. & M. 405; 4 Ad. & E. 68: *Baker* v. *Brown*, 2 M. & W. 199; 5 Dowl. 313. See *Baldwyn* and *Girries' case*, Godbolt, 245, where plaintiff was entitled to treble damages, but the verdict was taken for single damages only; the Court corrected the mistake; but there the Court only gave the finding of the jury its legal effect.

(*e*) *Baker* v. *Brown*, 2 M. & W. 199; 6 Dowl. 313.

(*f*) As to granting a new trial, upon the ground that the damages are excessive, see post, Ch. LXVIII.

(*g*) *Belt* v. *Lawes*, C. A., 13 Q. B. D. 356; 53 L. J., Q. B. 249; 50 L. T. 441; 32 W. R. 607.

(*h*) *Hilton* v. *Fowler*, 5 Dowl. 312.

(*i*) *Jackson* v. *Williamson*, 2 T. R. 281. See *Short* v. *Kalloway*, 11 Ad. & E. 28.

(*k*) Ante, p. 656.

(*l*) *Eliot* v. *Allen*, 1 C. B. 18: *Clark* v. *Newsan*, 1 Ex. 131; 16 L. J., Ex. 297. See *Powell* v. *Hodgetts*, 5 Car. & P. 432: *Howard* v. *Newton*, 2 M. & Rob. 509: *Hill* v. *Goodchild*, 5 Bur. 2790: *Mitchell* v. *Millbank*, 6 T. R. 199. As to severing the damages, &c., see 11 Co., 5 b: *Player* v. *Warn*, Cro. Car. 54: *Austen* v. *Willward*, Cro. El. 860; 11 Co. 6 a, 7 a: *Walker* v. *Woolcott*, 8 Car. & P. 352.

(*m*) 1 Ro. Abr. 570 (F), pl. 1: *Preston* v. *Pecke*, El. Bl. & El. 336; 27 L. J., Q. B. 424.

damages on the other issues (*n*). In an action for words used on one occasion, if the words be set forth in the statement of claim, and some of them be actionable, and others not, entire damages may be given; for it shall be intended that the damages were given for the words which were actionable, and that the others were inserted only for aggravation (*o*). But if the statement of claim in such an action charge the defendant with words used on several distinct occasions, and all the words used on some or one of them are not actionable, and there is not any special damage laid, and a *general* verdict and entire damages be given, it will be bad, and defendant may move for a new trial, or appeal (*p*).

On a nonsuit or verdict for defendant.

Damages may be assessed upon a nonsuit (*q*), or verdict for the defendant in replevin (*r*). And on the trial of an issue in fact, the jury cannot, except by consent, find a verdict for the defendant, and assess damages contingent upon the Court above being of opinion that the plaintiff was entitled to recover (*s*).

Double and treble damages.

Double and treble damages are in some cases given by particular statutes; but at common law the damages are always single. Double and treble damages mean double and treble the damages actually given by the jury, and are not reckoned in the same manner as double or treble costs are (*t*).

Damages where counter-claim.

Where damages are claimed by a counterclaim, the jury must assess the same in the same way as if the defendant were plaintiff (*ante, Ch. XXI.*).

5. Amendment of verdict.

5. Amendment of Verdict.]—The Court have, in general, no authority to amend or alter the verdict actually found by the jury in point of substance (*u*), but they may do so in order to give the finding of the jury its legal effect; and, therefore, where, plaintiff being entitled to treble damages, the verdict was taken by mistake for single damages only, the Court increased the amount accordingly (*x*). And where, in an action for not setting out tithes, the jury found damages to the amount of the single value only, although the Court refused to enter the verdict for the treble value, yet they said that, had the jury, instead of finding damages to the amount of the single value only, found that the single value was so much, the Court might have ordered judgment to be entered up for treble value, as given by the statute (*y*). So, before the Judicature

In general.

(*n*) See *Gregory* v. *Duke of Brunswick*, 3 C. B. 481; 16 L. J., C. P. 35.

(*o*) 1 Ro. Abr. 576 (F), pl. 1: *Broughton's case*, Moore, 142, 143, 708: *Brooke* v. *Clarke*, Cro. El. 328: *Thaxbie* v. *Smith*, Id. 785: *Lynker* v. *Stanwell*, 1 Bulst. 37: *Kitchenman* v. *Skeel*, 3 Ex. 49; 18 L. J., Ex. 23: *M'Gregor* v. *Graves*, 3 Ex. 34; 18 L. J., Ex. 109.

(*p*) 2 Saund. 171 e: *Lloyd* v. *Morris*, Willes, 443; 3 Bac. Abr. 7: *Emblin* v. *Dartnell*, 12 M. & W. 830; 13 L. J., Ex. 255: *Empson* v. *Griffin*, 11 A. & E. 186. And see *Cook* v. *Cox*, 3 M. & Sel. 110.

(*q*) Comb. 11; 5 Mod. 70; Tidd, 9th ed. 869.

(*r*) Stat. 7 H. 8, c. 43, s. 3; 21 Id. c. 19, s. 3, Vol. 2, Ch. CVII.

(*s*) *Newton* v. *Harland*, 1 Sc. N. R. 482; 1 M. & G. 645: *Booth* v. *Clive*, 10 C. B. 827; 20 L. J., C. P. 151.

(*t*) *Buckle* v. *Bewes*, 4 B. & C. 154; 6 D. & R. 1.

(*u*) See *Spencer* v. *Goter*, 1 H. Bl. 78: *Sandford* v. *Porter*, 2 Chit. 351.

(*x*) *Baldwyn and Girries' case*, Godbolt, 245.

(*y*) *Sandford* v. *Clarke*, 2 Chit. 351. See *Feize* v. *Thompson*, 1 Taunt. 121.

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Acts, if the jury gave greater damages than were laid in the declaration, the Court, even after judgment and error brought on that account, would allow plaintiff to remedy the defect, by entering a *remittitur* for the excess (*b*). So, if the jury in replevin found according to 17 *C.* 2, *c.* 7, *s.* 2, but, instead of finding the amount of the rent in arrear, and the value of the goods distrained, found damages to the amount of the rent claimed in the conusance, defendant might remedy the defect by obtaining leave of the Court to enter his judgment for a return as at common law, or the Court would allow him to amend his judgment, if already entered as according to the statute 17 *C.* 2, *c.* 7, *s.* 2 (*c*).

Amendment by judge's notes, &c. (*d*).

When a mistake is made in recording the verdict, the associate's certificate (*ante*, p. 653) may be amended by the Judge's notes (*e*), or by the notes of the clerk of assize or associate (*f*), the mistake, in such a case, being the misprision of the clerk. Thus, when the associate by mistake entered '*d.* damages instead of 174*l.*, an amendment was allowed by the Judge's notes (*g*). So, in a case, where in an action of debt for 5*l.* 15*s.* 1¼*d.*, defendant pleaded *nunquam indebitatus* as to all but 3*l.* 10*s.*, and as to that sum a tender, the verdict was entered on the postea as a general verdict for 5*l.* 15*s.* 1¼*d.*, and though apprised of the informality, plaintiff signed judgment and taxed his costs, the postea was allowed to be amended by the Judge's notes, after error brought, on payment of the costs of the application and of the proceeding in error (*h*). So, if there were several counts in a declaration, some of which were bad, and by mistake a general verdict was entered on all the counts, although evidence was given upon the good counts only, the postea might be amended by the Judge's notes (*i*). And where, in such a case, it appeared from the Judge's notes that the jury calculated the damages on evidence applicable to the good counts only (*k*), the postea was amended, although it appeared that evidence had been given applicable to the bad counts also (*l*). And

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(*b*) *Usher* v. *Dansey*, 4 M. & Sel. 94; MS., E. 1815: *Pickwood* v. *Wright*, 1 H. Bl. 642.

(*c*) *Rees* v. *Morgan*, 3 T. R. 349: *Herbert* v. *Waters*, Carth. 362: *Sheape* v. *Culpepper*, 1 Lev. 255. And see *Gamon* v. *Jones*, 4 T. R. 509.

(*d*) As to amendments in general, see ante, p. 442.

(*e*) *Abbott* v. *Andrews*, 8 Q. B. D. 648: *Clack* v. *Wood*, 9 Q. B. D. 276: *Newcombe* v. *Green*, 2 Str. 1197; 1 Wils. 33: *Doe* d. *Church* v. *Perkins*, 3 T. R. 749: *Richardson* v. *Mellish*, 11 Moore, 104; 7 B. & C. 819; 3 Bing. 334: *Ernest* v. *Brown*, 4 Bing. N. C. 162; 5 Sc. 491: *Pechell* v. *Watson*, 8 M. & W. 691. It seems that the Judge may make such an amendment from his recollection. See *Marianski* v. *Cairns*, 1 Macq. H. L. Ca. 212, 766; but see *R.* v. *Virrier*, 12 A. & E. 317; 4 P. & D. 161: *Walker* v. *King*, 6 L. J., Ex. 184: *Petrie* v. *Hannay*, 3 T. R. 659. And see *Iles* v. *Turner*, 3 Dowl. 211.

(*f*) *Rex* v. *Keat*, 1 Salk. 47: *Parsons* v. *Gill*, Id. 51; 2 Ld. Raym. 895: *Sandford* v. *Porter*, 2 Chit. Rep. 352.

(*g*) Bull. N. P. 320: *Newcombe* v. *Green*, 1 Wils. 33; 2 Str. 1197.

(*h*) *Wallis* v. *Goddard*, 3 Sc. N. R. 295. As to what the postea was, see ante, p. 654.

(*i*) *Eddowes* v. *Hopkins*, 1 Doug. 376. And see *Taylor* v. *Whitehead*, 2 Id. 746: *Henley* v. *Mayor*, *&c. of Lyme Regis*, 3 M. & P. 310; 6 Bing. 100.

(*k*) But this must clearly appear. See *Empson* v. *Griffin*, 11 A. & E. 186.

(*l*) *Williams* v. *Breedon*, 1 B. & P. 329. See *Spencer* v. *Goter*, 1 H. Bl. 78; 2 Saund. 171 a: *Spicer* v. *Teasdale*, 2 B. & P. 49.

where there was a misjoinder of counts, and a general verdict given, if the jury had calculated their damages with reference to one count only, the postea might have been so amended by entering the verdict on that count, by which means the misjoinder would be cured (*m*). And in a case before the *Com. Law Proc. Act*, 1852, after verdict in ejectment for a messuage and tenement, the Court (pending a rule to arrest the judgment) gave leave to amend by entering a verdict for the messuage only, without obliging the lessor of the plaintiff to release the damages (*n*). And, in a case where the declaration contained counts, first, for 139*l.*, stated to be due on a judgment; secondly, for 180*l.* rent; on the first count the pleadings led to an issue in law; to the second, defendant pleaded part payment, and, issue being joined on that allegation, a jury was impanelled to try it, and to assess contingent damages on the issue in law; on the second issue there appeared to be a balance of 106*l.* due to plaintiff; the jury found a general verdict for 139*l.*; afterwards the issue in law was decided in favour of defendant; it was held, that the Judge might amend the verdict by his notes, and direct it to be entered for plaintiff on the second count only, for 106*l.* (*o*). But in a penal action, where the jury found a verdict for one penalty, on evidence equally applicable to each of two counts, and plaintiff applied it to one of the counts which was subsequently found to be bad, an application to allow him to enter it up on the other was refused (*p*). It seems that it is only in a clear case that an amendment in accordance with the Judge's notes will be allowed (*q*).

To whom application to be made

The application to amend the associate's certificate by the Judge's notes should be made to the Judge who tried the action, and not to the Court (*r*).

When it should be made.

It seems it may be made at any time before judgment (*s*), or after final judgment, and even after appeal brought (*t*). But an application to enter a verdict upon particular counts, according to the evidence on the Judge's notes, after a lapse of eight years, and after judgment had been reversed on error brought for a defect in one of the counts, was refused (*u*). And in a case where, in an

(*m*) 1 Chit. 625, n.: *Kightly* v. *Birch*, 2 M. & S. 533.

(*n*) *Goodtitle* v. *Otway*, 8 East, 357. And see *Doe* v. *Dyball*, 1 M. & P. 330; 8 B. & C. 70.

(*o*) *Ferguson* v. *Mahon*, 11 A. & E. 179.

(*p*) *Holloway* v. *Bennett*, 3 T. R. 448: *Hardy* v. *Cathcart*, 5 Taunt. 2; 1 Marsh, 180; *aliter*, in an information by the Attorney-General, 10 Price, 9.

(*q*) See *Reece* v. *Lee*, 7 Moore, 269.

(*r*) *Newton* v. *Harland*, 1 Sc. N. R. 503; 1 M. & G. 958; 9 Dowl. 65: *Harrison* v. *King*, 1 B. & Ad. 163: *Ernest* v. *Brown*, 4 Bing., N. C. 162; 5 Sc. 491: *Scougall* v. *Campbell*, 1 Chit. 283: *Doe* v. *Perkins*, 3 T. R. 749: *Doe* d. *Haxby* v. *Preston*, 5 D. & L. 7.

(*s*) *Grant* v. *Astle*, 2 Doug. 730.

(*t*) *Petrie* v. *Hannay*, 3 T. R. 749, 659: *Usher* v. *Dansey*, 4 M. & Sel. 94; MS., E. 1815: *Richardson* v. *Mellish*, 11 Moore, 104; 7 B. & C. 819; 3 Bing. 334. In the latter case the amendment was made after argument in the Court of Error. And see *Gregory* v. *Cotterell*, 5 El. & Bl. 571; 25 L. J., Q. B. 33: *Wallis* v. *Goddard*, 3 Sc. N. R. 295: *Bowers* v. *Nixon*, 12 Q. B. 546; 18 L. J., Q. B. 41, where, after the postea was amended, the judgment was amended to accord with the postea: *Hooper* v. *Lane*, 6 H. L. 443; 3 Jur., N. S. 1026, H. L.

(*u*) *Harrison* v. *King*, 1 B. & Ald. 161; 4 Price, 46: *Jackson* v. *Galloway*, 2 D. & L. 839.

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action for the breach of a charter-party, three breaches were assigned in the declaration, and plaintiff obtained a general verdict, the Court seemed to be of opinion, that, after they had awarded a *venire de novo*, on the ground that one of the breaches was ill-assigned, it was not competent to the Judge who tried the cause to amend the postea, by confining the verdict to the issues raised on the other breaches (*x*).

Service of order to amend.

Where the plaintiff obtained an order to amend the postea at half-past nine o'clock on 22nd November, but did not draw it up until 23rd, and it was not served until four o'clock on 24th, it was held, that, as no fresh step could have been taken by defendant, plaintiff had not abandoned the order (*y*).

Court cannot alter Judge's order.

A Judge's direction as to the amendment of the certificate of the officer according to his notes of the trial cannot be questioned in the Court above (*z*).

Increasing, &c. damages.

As to the Court increasing or reducing the damages given by the jury, *see ante*, p. 666.

Amendment of special verdict or case.

A special verdict (*a*), or special case (*b*) where a verdict is taken subject to a special case, may be amended by the Judge's notes or by the minutes taken by the clerk of assize or officer (*c*).

(*x*) *Gould* v. *Oliver*, 2 Sc. N. R. 636.

(*y*) *Sandford* v. *Alcock*, 10 M. & W. 689; 2 Dowl., N. S. 463. As to when a Judge's order should in general be served, see Vol. 2, Ch. CXXVI.

(*z*) *Sandford* v. *Alcock*, 10 M. & W. 689; 2 Dowl., N. S. 463: *Newton* v. *Harland*, 1 Sc. N. R. 503; 1 M. & G. 958; 9 Dowl. 65: *Kilner* v. *Bailey*, 5 M. & W. 382; 7 Dowl. 803: *Daintry* v. *Brocklehurst*, 3 Ex. 691.

(*a*) *Manners* v. *Postan*, 3 B. & P. 343.

(*b*) Post, Vol. 2, Ch. CXVII.: *Doe* d. *Huchings* v. *Lewis*, 1 Bur. 617.

(*c*) *Rex* v. *Keat*, 1 Salk. 47; Bull. N. P. 320: *Sandford* v. *Porter*, 2 Chit. Rep. 352. As to amending by notes of counsel, &c., see *Mayo* v. *Archer*, 1 Str. 514: *Cromwell* v. *Grunsden*, 2 Salk. 462; 1 Ld. Raym. 335: *Trevivan* v. *Lawrance*, 1 Salk. 276; 3 Id. 151; 2 Ld. Raym. 1036: *Sanders* v. *Vanzeller*, 4 Q. B. 260.

PART VIII.

COSTS.

CHAPTER LXVII.

COSTS.

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[As to when an appeal may be brought for costs, *see post, Ch. LXXXV.* CHAP. LXVII.

See also as to costs between solicitor and client, *ante, Ch. VIII.*; security for costs, *ante, Ch. XXXIII.*; costs of appeal, *post, Ch. LXXXV.*

See also as to the costs of particular proceedings, the respective titles of those proceedings in the Index.]

Sect. 1. *Parties entitled to Costs.*

General Rule—Costs in Discretion of Court or Judge.]—The right to costs of and incident to all proceedings in the Supreme Court (*a*) is now regulated by *R. of S. C., Ord. LXV. r.* 1. This rule in General rule—discretion.

(*a*) See infra, n. (*n*). As to costs of proceedings in the Court of Appeal and House of Lords, see post, Chs. LXXXV. and LXXXVI.

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effect repeals all the earlier statutes as to costs so far as they are inconsistent with it (*a*). This repeal extends to all the statutes which deprive a successful plaintiff of his costs in the event of his recovering less than a certain amount (*a*), except the 5th section of the County Courts Act, 1867 (*b*), which is preserved by the 67th section of the *Judicature Act*, 1873 (*c*), and subject to which the rule is expressly made.

By *R. of S. C., Ord. LXV. r.* 1, "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court (*d*), including the administration of estates and trusts, shall be in the discretion of the Court or Judge: provided that nothing herein contained shall deprive an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (*e*); provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court shall, for good cause, otherwise order" (*f*).

Extent of rule.

The general principle established by this rule is that costs are in all cases in the discretion of the Court or Judge by whom the matter to which they relate is adjudicated upon (*g*). This is subject to special provisions in the case of actions tried by a jury (*h*); in the case of a plaintiff who recovers less than 20*l.* in an action founded on contract or 10*l.* in an action founded on tort (*i*); in the case of a plaintiff who does not recover more than 50*l.* in an action founded on contract (*k*); in the case of trustees, executors, mortgagees and others entitled to costs out of a particular estate or fund (*l*); and in certain cases provided for by special statutes (*m*). All these special provisions will be found separately discussed later on in this chapter.

"All proceedings."

The former rule (*Ord. LV.*) was expressly confined to the costs

(*a*) *Garnet* v. *Bradley*, 3 App. Cas. 944; 48 L. J., Ex. 186: *Ex p. Mercers' Co.*, 10 Ch. D. 481; 48 L. J., Ch. 384, C. A.: *Parsons* v. *Tinling*, 2 C. P. D. 119; 46 L. J., C. P. 230: *Tennant* v. *Ellis*, 6 Q. B. D. 46; 50 L. J., Q. B. 143; 43 L. T. 506 (31 & 32 V. c. 71, s. 9): *King* v. *Hawkesworth*, 4 Q. B. D. 371: *In re Hanbury's Trusts*, 31 W. R. 784 (Settled Land Act, 1882, s. 32). Most, if not all, the earlier statutes are now expressly repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 V. c. 59). This statute repeals altogether the stats. 43 Eliz. c. 6, s. 2; 3 & 4 V. c. 24. It repeals, as to the Supreme Court, the stats. 6 Edw. 1 (stat. Gloucester), c. 1; 23 H. 8, c. 15; 4 Jac. 1, c. 3; 21 Jac. 1, c. 16, s. 6; 8 & 9 W. 3, c. 11, ss. 1—5; 4 & 5 Anne, c. 3, s. 5 (c. 16 in Ruffhead); 43 G. 3, c. 3, s. 46; 3 & 4 W. 4, c. 42, ss. 31—35; and the latter statutes are altogether repealed by the stat. 46 & 47 Vict. c. 49, s. 4. The stat. 22 & 23 C. 2, c. 9, is repealed by the Statute Law Revision Act, 1863 (26 & 27 V. c. 125).

(*b*) 30 & 31 V. c. 142, s. 5. See this section fully considered post, p. 681.

(*c*) See this section, post, p. 681.

(*d*) See infra, n. (*u*).

(*e*) See post, p. 690.

(*f*) This proviso is discussed post, p. 675.

(*g*) See the order itself. *Fane* v. *Fane*, 41 L. T. 551, where a successful plaintiff was ordered to pay the costs of the action, on the ground that it was unnecessary.

(*h*) See post, p. 675.

(*i*) See post, p. 680.

(*k*) See post, p. 685.

(*l*) See post, p. 690.

(*m*) See post, p. 690.

of proceedings in the "High Court" (*n*), but in the present rule the words "Supreme Court" are substituted. By proceedings, the rule means proceedings that have actually come into or before the Court (*n*). It applies to all such proceedings (*o*). It applies to the proceedings on a case stated by sessions on appeal against a rate (*p*), but not to proceedings on a case stated by sessions on appeal from a conviction under the Weights and Measures Act (*q*). It applies to a rule for a certiorari to bring up an order of justices under the Public Health Act (*r*).

The rule confers a discretionary power to award costs of proceedings under statutes which contain no special provision as to costs (*s*).

The rule gives the Court, Judge or Master power over the costs of each proceeding which comes before them for adjudication. Thus, it gives a Master or Judge power to order a party who has insufficiently answered interrogatories, to pay the costs in any event of an application to compel a further answer (*t*), or to order that the costs of an inspection of property be paid by the party inspecting in any event (*u*).

General principles.

"Discretion," how exercised.

Although the rule does not expressly place any limit on the exercise of the discretion of the Court or Judge, still that discretion is guided by well-established principles (*x*). The leading principle on the subject is that, in the absence of special circumstances, the unsuccessful party must pay the costs of the party who succeeds against him (*y*); *victus victori in expensis condemnandus est* (*z*). A plaintiff who succeeds in an action brought to enforce a legal right, and who is guilty of no misconduct, is entitled as of right to have his costs paid by the defendant (*a*), even although the latter is innocent of any intention to do any wrong (*b*), and even although the plaintiff has brought the action without any notice to the defendant of his intention to do so (*c*).

The general principle is stated by *Jessel*, M. R., in *Cooper* v. *Whittingham* (*d*), as follows:—"As I understand the law as to costs

(*n*) Per *Jessel*, M. R., *In re Brandreth's Trade Marks*, 9 Ch. D. 618; 27 W. R. 281: cp. *Wimshurst* v. *Barrow, &c. Co.*, 2 Q. B. D., per *Mellor*, J., at p. 337.

(*o*) *Re Lee and Hemingway*, 24 Ch. D. 669; 49 L. T. 155.

(*p*) *Clark* v. *Fisherton Angar*, 6 Q. B. D. 139; 50 L. J., M. C. 33.

(*q*) *Reg.* v. *Baxendale*, 6 Q. B. D. 144 (n.); 29 W. R. 335.

(*r*) *Reg.* v. *Morris*, 31 W. R. 609.

(*s*) *Exp. Hospital of St. Katharine*, 17 Ch. D. 378: *Ex p. Mercers' Co.*, 10 Ch. D. 481; 48 L. J., Ch. 384: *In re Lee and Hemingway*, 24 Ch. D. 669; 49 L. T. 155.

(*t*) *Vicary* v. *Great Northern R. Co.*, 9 Q. B. D. 168; 52 L. J., Q. B. 462.

(*u*) *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457.

(*x*) See per *Brett*, L. J., in *Re Foster* v. *Great W. R. Co.*, 8 Q. B. D. at p. 521: per *Bramwell*, L. J., *Myers* v. *Defries*, 5 Ex. D. 180, at p. 184: per *Jessel*, M. R., *Willmott* v. *Barber*, 17 Ch. D. 772, 773, 774.

(*y*) 1 Bing. N. C. 522; 2 Inst. 289; Cod. 3, 1, 13, § 6: per *Willes*, J., *Curtis* v. *Platt*, 16 C. B., N. S. at p. 467.

(*z*) Id.

(*a*) *Cooper* v. *Whittingham*, 15 Ch. D. 501; 49 L. J., Ch. 752, M. R.: cp. *Harris* v. *Petherick*, cited post, p. 676, n. (*h*).

(*b*) *Upmann* v. *Forester* (C. A.), 24 Ch. D. 231; 52 L. J., Ch. 946.

(*c*) *Goodhart* v. *Hyett*, 25 Ch. D. 182, at pp. 192, 193; 48 J. P. 293; 50 L. T. 95, 97: *Wittman* v. *Oppenheim*, 27 Ch. D. 260.

(*d*) 15 Ch. D. 504; approved of by the C. A. in *Jones* v. *Curling* (C. A.), 13 Q. B. D. 262; 53 L. J., Q. B. 373; 50 L. T. 349; 32 W. R. 651.

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it is this, that when a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind, the rule is plain and well settled, and is as I have stated it."

So a defendant who succeeds absolutely, and who has been guilty of no misconduct in the litigation, cannot be ordered to pay the plaintiff's costs (*e*). But where the plaintiff proves no real damage, he may be ordered to pay the costs (*f*). And he may be refused his costs when he brings an administration action without any real necessity for doing so (*g*).

Costs between co-defendants.

Where one defendant is to bear the costs of a successful co-defendant, the proper course is to order him to pay them, and not to order the plaintiff to pay them in the first instance, and recover them over against the defendant actually liable (*h*). When co-defendants are ordered to pay costs, one of them cannot sue the other for contribution in respect of what he pays (*i*).

Where several defendants.

Where there are several defendants who defend jointly, and one of them gets a verdict, and is entitled to recover his costs, he will be entitled to an aliquot portion of the joint costs of the defence, unless the Master is satisfied that some smaller portion should be allowed by reason of any special circumstances: thus, if there be two defendants he will be entitled to half the costs, or if there be three, he will be entitled to a third (*k*). But the successful defendant, besides being allowed his aliquot part of the joint costs, is sometimes entitled to separate costs incurred by him applicable to his defence alone (*l*). Where several defendants *bonâ fide* defend by separate solicitors, and one of them gets a verdict, and is entitled to costs, he is entitled to the whole of his costs (*m*). Where a verdict was found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff was held entitled to the balance only of the costs after deduction of

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(*e*) *Re Foster* v. *Great W. R. Co.*, 8 Q. B. D. 515; 51 L. J., Q. B. 233, C. A. See per *Brett*, L. J., at p. 521: *Witt* v. *Corcoran*, 2 Ch. D. 69: *Dicks* v. *Yates*, 18 Ch. D. 76: *Willmott* v. *Barber*, 17 Ch. D. 772.

(*f*) *Sayers* v. *Collyer*, 24 Ch. D. 180.

(*g*) *Croggan* v. *Allen*, 22 Ch. D. 101; 31 W. R. 319.

(*h*) *Rudow* v. *Great Britain Mutual Life Ass. Society*, 17 Ch. D. 600, per *Jessel*, M. R., at p. 610; 50 L. J., Ch. 504; 44 L. T. 600, 608.

(*i*) *Dearsley* v. *Middleweek*, 18 Ch. D. 236; 50 L. J., Ch. 777.

(*k*) *Griffiths* v. *Jones*, 4 Dowl. 159: *Starling* v. *Cozens*, 2 C. M. & R. 445; 3 Dowl. 782; 1 Gale, 159: *Norman* v. *Climenson*, 4 M. & G. 243; 1 Dowl. N. S. 718: *Gougenheim* v. *Lane*, 4 Dowl. 482; 1 M. & W. 136: *Allenby* v. *Proudlock*, 5 N. & M. 636; 4 A. & E. 326: *Alderson* v. *Waistell*, 2 D. & L. 127: *Redway* v. *Webber*, 32 L. J., Q. B. 84.

(*l*) Gray on Costs, 96: *Griffiths* v. *Kynaston*, 2 Tyr. 757.

(*m*) *Nanny* v. *Kenrick*, 2 Dowl. 334; Gray on Costs, 98: *Bartholomew* v. *Stephens*, 5 M. & W. 386; 8 L. J., Ex. 250, where the defendants defended separately until the trial. See *Humphrey* v. *Woodhouse*, 1 Sc. 395; 3 Dowl. 416; 1 Bing. N. C. 506, an action against officers of metropolitan police.

all the costs of all the defendants (*n*). And, although the acquitted defendant was thus entitled, in the absence of a Judge's certificate against it, to have a judgment for his costs, he might, by leave of the Court or a Judge, have these costs deducted from the costs the plaintiff was entitled to against the other defendants against whom plaintiff had got a verdict (*o*). As to the costs when one of several defendants withdraws his defence, *see ante*, p. 340.

In actions *ex delicto* against several defendants, where some only of them plead and the others suffer judgment by default, and those who plead obtain a verdict at the trial, they may be entitled to their costs, although the plaintiff has his judgment for damages and costs against the others who suffered judgment by default (*p*). And this is so in actions *ex contractu* (*q*).

If several defendants defend jointly and obtain judgment in the action and are jointly entitled to recover costs against the plaintiff, the plaintiff may pay the same to which of them he pleases; and, when they fail, each defendant is liable for the whole costs (*r*). In an action against several defendants, where one makes a successful application in the cause, and costs are ordered to be paid upon it, the payment of them should be to him (*s*). Where there are several defendants who plead different pleas, and *bonâ fide* sever in their defences, and a verdict is found for them, each will be entitled to make out and have taxed a separate bill for his costs (*t*).

Third party.

The Court or Judge has now full power over the costs as between a third party brought in under *Ord. XVI. r.* 48, and the other parties to the action (*u*).

But there is in general no power to order a person who is not a party to an action to pay the costs of it, although he be the real party interested (*x*).

Trial by jury costs follow event.

After Trial of Action or Issue with a Jury.]—When any action, cause, matter or issue is tried with a jury, it is provided by *R. of S. C., Ord. LXV. r.* 1 (*supra*, p. 672) that the costs shall follow the

(*n*) *Starling* v. *Cozens*, supra: *Gambrell* v. *Earl of Falmouth*, post, p. 686, n. (*x*).

(*o*) *Norman* v. *Climenson*, 4 M. & G. 243; 1 Dowl., N. S. 718.

(*p*) *Price* v. *Harris*, 10 Bing. 557; 4 M. & Sc. 474; 2 Dowl. 804: per Cur. *Morgan* v. *Edwards*, 6 Taunt. 398; 2 Marsh. 201. See *Biggs* v. *Benger*, 2 Ld. Raym. 1372, where the plea showed that the action was not maintainable against any of the defendants.

(*q*) Ord. XVI. r. 4, ante, p. 666: *Shrubb* v. *Barrett*, 2 H. Bl. 28: *Morgan* v. *Edwards*, supra; Hull. 143: *Noke* v. *Ingham*, 1 Wils. 89: *Baylis* v. *Dyneley*, 2 Chit. Rep. 153.

(*r*) *Wilson* v. *Foote*, Bull. N. P. 335.

(*s*) *Showler* v. *Stoakes*, 13 L. J., Q. B. 230.

(*t*) *Gambrell* v. *Earl of Falmouth*, 5 A. & E. 403; 6 N. & M. 859: *Nanny* v. *Kenrick*, 2 Dowl. 334: *George* v. *Elston*, 1 Sc. 518; 1 Bing. N. C. 513: *Lees* v. *Kendall*, 1 H. & W. 316; 3 A. & E. 707: *Rolfe* v. *Johnson*, 7 Sc. N. R. 496; 6 M. & G. 759, where a separate solicitor was appointed just before the trial. *Newton* v. *Boodle*, 4 C. B. 359. See *Dodds* v. *Tuke*, 32 W. R. 424.

(*u*) Ord. XVI. r. 54, ante, p. 424. See *Hornby* v. *Cardwell*, 8 Q. B. D. 329; 51 L. J., Q. B. 89: *Piller* v. *Roberts*, 21 Ch. D. 198; 46 L. T. 529.

(*x*) *Hayward* v. *Gifford, et al.*, 4 M. & W. 194; 6 Dowl. 699: *Richards* v. *Frankum*, 9 L. J., Ex. 231: *Doe* v. *Smith*, 8 Dowl. 517: *Evans* v. *Rees*, 2 Q. B. 334; 1 Dowl., N. S. 338. See *Tardrew* v. *Brook*, 5 B. & Ad. 880: *Riley* v. *Byrne*, 2 B. & Ad. 779. As to the power to do so in an action for recovery of land, see post, Ch. CVI., "*Recovery of Land.*"

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To what cases applicable.

event unless the Judge before whom such action, cause, matter or issue is tried, or the Court, shall for good cause (*x*) otherwise order. This proviso applies to all cases where an action, cause, matter or issue is tried with a jury. It applies where an action involving several issues is tried by a jury, and the plaintiff is nonsuited as to some of the issues, and entitles the defendant to the costs of the issues on which the plaintiff is nonsuited (*y*). It does not apply to a case where the defendant suffers judgment by default, and damages are assessed by a sheriff's jury on a writ of inquiry (*z*).

"The event."

The expression "follow the event" in the above proviso means that the party who succeeds shall get his costs from the unsuccessful party (*a*). In cases where there is but one issue to try, or where one party succeeds on all the issues tried, the application of the rule is simple and the successful party gets his costs from his opponent (*b*). In cases, however, where there are more than one cause of action and one party succeeds on one or some and the other on others, the "event" must be read distributively, and each party is entitled to the costs of the issue or issues on which he succeeds (*c*). In the latter case, if the plaintiff succeeds on any of the causes of action he will get the general costs of the action (*d*). Thus, where the plaintiff sued the defendant in respect of three distinct causes of action and succeeded on one only, it was held that he was entitled to the costs of the issue on which he succeeded and to the general costs of the action, and that the defendant was entitled to the costs of the two issues on which he succeeded (*e*). So, where the plaintiff is nonsuited on one of several issues, the defendant is entitled to the costs of that issue (*f*). This is, of course, subject to the provisions of the County Courts Act (*post*, p. 681), and to *r.* 12 (*post*, p. 685), and to the power of the Judge to make a special order as to costs (*see post* p. 679).

—Where several issues.

—General costs of cause.

—New trial.

In the case of a new trial being ordered, the "event," within the meaning of the rule, is the event of the second trial (*g*), and the costs of both trials follow the event of the second (*g*), unless the Judge, as he has power to do (*h*), otherwise orders.

—Where counter-claim set up.

In cases where the defendant set up and succeeded on a counter-claim, much difficulty appears to have arisen as to what was the

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(*x*) See post, p. 679.

(*y*) *Abbott* v. *Andrews*, 8 Q. B. D. 648; 51 L. J., Q. B. 641.

(*z*) *Gath* v. *Howarth*, W. N. 1884, 99; Bitt. Ch. Cas. 99.

(*a*) See cases cited infra.

(*b*) Id.

(*c*) Ord. LXV. r. 2, post, p. 686. *Myers* v. *Defries*, 5 Ex. D. 180; 49 L. J., Ex. 266 (C. A.): *Abbott* v. *Andrews*, 8 Q. B. D. 645; 51 L. J., Q. B. 641: *Stooke* v. *Taylor*, 5 Q. B. D. 569, per *Cockburn*, L. C. J., at p. 581: *Knight* v. *Purcell*, 41 L. T. 481: *Sparrow* v. *Hill*, 8 Q. B. D. 479 (C. A.).

(*d*) *In re Brown, Ward* v. *Morse* (C. A.), 23 Ch. D. 377; 52 L. J., Ch. 524; 49 L. T. 68; 31 W. R. 936: *Myers* v. *Defries*, 5 Ex. D. 180, per *Bramwell*, L. J., at p. 185: per *Thesiger*, L. J., at p. 188: *Sparrow* v. *Hill*, 8 Q. B. D. 479 (C. A.). As to the mode of apportioning the costs, see *Saner* v. *Bilton*, 11 Ch. D. at p. 416, n.

(*e*) *Myers* v. *Defries*, supra.

(*f*) *Abbott* v. *Andrews*, supra.

(*g*) *Field* v. *Great Northern R. Co.*, 3 Ex. D. [illegible] L. J., Ex. 662: *Green* v. [illegible] C. P. D. 354; 46 L. J., C. [illegible] *Marcus* v. *Gen. Steam Na[illegible]* Co. 55 L. T. 353: cp. *Reg.* v. *North London R. Co.*, 51 L. J., Q. B. 241, when the party successful on an inquiry under the Lands Clauses Act was held entitled to the costs of a prior abortive inquiry.

(*h*) *Harris* v. *Petherick*, 4 Q. B. D. 611; 48 L. J., Q. B. 521.

"event" within the rule (*i*). It is now, however, settled that in this, as in other cases (*k*), the event must be read distributively, and that, in the absence of any special order, each party gets the costs of those issues on which he succeeds (*l*). The plaintiff recovers from the defendant the costs of the issues raised on his claim on which he succeeds, and pays to the defendant the costs of those on which he fails (*m*), and the defendant recovers from the plaintiff the costs of the issues raised on the counterclaim on which he succeeds, and pays to the plaintiff the costs of those on which he fails (*n*). The general costs of the action are paid to or by the plaintiff according as he succeeds or fails in establishing his claim, and are unaffected by the result of the counterclaim (*o*). If the plaintiff succeeds as to any part of his claim (in the absence of any special order and subject to the County Courts Act), he gets the general costs of the action (*o*). If he establishes no part at all of his claim he pays to the defendant the general costs of the action (*o*). Thus, where both claim and counterclaim are dismissed the general costs of the action are paid by the plaintiff (*p*). It is immaterial for this purpose, in the case of a counterclaim as contra-distinguished from a set-off, whether the amount awarded to the plaintiff on his claim exceeds or is exceeded by the amount awarded to the defendant on his counterclaim (*q*), provided that the plaintiff recovers on his claim an amount sufficient to entitle him to costs under the County Courts Act, 1867, *s.* 5 (*r*). For the purposes of that Act the plaintiff, in the case of a counterclaim proper, recovers the whole amount awarded or adjudged to be due to him

(*i*) See cases cited infra.

(*k*) See ante, p. 676, n. (*c*).

(*l*) Ord. LXV. r. 2, post, p. 686: *Neale* v. *Clarke*, 4 Ex. D. 286; 41 L. T. 438: *Stooke* v. *Taylor*, 5 Q. B. D. 569; 49 L. J., Q. B. 867: *Barnes* v. *Bromley*, 6 Q. B. D. 691 (C. A.): *Cole* v. *Firth*, 40 L. T. 851; *S. C.*, 4 Ex. D. 301: *Ellis* v. *De Silva*, 6 Q. B. D. 521; 50 L. J., Q. B. 328 (C. A.), award remitted for distributive findings.

(*m*) Id.: cp. *Sparrow* v. *Hill*, 8 Q. B. D. 479; 50 L. J., Q. B. 675 (C. A.).

(*n*) Id.: *Pearson* v. *Ripley*, 50 L. T. 629: *Blake* v. *Appleyard*, 3 Ex. D. 195: *Chatfield* v. *Sedgwick* (C. A.), 4 C. P. D. 459; 27 W. R. 790: *Davidson* v. *Gray*, 5 C. P. D. 189 (*a*); 40 L. T. 192; affd. 42 id. 834 (C. A.).

(*o*) *In re Brown, Ward* v. *Morse* (C. A.), 23 Ch. D. 377; 52 L. J., Ch. 524; 49 L. T. 68; 31 W. R. 936: *Waring* v. *Pearman*, 50 L. T. 633; 32 W. R. 429: *Mason* v. *Brentini*, 15 Ch. D. 287; 43 L. T. 557 (C. A.): *Saner* v. *Bilton*, 11 Ch. D. 416; 48 L. J., Ch. 545: *Neale* v. *Clarke*, 4 Ex. D. 286; 41 L. T. 438: *Barnes* v. *Bromley*, 6 Q. B. D. 691; 50 L. J., Q. B. 465 (C. A.): *Cole* v. *Firth*, 40 L. T. 851: *Hallman* v. *Price*, 41 L. T. 627; 27 W. R. 490: cp. *Sparrow* v. *Hill*, 8 Q. B. D. 479; 50 L. J., Q. B. 675. See the note, 11 Ch. D. 417 (*a*), as to the mode of taxing the costs. In *Barnes* v. *Bromley*, supra (6 Q. B. D. at p. 695), *Brett*, L. J., is reported to have said that "where there is a claim with issues taken on it and a counterclaim, not a set-off, but in the nature of a cross action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counterclaim, the proper principle of taxation, if not otherwise ordered, is to take the claim as if it and its issues were an action, and then to take the counterclaim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions the Master would divide them. Where the so-called counterclaim is a set-off there is but one action."

(*p*) *Mason* v. *Brentini*, supra: *Saner* v. *Bilton*, supra.

(*q*) *Stooke* v. *Taylor*, 5 Q. B. D. 569.

(*r*) Id.: *Potter* v. *Chambers* (No. 1), 4 C. P. D. 69, 71. See post, p. 680.

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on his claim irrespective of the amount recovered by the defendant on the counterclaim (*u*). The County Courts Act does not apply to a counterclaim or affect the defendant's right to costs however small the amount awarded or adjudged to be due to him may be (*x*). In a case where the plaintiff claimed to recover a liquidated sum and the defendant denied the claim and set up a counterclaim for goods sold and the jury found a verdict for the plaintiff for 114*l.* 17*s.* 6*d.* on the claim, and for the defendant for 230*l.* 0*s.* 9*d.* on the counterclaim, and judgment was entered "that the plaintiff recover against the defendant £ for his costs of suit and that the defendant recover against the plaintiff 115*l.* 3*s.* 3*d.* on the counterclaim," it was held that according to this judgment the plaintiff was entitled to the costs of the action (*y*). Where the defendant admitted the plaintiff's claim, but set up a counterclaim exceeding the amount of it, and judgment was given for each party for his costs, it was held that the plaintiff only got the costs of the cause up to the time of delivery of the defence admitting the claim, and that the defendant was entitled to the costs of the cause subsequently to that time (*z*).

—Rule.

The correct course in ordinary cases is to direct separate findings on the claim and counterclaim, and to order judgment to be entered for the plaintiff on the claim with costs, and for the defendant on the counterclaim with costs (*a*).

—Set-off.

In the case of a set-off proper, as contradistinguished from a counterclaim, that is to say, a set-off in respect of a liquidated amount set up as such against a liquidated claim (*b*), the case differs from that of a counterclaim (*c*). The plaintiff, in such a case, only recovers within the meaning of the County Court Act, 1867, *s.* 5 (which *see post*, p. 681), the excess of his claim over that of the defendant (*c*). This, of course, is subject to the power of the Judge or Court to make a special order (*d*).

Ambiguity in certificate.

Alteration of certificate or judgment.

If the terms of the certificate of the officer at the trial or of the judgment are ambiguous or indefinite as to costs, and the Master, in consequence, refuses to tax them, the proper course is to apply to the Judge who tried the action, or ordered judgment to be entered, for directions (*e*), and he may order the necessary alteration, if any, to be made (*e*). In such a case it is wrong either to appeal from the Master's decision or to apply to review the taxation (*e*). In some cases the Judge might order the certificate to be altered so as

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(*u*) *Stooke* v. *Taylor*, 5 Q. B. D. 569: *Neale* v. *Clarke*, 4 Ex. D. 286; 41 L. T. 438: *Potter* v. *Chambers* (No. 2), 4 C. P. D. 457; 48 L. J., C. P. 274. The cases of *Staples* v. *Young*, 2 Ex. D. 324; 25 W. R. 304, and *Halliman* v. *Price*, 41 L. T. 627, per *Kelly*, C. B., at p. 628, so far as they are inconsistent with the statement in the text, cannot, it is submitted, be supported.

(*x*) *Pilcher* v. *Appleyard*, 3 Ex. D. 195; 47 L. J., Ex. 407.

(*y*) *Barnes* v. *Bromley*, 6 Q. B. D. 691. See *Lowe* v. *Holme*, 10 Q. B. D. 286; 52 L. J., Q. B. 270; 31 W. R. 400.

(*z*) *Bowker* v. *Kesteven*, 47 L. T. 545.

(*a*) See *Potter* v. *Chambers* (No. 1), 4 C. P. D. 69, 72; 48 L. J., C. P. 274.

(*b*) Bull & Leake, Pl. 3rd ed. 678.

(*c*) Per *Cockburn*, C. J., *Stooke* v. *Taylor*, 5 Q. B. D. at pp. 577, 578: per *Brett*, [illegible] *Barnes* v. *Bromley*, 6 Q. B. D. [illegible] 694, 695: per *Pollock*, B., *Barnes* v. *Bromley*, 6 Q. B. D. [illegible] pp. [illegible] 200: per *Hawkins*, J., *Neale* v. *Clarke*, 4 Ex. D. at p. 295.

(*d*) Per *Kelly*, J., *Saner* v. *Bilton*, 11 Ch. D. at p. 419.

(*e*) *Abbott* v. *Andrews*, 8 Q. B. D. 648; 51 L. J., Q. B. 641.

—Award.

to distribute the findings (*f*); but in one case, where the jury found generally for the plaintiff for the excess of his claim over the defendant's counterclaim, the Court refused to interfere (*g*). The Court of Appeal has power to amend the certificate (*h*). An award, where the costs of the reference are to abide the event, may be remitted to the arbitrator to distribute his findings as to the issues when there are several, and he finds generally (*i*). The certificate of a County Court registrar, after a trial of an action remitted under 19 & 20 *V. c.* 108, *s.* 26, may be altered by order of the Court so as to distribute the findings for the purpose of giving costs (*k*).

Application to deprive successful party of costs.

The Judge by whom the action, cause, matter or issue is tried with a jury, or the Court, may for good cause shown, order that the costs shall not follow the event (*l*). The existence of "good cause" is a condition precedent to the power to order that the costs shall do otherwise than follow the event (*m*); and if such an order is made without good cause, an appeal against it lies to the Court of Appeal (*n*). "Good cause" means the existence of something having regard either to the conduct of the parties or the facts of the case which makes it more just that an exceptional order should be made (*o*). In exercising the power given by the rule of depriving a successful party of his costs, the Judge is bound to assume that the finding of the jury is correct (*p*). He may however take into consideration the conduct of the parties before commencing the action, and is not confined to the consideration of their conduct in the litigation itself (*q*). He may in a proper case, order a

(*f*) *Davidson* v. *Gray*, 5 Ex. D. 189 (n.); 40 L. T. 192, affd. 42 id. 834: cp. *Cole* v. *Firth*, 40 L. T. 851.

(*g*) *Potter* v. *Chambers* (No. 1), 4 C. P. D. 69; 48 L. J., C. P. 274.

(*h*) *Clack* v. *Wood*, 9 Q. B. D. 276; 30 W. R. 931.

(*i*) *Ellis* v. *De Silva*, 6 Q. B. D. 521.

(*k*) *Davidson* v. *Gray*, supra.

(*l*) Ord. LXV. r. 1 (ante, p. 672). See per *Bramwell*, L. J., *Harris* v. *Petherick*, 4 Q. B. D. at p. 613. The present rule differs from the former rule, Ord. LV. r. 1, which provided that the order, if made by the judge, must have been made "upon application made at the trial," and it is important to bear this in mind when referring to the cases decided under the old rule. Under the former rule it was held that the judge might make the order without any application being made to him to do so (*Turner* v. *Heyland*, 4 C. P. D. 432; 48 L. J., C. P. 535: *Collins* v. *Welch*, 5 C. P. D. 27; 49 L. J., C. P. 260: cp. *Marsden* v. *Lancashire & Yorks. R. Co.*, 7 Q. B. D. 641; 50 L. J., Q. B. 318). But the order, if made, must have been made "at the trial" (*Baker* v. *Oakes*, infra: per *Brett*, L. J., *Collins* v. *Welch*, 5 C. P. D. at p. 33). After the trial the Divisional Court alone had power to make any such order (*Baker* v. *Oakes*, 2 Q. B. D. 171; 46 L. J., Q. B. 246: *Turner* v. *Heyland*, 4 C. P. D. 432; per *Grove*, J., at pp. 435, 436; 48 L. J., C. P. 535), and neither the judge who tried the action nor a judge at Chambers had any power to do so. (Id.). An application made at the rising of the Court on the day on which the action was tried and of which the opposite counsel had notice, and which was disposed of on the following day—the judge having reserved his decision—was held in time. (*Kynaston* v. *Mackinder*, 37 L. T. 390; 47 L. J., Q. B. 76.) But where an action was tried at one assize town, an application made at the next, though made before the jury had returned their verdict, was held too late. *The Tyne Alkali Co.* v. *Lawson*, 36 L. T. 100.

(*m*) *Jones* v. *Curling* (C. A.), 13 Q. B. D. 262; 53 L. J., Q. B. 373; 50 L. T. 349; 32 W. R. 651.

(*n*) *Jones* v. *Curling*, supra.

(*o*) Id. See the principle stated by *Jessel*, M. R., and approved of in *Jones* v. *Curling*, ante, p. 673.

(*p*) *Harnet* v. *Vise*, 5 Ex. D. 307; 43 L. T. 645; 29 W. R. 7 (C. A.).

(*q*) Id.

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successful plaintiff to pay the defendant's costs (*r*), but he cannot order a defendant against whom the plaintiff has failed to establish any claim, and who has been guilty of no misconduct in the litigation to pay the plaintiff's costs (*s*). The fact that a plaintiff who has brought an action for recovery of possession of several closes, there being a real question as to his title to them all, has failed as to half, is not a good cause for depriving him of the costs (*t*).

Application to the Court on an appeal.

If no application is made to the Judge (*u*), or whether such application is made or not, and he makes no order as to the costs (*x*), an original application for an order as to these may be made to the Divisional Court (*y*). If, however, the Judge has made any order, then no application to the Divisional Court can be made, but any application must be to the Court of Appeal by way of appeal (*z*). The jurisdiction of the Divisional Court under the former rule, was held to be an original, and not an appellate jurisdiction (*a*). It conferred no power on the Court to review any order made by the Judge at the trial (*b*); but where the Judge refuses to make any order, on an application to him the Court might make it on sufficient cause—such as facts not before the Judge at the trial—being shown (*c*). This appears to be so under the present rule, though the wording is different. The application to the Divisional Court should be made on notice of motion in the usual way (*d*). It must be made within a reasonable time (*e*). The application to the Court of Appeal is made in the same manner as any other appeal from a Judge at the trial (*see post, Ch. LXXXV., "Appeal"*). Subject to the rule as to appeals for costs only (*f*), an appeal lies from a decision of the Divisional Court to the Court of Appeal.

Where plaintiff recovers less than 20*l.* in contract or 10*l.* in tort.

Effect of County Courts Act, 1867, *s. 5, on Plaintiff's Right to Costs where he recovers less than* 20*l. in Contract or* 10*l. in Tort.*]—In certain cases where the plaintiff, in an action of contract, recovers less than (*g*) 20*l.*, or in an action of tort less than (*g*) 10*l.*, he is deprived of costs by the County Courts Act, 1867, s. 5, unless he gets a certificate entitling him to them. This section is expressly preserved with a qualification by sect. 67 of the *Judicature Act*,

(*r*) *Harris* v. *Petherick*, 4 Q. B. D. 611; 48 L. J., Q. B. 521 (C. A.), in which case the plaintiff claimed 85*l.* and 6*s.* 8*d.*, and after a nonsuit, on a new trial established his claim to the 6*s.* 8*d.*, but failed as to the 85*l.*, and was ordered to pay the costs of both trials. See ante, p. 673. In *Matthews* v. *Jeffreys*, 43 L. T. 796, *Fry*, J., deprived a plaintiff, who had protracted the litigation by insisting on an injunction which was eventually refused, of costs.

(*s*) *Re Foster* v. *Great Western R. Co.*, 8 Q. B. D. 515, 521 (C. A.). See cases cited ante, p. 674, n. (*c*).

(*t*) *Jones* v. *Curling*, supra.

(*u*) See cases cited n. (*y*), infra.

(*x*) See infra, n. (*y*).

(*y*) Ord. LXV. r. 1, ante, p. 672: *Myers* v. *Defries* (No. 1), 4 Ex. D. 176; 48 L. J., Ex. 446 (C. A.): *Siddons* v. *Lawrence*, Id.: *Marsden* v. *Lane. & Yorks. R. Co.*, 7 Q. B. D. 641: *Rowey* v. *Bell*, 4 Q. B. D. 95; 48 L. J., Q. B. 161: *Brook* v. *Israel*, Id.: *North* v. *Bilton*, Id.

(*z*) *Marsden* v. *Lane. & Yorks. R. Co.*, 7 Q. B. D. 641; 50 L. J., Q. B. 318 (C. A.).

(*a*) Id.: *Myers* v. *Defries*, supra.

(*b*) Id.

(*c*) Id. See especially per *Bramwell*, L. J., at pp. 180, 181.

(*d*) *Rowey* v. *Bell*, supra.

(*e*) Id.

(*f*) See post, Ch. LXXXV.

(*g*) By the County Courts (Costs and Salaries) Act, 1882, 45 & 46 V. c. 57, s. 4, "Section 5 of the 30 & 31 V. c. 142, shall be read and construed as if the words '*less than*' were substituted for the words '*not exceeding.*'"

1873 (*infra*), and *Ord. LXV. r.* 1 (*ante*, p. 672), is expressly made subject to its provisions.

County Courts Act, 1867, s. 5.

The section (30 & 31 *V. c.* 142, *s.* 5, as amended by 45 & 46 *V. c.* 57, *s.* 4), is as follows:—"If, in any action commenced after the passing of this Act (*h*) in any of Her Majesty's Superior Courts of Record, the plaintiff shall recover a sum less than (*i*) 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs" (*i*).

Judicature Act, 1873, s. 67.

This section is preserved and applied to actions in the High Court of Justice by sect. 67 of the *Judicature Act*, 1873, which provides that "The provisions contained in the fifth, seventh, eighth and tenth sections of the County Court Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court."

To what actions applicable.

The latter section imposes an important qualification on the former, by limiting its application to actions in which any relief is sought which can be given in a County Court (*k*). This refers to the kind or nature, and not the amount of the relief sought (*l*), and excludes from the operation of sect. 5 all those actions in which a County Court has no jurisdiction (*m*). It does not apply (*m*), therefore, to actions of ejectment (*n*), or to those in which the title to any corporeal or incorporeal hereditaments (*o*), or to any toll, fair, market, or franchise is in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed (*p*), or for any malicious prosecution, or for any libel or

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(*h*) See *Wood* v. *Riley*, L. R., 3 C. P. 26; 37 L. J., C. P. 24: *Restall* v. *L. & S. West R. Co.*, L. R., 3 Ex. 141; 37 L. J., Ex. 89: *Oldreeve* v. *Puckridge*, L. R., 3 Ex. 145 (1); 37 L. J., Ex. 90: *Butcher* v. *Henderson*, L. R., 3 Q. B. 335; 37 L. J., Q. B. 139: *Mount* v. *Taylor*, L. R., 3 C. P. 645; 37 L. J., C. P. 325: *Levi* v. *Sanderson*, L. R., 4 Q. B. 330; 38 L. J., Q. B. 135: *Mirfin* v. *Attwood*, L. R., 4 Q. B. 330; 38 L. J., Q. B. 181: *Ings* v. *London & S. West R. Co.*, L. R., 4 C. P. 17; 38 L. J., C. P. 86. The time which has elapsed since the passing of the statute renders it unnecessary to do more than refer to these cases in which the question as to when it came into force was discussed.

(*i*) See note (*g*), supra. The prior enactments were 9 & 10 V. c. 95, s. 129; 12 & 14 V. c. 61, s. 11; 15 & 16 V. c. 54, s. 4; 23 & 24 V. c. 126 (C. L. P. Act, 1860), s. 34, which are repealed by 30 & 31 V. c. 142, s. 33.

(*k*) This was otherwise before the Jud. Act. See *Sampson* v. *Mackay*, L. R., 4 Q. B. 643; 38 L. J., Q. B. 245: *Craven* v. *Smith*, L. R., 4 Ex. 146; 38 L. J., Ex. 90.

(*l*) *Chatfield* v. *Sedgwick*, 4 C. P. D. 459; per *Jessel*, M. R., at p. 461, and per *Brett*, L. J., Id.: per *Cockburn*, L. C. J., *Stooke* v. *Taylor*, 5 Q. B. D. at pp. 578, 579. See *Potter* v. *Chambers*, 4 C. P. D. 457: *Neale* v. *Clarke*, 4 Ex. D. 286: *Rutherford* v. *Wilkie*, 41 L. T. 435.

(*m*) See stat. 9 & 10 V. c. 95, s. 58, as amended by 38 & 39 V. c. 66.

(*n*) Except where neither the value of the lands, tenements or hereditaments sought to be recovered nor the rent exceeds 20*l.* by the year, 30 & 31 V. c. 142, s. 11. A question as to the title to a wall forming part of a house is within the County Court jurisdiction. *Rutherford* v. *Wilkie*, 41 L. T. 435. See post, Ch. CVI.

(*o*) Except where neither the value nor rent exceeds 20*l.* a year, 30 & 31 V. c. 142, s. 12. See post, Ch. CVI.

(*p*) See now 28 & 29 V. c. 99, s. 1, amended by 30 & 31 V. c. 142, s. 33.

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slander, or for seduction or breach of promise of marriage (*q*), or where the defendant resides out of the jurisdiction (*r*). The qualification introduced by the Judicature Act does not refer to the amount sought to be recovered, so that, although the County Court jurisdiction is limited to pleas of personal actions when the amount, debt or damage claimed does not exceed 50*l.* (*s*), a plaintiff cannot escape the provisions of [illegible] by merely indorsing on his writ a claim for a larger amount (*t*).

The words "commenced after the passing of this Act" are parenthetical (*u*), and the section is not confined to actions commenced in the High Court (*x*). It applies to an action commenced in an inferior Court, and removed by *certiorari* (*y*), and to an action where the defendant, by giving notice and making a deposit under 19 & 20 *Vict. c.* 108, *s.* 39, has prevented the plaintiff from proceeding in a County Court (*z*).

Counterclaim. Third party.

The section does not apply to a counterclaim, and, consequently, does not affect a defendant's right to costs thereon (*a*); nor does it affect the costs as between a defendant and a third party brought in by notice under *Ord. XVI. r.* 54 (*b*).

"Recovers."

The section applies whenever the plaintiff "recovers" an amount less than that specified in it (*c*). It expressly applies to recovery by verdict, judgment by default or on demurrer, or otherwise (*see the section, ante,* p. 681). It applies when the action is referred to arbitration, and the amount is recovered under an award (*c*), or when the defendant pays money into Court which is accepted by the plaintiff (*d*). When the defendant pleads a tender, and pays into Court the amount tendered and proves his plea, the plaintiff only recovers the amount, if any, found to be due to him beyond the amount tendered (*e*).

—Counterclaim or set-off.

Where the defendant sets up a counterclaim, the plaintiff recovers the amount found to be due to him in respect of his claim, independently of the counterclaim, and not merely the excess of the amount so found to be due over any amount found to be due to the defendant on his counterclaim (*f*). But where the defendant sets up as such a set-off properly so called, *i. e.* a liquidated cross

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(*q*) See stat., supra, n. (*m*).

(*r*) *Hunter* v. *Hillman*, 28 Sol. Jour. 569; *Mendelssohn* v. *Hoppe*, W. N. 1884, 31.

(*s*) 9 & 10 V. c. 95, s. 58, as amended by 13 & 14 V. c. 61, s. 1.

(*t*) *Chatfield* v. *Sedgwick*, 4 C. P. D. 459; per *Jessel*, M. R., at p. 461, and per *Brett*, L. J., at p. 464. See also cases cited supra, n. (*c*).

(*u*) *Pellas* v. *Brestaux*, L. R. 6 Q. B. 438; 40 L. J., Q. B. 161.

(*x*) Id.

(*y*) Id.

(*z*) *Flitters* v. *Allfrey*, L. R., 10 C. P. 29; 44 L. J., C. P. 10. Quære whether this is affected by Jud. Act, 1873, s. 67 (ante, p. 181). It does not appear that it would be.

(*a*) *Blake* v. *Appleyard*, 3 Ex. D. 195; 47 L. J., Ex. 407.

(*b*) *Bates* v. *Burchell*, W. N. 1884, 108; Bitt. Ch. Cas.

(*c*) *Fergusson* v. *Davison*, 8 Q. B. D. 470; 51 L. J., Q. B. 266, overruling *Jones* v. *Jones*, 7 C. B., N. S. 832; 29 L. J., C. P. 151. See more fully post, "*Arbitration*," Vol. 2, Ch. CXXXVI.

(*d*) *Parr* v. *Lillicrap*, 1 H. & C. 615; 32 L. J., Ex. 150.

(*e*) *James* v. *Vane*, 2 El. & El. 882; 2 L. T. 281.

(*f*) *Stooke* v. *Taylor*, 5 Q. B. D. 569; *Neale* v. *Clarke*, 4 Ex. D. 286; 41 L. T. 438; *Potter* v. *Chambers* (No. 2), 4 C. P. D. 457; 48 L. J., C. P. 274. The case of *Staples* v. *Young*, 2 Ex. D. 324; 25 W. R. 304; and *Hallman* v. *Price*, 41 L. T. 627, per *Kelly*, C. B., at p. 628, so far as they are inconsistent with the view stated in the text, cannot be supported. See ante, p. 678, n. (*u*).

claim set up as a set-off against a liquidated claim, and for which the plaintiff could have given credit, the plaintiff only recovers the balance, if any, found to be due to him after deducting the set-off (*g*).

—Arbitration.

As to the effect of this section where an action or matters in difference are referred to arbitration, *see post*, *Ch. CXXXVI.*

Founded on contract or tort.

In most cases there is no difficulty in determining whether the action is "founded on contract" or "founded on tort," but in some cases there is considerable difficulty in doing so, and, as the decisions at present stand, it is not possible to lay down any general rule in such cases on the subject (*h*). The cases in which any difficulty arises are chiefly those in which the plaintiff has the option whether to sue in contract or in tort. The first thing to do is to look at the pleadings, and if it appears from them that the plaintiff relies on the contract or the tort, the action will be founded on the one or the other accordingly. If, however, this does not appear on the pleadings the criterion appears to be whether the action is in substance one of contract or of tort. An action of detinue for the return of a picture or its value, and damages for its detention, was held to be founded on tort (*i*). An action against common carriers for not safely and securely carrying goods was held to be founded on contract (*k*). So was an action against a cab proprietor for loss of a passenger's luggage (*l*); but an action against carriers for wrongfully delivering goods to an insolvent consignee, after notice by the unpaid vendor not to do so, was held to be founded on tort (*m*).

To what costs the section extends.

This section is expressly confined to costs of suit. It does not affect the right of the plaintiff to costs of issuing execution (*n*) to which he is entitled under *R. of S. C., Ord. XLII. r.* 15 (*post*, *Ch. XXIV.*). It does not affect the right of parties to agree as to who shall pay the costs of a reference and award when an action is referred (*o*).

How costs obtainable in cases within the section.

In cases within this section the plaintiff, in order to get his costs, must either get the Judge at the trial to certify on the record that there was sufficient reason for bringing the action in the High Court, or he must get an order for costs from a Judge at Chambers or the Court.

Certificate, who may give, &c.

In the case of an ordinary action tried at Nisi Prius, or at the assizes, the certificate may be given by the Judge before whom the action is tried. It is entered by the officer at the trial in the book kept pursuant to *Ord. XXXVI. r.* 41, and in the certificate

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(*g*) Per *Cockburn*, C. J., *Stooke* v. *Taylor*, 5 Q. B. D. 577, 578: per *Brett*, L. J., *Barnes* v. *Bromley*, 6 Q. B. D. pp. 694, 695: per *Pollock*, B., Id. 199, 200: per *Hawkins*, J., *Neale* v. *Clarke*, 4 Ex. D. at p. 295.

(*h*) See *Bryant* v. *Herbert*, 3 C. P. D. 389; 47 L. J., C. P. 670, where the Lords Justices differed in the reasons given for their judgments. It is most respectfully submitted that the view adopted by *Bramwell*, L. J., is the correct one.

(*i*) *Bryant* v. *Herbert*, 3 C. P. D. 389; 47 L. J., C. P. 670, C. A.

(*k*) *Fleming* v. *Manchester, Sheffield and Lincoln R. Co.*, 4 Q. B. D. 81; 39 L. T. 555, C. A.

(*l*) *Bayliss* v. *Lintott*, L. R., 8 C. P. 245; 42 L. J., C. P. 119.

(*m*) *Pontifex* v. *Midland R. Co.*, 3 Q. B. D. 23; 47 L. J., Q. B. 28. See *Fleming* v. *Manchester, &c. R. Co.*, supra.

(*n*) *Armitage* v. *Jessop*, L. R., 2 C. P. 12: 36 L. J., C. P. 63: *Marquis of Salisbury* v. *Ray*, 8 C. B., N. S. 193; 29 L. J., C. P. 225.

(*o*) *Forshaw* v. *De Wette*, L. R., 6 Ex. 200; 40 L. J., Ex. 153.

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given under *Ord. XXXVI. r.* 42 (*p*), which for this purpose is the record (*q*). It is not necessary that the certificate should be given at the trial (*r*). It will suffice if it is given at any time before taxation (*r*). A County Court Judge, to whom an action is remitted for trial under 19 & 20 *V. c.* 108, *s.* 26, may give the certificate, and the issue sent with the remitting order is, in this case, the record (*s*). It is not clear whether an under-sheriff, before whom a writ of inquiry is executed, can give the certificate, but it would appear, and it is submitted, that he can (*t*). Where a verdict is taken at the trial, subject to a reference, and the arbitrator is to have all the powers of a Judge as to certifying, &c., he may give the certificate (*u*).

Sufficient reason, what is.

Whether he will grant or refuse the certificate is in the discretion of the Judge (*x*), subject, however, to review of his decision by the Court (*x*). To entitle the plaintiff to the certificate, he must show some sufficient reason for bringing the action in the High Court (*y*). The fact that an action was brought to try a question as to an important right may be a sufficient reason (*z*); so may the fact that the plaintiff has a reasonable ground for supposing that he would obtain judgment under *Ord. XIV.* (*a*). The fact that the action was originally commenced in a County Court, and has been removed by the defendant by *certiorari*, may be a sufficient reason (*b*). The distance at which the parties reside from one another is not a sufficient reason (*c*); nor is the fact that a trial in a County Court would have been attended with greater expense and delay than the trial in the superior Court (*d*); nor is the fact that the plaintiff was misled by a County Court Registrar as to the jurisdiction of the Court (*d*).

Since the *Judicature Act*, 1873, *sect.* 67 (*ante*, p. 681), which limits the application of the section to cases in which the relief sought could not be granted in a County Court (*see ante*, p. 681), it is unnecessary to do more than refer to the cases showing that formerly the fact that an action could not have been commenced in the County Court was a matter to be taken into consideration,

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(*p*) Ante, p. 653.

(*q*) See ante, p. 653: cp. *Taylor* v. *Cass*, infra.

(*r*) *Bennett* v. *Thompson*, 6 El. & Bl. 683; 25 L. J., Q. B. 378.

(*s*) *Taylor* v. *Cass*, L. R., 4 C. P. 614; 20 L. T. 667; *Emeny* v. *Sandes*, W. N. 1884, 220. But, in order to sign judgment for the costs, an order of the Judge at chambers is necessary. See post, Ch. CXXXIII.

(*t*) *Craven* v. *Smith*, L. R., 4 Ex. 146, per *Kelly*, C. B., at p. 149. But see contra, *Ayres* v. *Lovelock*, W. N. 1874, 29.

(*u*) *Smith* v. *Haley*, L. R., 8 Ex. 16; 27 L. T. 426.

(*x*) *Flitters* v. *Allfrey*, L. R., 10 C. P. 29. See cases cited post, p. 685, n. (*i*).

(*y*) See the section, ante, p. 681.

(*z*) *Hinde* v. *Sheppard*, L. R., 7 Ex. 21; 41 L. J., Ex. 25. This is not necessarily a sufficient reason if the Judge thinks the action ought not to have been brought at all. *Strachey* v. *Lord Osborne*, L. R., 10 C. P. 92; 44 L. J., C. P. 6.

(*a*) *Evans* v. *Edwards*, W. N. 1883, 194, per *Field*, J., at p. 195: *Copley* v. *Jackson*, W. N. 1884, 94; Bitt. Ch. Cas. 42.

(*b*) *Pellas* v. *Breslauer*, L. R., 6 Q. B. 438; 40 L. J., Q. B. 161: cp. *Flitters* v. *Allfrey*, L. R., 10 C. P. 29; 44 L. J., C. P. 10, where the Court upheld the Judge's refusal to certify in an action where the defendant had prevented the plaintiff from proceeding in a County Court by a notice and a deposit under 19 & 20 V. c. 108, s. 39.

(*c*) *Thompson* v. *Dallas*, L. R., 3 Q. B. 358; 37 L. J., Q. B. 133: *Copley* v. *Jackson*, supra; cp. 9 & 10 V. c. 95, s. 128, repealed by 30 & 31 V. c. 142, s. 33.

(*d*) *Holborow* v. *Jones*, L. R., 4 C. P. 14; 32 L. J., C. P. 22.

but was not conclusive in deciding whether to grant or withhold the certificate (*e*). The Judge may refuse to certify when he considers that the action ought not to have been brought at all (*f*).

Rule or order for costs.

If no certificate is given by the Judge who tried the action, an application may be made to the Court or a Judge at Chambers for an order allowing the costs. As a general rule, if no application for costs is made to the Judge who tried the action, any subsequent application should be made to a Judge at Chambers by a summons in the ordinary manner (*g*); but if the application has been made to and refused by the Judge at the trial, any subsequent application should be made to the Court. A Judge at Chambers will be guided by the same principles as those above pointed out in case the application is made at the trial. Any application to the Court must be made on notice of motion in the usual manner (*h*). The Court can review the decision of the Judge, and if satisfied that his discretion was wrongly exercised, will make the order (*i*), but they will only do this in a case when they think the Judge clearly wrong (*k*). The Court will in a proper case make the order on new materials not before the Judge at the trial (*l*).

When plaintiff recovers sum not exceeding 50*l.* in contract.

When Plaintiff recovers a sum not exceeding 50l. in Action on Contract—Effect of Ord. LXV. r. 12.]—By *R. of S. C., Ord. LXV. r.* 12, "In actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the Court or a Judge otherwise orders."

This rule, it will be observed, is confined to actions founded on contract. It does not affect any other actions. It applies to all cases where judgment is obtained after the 23rd October, 1883, although the action was commenced before that date (*m*). It does not interfere with the operation of the *County Courts Act*, 1867, *s.* 5 (*ante*, p. 681), and, therefore, a plaintiff who recovers less than 20*l.* in an action of contract gets no costs at all unless he gets an order for them under that Act (*n*). The word "recovers" is used in the *County Courts Act*, 1867, *s.* 5, and the decisions as to the construction of that word in the Act are applicable to the rule. (*See ante*, p. 682.) The power to give the plaintiff his costs in cases within the rule will only be exercised on special grounds (*o*). As, for instance,

(*e*) *Craven* v. *Smith*, L. R., 4 Ex. 146; 38 L. J., Ex. 90: *Sampson* v. *Mackay*, L. R., 4 Q. B. 643; 38 L. J., Q. B. 245: *Gray* v. *West*, L. R., 4 Q. B. 175; 38 L. J., Q. B. 78.

(*f*) *Strachey* v. *Lord Osborne*, L. R., 10 C. P. 92; 44 L. J., C. P. 6: *Flitters* v. *Allfrey*, L. R., 10 C. P. 29.

(*g*) See post, Ch. CXXIII.

(*h*) See post, Ch. CXXII.

(*i*) *Strachey* v. *Lord Osborne*, L. R., 10 C. P. 92; 44 L. J., C. P. 6: *Sampson* v. *Mackay*, L. R., 4 Q. B. 643; 38 L. J., Q. B. 245: *Gray* v. *West*, L. R., 4 Q. B. 175; 38 L. J., Q. B. 78: *Hinde* v. *Sheppard*, L. R., 7 Ex. 21; 41 L. J., Ex. 25: cp. *Hatch* v. *Lewis*, 7 H. & N. 367; 31 L. J., Ex. 26.

(*k*) Id.: *Courtenay* v. *Wagstaff*, 16 C. B., N. S. 110.

(*l*) Per *Mellor*, J., L. R., 4 Q. B. at p. 648.

(*m*) *Langley* v. *Sugden*, W. N. 1883, 198: *La Fargue* v. *Stead*, 28 Sol. Jour. 547.

(*n*) *Calvert* v. *Davison*, W. N. 1884, 18: *Oppenheimer* v. *Davenport*, Id. 57.

(*o*) Ante, p. 684. In the case of an action remitted to the County Court for trial the order, if any, must be made by the County Court Judge, *Emeny* v. *Sandes*, W. N. 1884, 220.

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when the defendant is out of the jurisdiction (*p*), or when the plaintiff might reasonably have supposed that he would get an order for judgment under *Ord. XIV.* (*q*), or where the action could not have been brought in a County Court (*r*). The mere fact that the plaintiff resides at a distance from the County Court where he would have to sue is not sufficient (*q*).

In cases within this rule, when the plaintiff obtains an order for judgment under *Ord. XIV. r.* 1, he will, except in special cases, be allowed 6*l.* 10*s.* for his costs in town cases, and 7*l.* in country cases (*s*); and an extra allowance of 6*s.* for each additional defendant beyond one (*s*). In special cases an application must be made (*s*). When the writ is issued in London, but served in the country, the case is a country case for the purpose of costs (*t*). In cases within the rule only one counsel will be allowed unless the taxing officer, for special reasons, thinks that briefing more than one counsel was proper (*u*).

Where several issues.

Costs where several Issues.]—By *Ord. LXV. r.* 2, "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." We have already discussed the question as to the practice in the event of there being several distinct causes of action raised in one action (*see ante*, p. 676.) It is here only necessary to point out the rule in those cases in which several issues are involved with regard to one and the same cause of action. In these cases, in the absence of any special order, the costs of the various issues are distributed, and each party is paid the costs of the issues on which he wins and pays the costs of those on which he loses, and plaintiff gets the general costs of the cause if he recovers any sum sufficient to entitle him to costs at all, and the defendant gets the general costs of the cause if he succeeds on any defence going to the whole action (*x*). The defendant therefore gets the

(*p*) *Mendelssohn* v. *Hoppe*, W. N. 1884, 31: cp. *Hunter* v. *Hillman*, 28 Sol. Jour. 560.

(*q*) *Copley* v. *Jackson*, W. N. 1884, 94; cp. cases cited ante, p. 684, n. (*a*).

(*r*) *Saywood* v. *Cross*, 19 L. J., N. C. 132.

(*s*) *Bye* v. *Kirby*, W. N. 1883, 195.

(*t*) *Davies* v. *Stevens*, W. N. 1884, 9.

(*u*) Ord. LXV. r. 27, sub-r. 46, post, p. 709.

(*x*) *Myers* v. *Defries*, 5 Ex. D. 180; 49 L. J., Ex. 266. See *Ellis* v. *Desilva*, 6 Q. B. D. 521; 50 L. J., Q. B. 328: *Sparrow* v. *Hill*, 8 Q. B. D. 479; 50 L. J., Q. B. 675, and other cases cited ante, p. 677. By R. 62, H. T. 1853, "When issues in law and fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party *otherwise* entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party." This rule is repealed, but it is still looked at as a guide. See per *Baggallay*, L. J., *Myers* v. *Defries*, 5 Ex. D. at p. 186. Before the Jud. Acts if there were several issues, and one was found for plaintiff and the other for defendant, if that found for plaintiff entitled him to recover his debt or damages, or any part of them, he was entitled to the general costs of the cause. But defendant was entitled to the same, if the defence raised upon the issue found for him furnished a defence to the whole action. See *Hart* v. *Cutbush*, 2 Dowl. 456, per *Parke*, J.: *Dignam* v. *Bailey*, L. R., 5 Q. B. 53; 39 L. J., Q. B. 13; L. R., 6

general costs of the action if he succeeds on a plea of payment into Court, even although accompanied in the alternative by a denial of the claim (*y*).

Q. B. 47; 40 L. J., Q. B. 68. Thus, in an action for libel, if there was a plea of not guilty, and pleas of justification, and a verdict was found for defendant on the general issue, and for plaintiff on the special pleas, defendant was entitled to the general costs of the cause. *Spencer* v. *Hamerton*, 4 A. & E. 413; 6 N. & M. 22: *Hart* v. *Cutbush*, 2 Dowl. 456. So he was entitled to them if there was but one plea upon which issue was joined, if that plea raised divisible and distinct issues, and one of which, substantially a defence to the whole action, was found for defendant. *Knight* v. *Woore*, 3 Bing. N. C. 534; 5 Dowl. 487. Also, before the Jud. Acts, the costs of each issue followed the finding or judgment. Thus, in trespass, where defendant pleaded not guilty, and *son assault demesne*, and had a verdict on the latter plea only, he was not entitled to the costs of the former. *Mullins* v. *Scott*, 5 Bing. N. C. 423: *Daniel* v. *Barry*, 4 Q. B. 59. So in covenant, if there were several breaches assigned, defendant was entitled to the costs of the issues found for him. *Daubuz* v. *Rickman*, 4 Dowl. 129; 1 Sc. 564: *Dods* v. *Evans*, 33 L. J., C. P. 146. In some cases an issue might be found, part for plaintiff and part for defendant. In such a case each party was entitled to costs on that part of the issue on which he succeeded. *Prudhomme* v. *Fraser*, 2 A. & E. 645: *Freshney* v. *Wells*, 26 L. J., Ex. 228. Where, to a count for money had and received, defendant pleaded never indebted, and the claim of plaintiff, who sought to recover certain fees paid by him to defendant under protest, consisted of several distinct items, on each of which he recovered something, and defendant succeeded in reducing the demand as to several of them, so that plaintiff recovered less than his demand, it was held that defendant was entitled to have the verdict for the residue entered for him, and to have the costs of those parts on which he had succeeded. *Traherne* v. *Gardner*, 8 E. & B. 161; 26 L. J., Q. B. 259: *Reynolds* v. *Harris*, 3 C. B., N. S. 267; 28 L. J., C. P. 26. In an action upon a policy of insurance effected upon an electric telegraph cable, the declaration alleged that the cable was totally lost by the perils of the sea; defendant pleaded that the subject-matter of the said insurance was not, nor was any part thereof, lost as alleged; it turned out that only 373 miles of the cable had been lost by the perils of the sea: held, that the plea ought to be construed distributively, and that defendant was entitled to have the verdict entered for him upon the issue joined on the above plea in respect of the whole claim, except as to the 373 miles of cable. *Paterson* v. *Harris*, 2 B. & S. 814; 31 L. J., Q. B. 277; et per *Crompton*, J., "Where the issues admit of being divided, and there are two really distinct questions, the postea ought to be made to correspond with the truth, and to divide those issues." In actions of trespass or on the case, where plaintiff recovered less than 40*s.* damages, and the Judge refused to certify under 3 & 4 V. c. 24, plaintiff was not entitled to any costs upon any of the issues found for him. *Newton* v. *Rowe*, 1 C. B. 187. But, if in such an action, defendant obtained a verdict upon a plea or pleas going to the whole cause of action, plaintiff was entitled to the costs of the issues upon which he succeeded. *Sharland* v. *Loaring*, 1 Ex. 375; 17 L. J., Ex. 32: *Skinner* v. *Shoppee*, 6 Bing. N. C. 131. It seems that, if plaintiff was deprived of costs under the County Courts Act (ante, p. 681), defendant was entitled to the costs of issues found in his favour. See *Jenks* v. *Taylor*, 1 M. & W. 578. Neither party was entitled to the costs of issues from the trial of which the jury had been discharged. *Vallance* v. *Adams* or *Evans*, 2 Dowl. 118; 1 C. & M. 856; 3 Tyr. 865. In the case of a reference of a cause, without other matters in difference, to arbitration, though before issue joined, where the costs of the cause were to abide the event, each party was only entitled to costs upon the issues upon which he suc-

(*y*) *Goutard* v. *Carr* (C. A.), 13 Q. B. D. 598, n.; 53 L. J., Q. B. 55; 32 W. R. 242: *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597; 53 L. J., Q. B. 466; 50 L. T. 749.

PART VIII.

Where County Courts have Admiralty jurisdiction.

Where County Courts have Admiralty Jurisdiction.]—By "The County Courts Admiralty Jurisdiction Act, 1868," 31 & 32 *V. c.* 71, *s.* 2, "The Queen in council, on the representation of the Lord Chancellor, may by order in council appoint County Courts to have Admiralty jurisdiction, and to assign to such Courts districts. And a County Court so appointed to have Admiralty jurisdiction shall, for the purposes of this Act, be deemed a County Court having Admiralty jurisdiction."

Extent of Admiralty jurisdiction of County Courts.

By sect. 3, "Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes):

(1.) *As to any claim for salvage* (*z*). Any cause in which the value of the property saved does not exceed 1,000*l.*, or (*a*) in which the amount claimed (*b*) does not exceed 300*l.*

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ceeded. See *Daubuz* v. *Rickman*, 4 Dowl. 129; 1 Sc. 564: *Allenby* v. *Proudlock*, 5 N. & M. 636; 4 A. & E. 326: *Reynolds* v. *Harris*, 3 C. B., N. S. 267; 28 L. J., C. P. 26. See Vol. 2, Ch. CXXXVI. It may be added, that plaintiff did not, it seems, lose his right to the costs upon the issues upon which he had succeeded by not having them taxed at the same time as defendant had his costs taxed. *Watson* v. *Boyes*, 13 M. & W. 635; 14 L. J., Ex. 116. If defendant's costs exceeded those to which plaintiff was entitled, defendant would have judgment and execution for the amount of the excess. *Twigg* v. *Potts*, 4 Dowl. 266: *Milner* v. *Graham*, 2 Dowl. 422. Where before the Jud. Acts there were several issues, the party who was entitled to the general costs of the cause was (except where no material issue in fact was found for him (see R. 62, H. T. 1853, ante, p. 686, n. (*x*)), entitled to all the costs, with the exception of the costs of such parts of the pleadings, briefs and counsel's fees (*Hazlewood* v. *Back*, 9 M. & W. 1: *Hart* v. *Cutbush*, 2 Dowl. 456: *Spencer* v. *Hammerton*, 4 A. & E. 413; 6 N. & M. 22), and of such of the witnesses and other expenses (see *Eades* v. *Everatt*, 3 Dowl. 687: *Richards* v. *Cohen*, 1 Dowl. 533: *Knight* v. *Woore*, 3 Bing. N. C. 534; 5 Dowl. 487: *Doe* d. *Smith* v. *Webber*, 4 N. & M. 381; 2 A. & E. 448: *Ratcliffe* v. *Hall*, 2 C. M. & R. 258; 1 Gale, 140: *Eyre* v. *Thorpe*, 6 Dowl. 768: *Gravatt* v. *Attwood*, 21 L. J., Q. B. 215), as were applicable only to the issue or issues on which he had failed, which costs had to be deducted from his costs. And it is further to be observed, that such party was entitled to the costs of all witnesses whose evidence related to the issues upon which he had succeeded, although their evidence also related to the issues on which he had failed; but that the opposite party would only be entitled to the costs of those witnesses whose evidence related exclusively to the issues on which he had succeeded. *Freeman* v. *Rosher*, 6 D. & L. 517; 18 L. J., Q. B. 105: *Clothier* v. *Gann*, 13 C. B. 220; 22 L. J., C. P. 98: *Jewell* v. *Parr*, 25 L. J., C. P. 179: *Harrison* v. *Bush*, 25 L. J., Q. B. 99; 5 E. & B. 344. Where, after a cause was made a *remanet*, defendant added a plea going to the whole cause of action, and on the trial succeeded on such plea, but failed as to the others, the Court held that plaintiff was entitled to the costs of the *remanet*. *Warner* v. *Blacklock*, 10 Jur. 716, Ex. In general, the question as to whether particular costs were referable to one issue or another, was a question of fact for the decision of the Master, and the Court would not interfere with it. *Doe* d. *Smith* v. *Webber*, 4 N. & M. 381; 2 A. & E. 448; 1 H. & W. 10: *Pilgrim* v. *Southampton and Dorchester R. Co.*, 8 C. B. 25.

(*z*) This includes a claim for distribution of salvage. *The Glannibanta, Elenore* v. *Trim*, 2 P. D. 45; 46 L. J., Adm. 45.

(*a*) This must be read as indicating the alternative. *The Glannibanta*, supra.

(*b*) The amount *recovered*, not any amount the plaintiff chooses to claim, is the amount by which the plaintiff's right to costs must be tested. *Hewitt*

(2.) *As to any claim for towage, necessaries or wages* (*c*), any cause in which the amount claimed (*d*) does not exceed 150*l.*

(3.) *As to any claim for damage to cargo or damage by collision*, any cause in which the amount claimed (*d*) does not exceed 300*l.* (*e*).

(4.) Any cause in respect of any such claim or claims as aforesaid, but in which the value of the property saved or the amount claimed is beyond the amount limited as above mentioned, when the parties agree by a memorandum signed by them or by their attornies or agents that any County Court having Admiralty jurisdiction and specified in the memorandum shall have jurisdiction."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *V. c.* 51), *s.* 2, "Any County Court appointed or to be appointed to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—

(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.* (*f*).

(2.) As to any cause in respect of any such claim or claims as aforesaid, but in which the amount claimed is beyond the amount limited as above mentioned, when the parties agree by a memorandum signed by them or by their attornies or agents that any County Court having Admiralty jurisdiction and specified in the memorandum, shall have jurisdiction."

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v. *Corry*, L. R., 5 Q. B. 418; L. R., 3 Adm. & Ecc. 502; 39 L. J., Q. B. 279. No suggestion is necessary to deprive plaintiff of costs. Id.

(*c*) See *The Elpis*, L. R., 4 Adm. 1; 42 L. J., Adm. 43: *The Dowse*, L. R., 3 Adm. 135; 39 L. J., Adm. 46: *Allen* v. *Garbutt*, 6 Q. B. D. 165; 50 L. J., Q. B. 141; 29 W. R. 287. A claim by a master for wrongful dismissal is within the statute. *The Blessing*, 3 P. D. 35; 38 L. T. 259.

(*d*) See ante, n. (*b*).

(*e*) By 32 & 33 V. c. 51, s. 4, "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships (see note (*f*), infra), whether by collision or otherwise, when the amount claimed does not exceed 300*l.*" See note (*b*), supra.

(*f*) This section gives the County Courts having Admiralty jurisdiction, jurisdiction in cases arising out of charter-parties, or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases. *Cargo ex Argos, Gaudet* v. *Brown, The Hewsons, Geipel* v. *Cornforth*, L. R., 5 P. C. 134; 42 L. J., Adm. 1 (P. C.), where *Simpson* v. *Blues*, L. R., 7 C. P. 290; 41 L. J., C. P. 121, is disapproved of. These sections do not affect the jurisdiction of County Courts *not* having Admiralty jurisdiction to try actions for freight when the claim does not exceed 50*l.* *Reg.* v. *Judge of Southend County Court*, 13 Q. B. D. 142; 53 L. J., Q. B. 423; 32 W. R. 754. A County Court has no jurisdiction to try a question of collision between barges propelled by oars only (*Everard* v. *Kendall*, L. R., 5 C. P. 428; 39 L. J., C. P. 234), or an action against a pilot for damages to a barge caused by a vessel under his control. *Flower* v. *Bradley*, 44 L. J., Ex. 1; 31 L. T. 702. A County Court to which Admiralty jurisdiction is given by 31 & 32 V. c. 71, has jurisdiction over a claim not exceeding 300*l.* for damages for negligence causing a collision between a barge of the defendant and a ship of the plaintiff in a river within the body of a county forming part of its district. *Purkes* v. *Flower*, L. R., 9 Q. B. 114; 43 L. J., Q. B. 33. See *Reg.* v. *Judge of City of London Court*, 8 Q. B. D. 609.

PART VIII.

Restriction on proceedings in superior Court.

By *Ord. LXV.* (*ante*, p. 672), costs are now, in all cases, in the discretion of the Court or Judge, and it has been held (*e*) that this order is inconsistent with the stat. 31 & 32 *V. c.* 71, *s.* 9, which enacted that "If any person shall take, in the High Court of Admiralty in England, or in any superior Court, proceedings which he might, without agreement, have taken in a County Court, except by order of the Judge of the High Court of Admiralty, or of such superior Court, or of a County Court having Admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that Admiralty case is limited by this Act, and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty, or in any superior Court, in respect of property saved, the value of which, when saved, does not exceed 1,000*l.*, he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the Judge of the High Court of Admiralty, or of a superior Court before whom the cause is tried or heard, shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty of England, or in a superior Court." This section, though repealed by *Ord. LXV.*, still serves as a guide in the exercise of the discretion given by that order.

Costs of executors, trustees, &c.

Costs of Executors, Administrators, Trustees and Mortgagees entitled to Costs out of a Particular Estate or Fund.]—The rights of executors, administrators, trustees and mortgagees to costs out of a particular estate or fund to which they would be entitled according to the rules acted upon in Courts of Equity are expressly preserved by *Ord. LXV. r.* 1 (*see ante*, p. 672) (*f*).

Where the settlement under which a person claims to be trustee is set aside, such person has no absolute right to costs, and consequently no right of appeal from an order that he shall pay them (*g*). Where a trustee has a right to costs he may appeal from an order depriving him of them (*h*).

Costs under particular statutes.

Costs under Particular and Special Statutes.]—In certain statutes provisions will be found with regard to costs. So far as these provisions are of a general character they are, as we have seen, repealed by *Ord. LXV.* (*see ante*, p. 672, *and cases cited*, n. (*a*)). Where, however, the provision is confined to a particular class of persons, or to a particular subject-matter, it is submitted, and would appear from the judgment in *Garnett* v. *Bradley* (*i*), that *Ord. LXV.* does not operate as a repeal or affect such prior enactment.

(*e*) *Tenant* v. *Ellis*, 6 Q. B. D. 46; 50 L. J., Q. B. 143.

(*f*) Cp. *Farrow* v. *Austin*, 18 Ch. D. 58: *In re Sutton*, 21 Ch. D. 855: *In re Basham, Hannay* v. *Basham*, 23 Ch. D. 195: *Clare* v. *Clare*, 21 Ch. D. 865; 51 L. J., Ch. 553: *Lewis* v. *Trask*, 21 Ch. D. 862: *Turner* v. *Hancock*, 20 Ch. D. 303: *In re Silver Valley Mines*, 21 Ch. D. 381: *Ex p. Harper, In re Pooley*, 20 Ch. D. 685: *In re Knight's Trusts* (C. A.), 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417: *Stott* v. *Milne* (C. A.), 25 Ch. D. 710: *Re Griffiths* (C. A.), 51 L. T. 278.

(*g*) *Dutton* v. *Thompson* (C. A.), 23 Ch. D. 278; 52 L. J., Ch. 661; 49 L. T. 109.

(*h*) *Farrow* v. *Austin*, 18 Ch. D. 58; 45 L. T. 227; 30 W. R. 50: *Turner* v. *Hancock*, 20 Ch. D. 303; 51 L. J., Ch. 517: *In re Knight's Trusts* (C. A.), 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417.

(*i*) 3 App. Cas. 944. See per Lord *Hatherley* at pp. 952, 953; per Lord *Blackburn* at p. 698, *et passim*.

If the Act of Parliament be repealed pending the suit, it seems that the costs must be awarded as if the Act had never existed, unless there be some express saving in the repealing Act (*k*).

Where the statute prescribes a particular mode of proceeding, the defendant, to avail himself of it, must follow that mode, and the Court will not permit him to follow any other (*l*). Where the statute contains no *prohibitory* clause against the action being brought, it could not formerly have been pleaded; the mode of taking advantage of it in that case, where the facts did not appear upon the record, was by defendant moving, upon affidavit, for leave to enter a suggestion upon the record (*m*). Sometimes the statute gives defendant leave to take advantage of it, either by plea or by suggestion, and in that case he might have recourse to either mode (*n*). Probably in any case the statute could now be pleaded.

Actions against public officers, justices of the peace, &c.

In Actions against Public Officers—Justices of the Peace, &c.]—There are some cases in which the legislature, for the protection of persons occupying particular public situations, has taken away the plaintiff's right to costs under certain circumstances. And it would seem that these enactments still remain in force (*o*). As to costs in actions against justices of the peace, &c., *see Vol.* 2, *Ch. XCI.*

In actions for infringement of patent.

In Actions for Infringement of Patents.]—By the Patents, Designs and Trade Marks Act, 1883 (46 & 47 *V. c.* 57), *s.* 29, *sub-s.* 6, it is enacted that, "On taxation of costs, regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a Judge to have been proven, or to have been reasonable and proper, without regard to the general costs of the case" (*p*).

When the plaintiff is nonsuited, the defendant was held not entitled to any costs in respect of particulars of objections delivered with the pleas under the corresponding section in the former Act, unless such particulars were certified by the Judge to have been proved (*q*). That section applied only to cases where there had been a trial (*r*).

(*k*) *Warne* v. *Beresford*, 6 Dowl. 157: *Charinton* v. *Meatheringham*, 5 Dowl. 464.

(*l*) *Taylor* v. *Blair*, 3 T. R. 452; 1 East, 352. And see *Anstee* v. *Tiley*, 1 M. & R. 564: *Clark* v. *Hamlet*, 1 H. & W. 177: *West* v. *Turner*, 1 N. & P. 617: *Jackman* v. *Cother*, 5 M. & W. 147.

(*m*) *Barney* v. *Tubbs*, 2 H. Bl. 352: *Fitzpatrick* v. *Pickering*, 2 Wils. 68: *Watchorn* v. *Cook*, 2 M. & S. 348. See *Harris* v. *Lloyd*, 4 M. & S. 171: *Swinglehurst* v. *Altham*, 3 T. R. 139: *Sandall* v. *Bennett*, 3 Dowl. 294: *Maberley* v. *Titterton*, 7 M. & W. 540: *Norwood* v. *Pitt*, 28 L. J., Ex. 212; 29 L. J., Ex. 486.

(*n*) *Capes* v. *Jones*, 2 C. B. 911; 3 D. & L. 779; 15 L. J., C. P. 209. *Mason* v. *Tucker*, 4 H. & N. 356; 28 L. J., Ex. 271.

(*o*) See ante, p. 690, n. (*i*).

(*p*) See *Stocker* v. *Rodgers*, 1 C. & K. 99: *Losche* v. *Hague*, 7 Dowl. 495. The 5 & 6 W. 4, c. 83, ss. 3 and 6, and previous enactments, are repealed by 42 & 43 V. c. 59.

(*q*) *Honiball* v. *Bloomer*, 10 Ex. 538; 24 L. J., Ex. 11.

(*r*) *Greaves* v. *East. Counties R. Co.*, 1 El. & El. 961; 28 L. J., Q. B. 290.

PART VIII.

In pauper actions.

In Pauper Actions.]—As to costs in actions brought *in formâ pauperis, see Vol. 2, Ch. CIV.*

Double and treble costs.

In what cases formerly allowed.

Double and Treble Costs—Full and Reasonable Indemnity as to Costs, &c.]—Only single costs were allowed by the Statute of Gloucester, but double and treble costs were, after that Act, in many cases expressly given by statute. It is submitted that such of these statutes as are not repealed by the stat. 5 & 6 *V. c.* 97 (*infra*), are not repealed by *Ord. LXV.* (*s*). Where a statute gave double or treble damages, where damages were recoverable at common law, the plaintiff had double or treble costs also, the costs in law being parcel of the damages (*t*); but not where damages were not recoverable at common law, and were given by statute (*u*). Where a statute gave double costs to defendants in case the plaintiff failed, it was held that the defendants who obtained a verdict were entitled to their double costs though plaintiff obtained a verdict against the others (*x*). Where, in an action upon a statute which gave double costs, a new trial was granted, and nothing was said on the subject of costs, the party who succeeded on both trials was held entitled to double costs of both (*y*). Where the declaration contained several counts, and defendants obtained a general verdict, it was held, that they were not entitled to treble costs on the counts which complained of acts prohibited by the statute which entitled them to treble costs in case of success, for anything done in pursuance of the statute (*z*).

Such costs not now allowed but other costs instead.

5 & 6 V. c. 97.

But now, by 5 & 6 *V. c.* 97, *s.* 1, "So much of any clause, enactment, or provision in any Act or Acts, commonly called public local and personal, or local and personal, or in any Act or Acts of a local or personal nature (*a*), whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: *Provided always*, that in lieu thereof the usual costs between party and party shall and may be recovered, and no more." And sect. 2 enacts, "That so much of any clause, enactment or provision in any public Act or Acts, not local or personal, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: *Provided always*, that, instead of such costs, the party or parties heretofore entitled under such last-mentioned Acts to such double, treble or other costs, shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit or other legal proceeding,

(*s*) See ante, p. 690, n. (*i*).

(*t*) 2 Bac. Abr. Costs, C.; Bull. N. P. 334. See *Deacon* v. *Morris*, 2 B. & Ald. 393.

(*u*) *Okeley* v. *Salter*, Noy, 137: *Butterton* v. *Furber*, 1 B. & B. 517; 4 Moore, 296: *Charinton* v. *Meatheringham*, 5 Dowl. 313.

(*x*) *Hall* v. *Smith*, 2 Bing. 267; 9 Moore, 477. See *Humphrey* v. *Woodhouse*, 1 Sc. 395, as to the effect of a certificate being given under 3 & 4 W. 4, c. 42, s. 32.

(*y*) *Loader* v. *Thomas*, 1 C. & J. 54.

(*z*) *Wilson* v. *River Dun Co.*, 5 M. & W. 89; 7 Dowl. 369.

(*a*) See *Barnett* v. *Cox*, 9 Q. B. 617: *Richards* v. *Easto*, 15 M. & W. 244.

as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer" (*b*).

The owner of a rent-charge in lieu of tithes, distraining under 6 & 7 *W.* 4, *c.* 71, *s.* 81, and afterwards obtaining judgment in an action of replevin, is not entitled to the "full and reasonable indemnity as to costs," under the last-mentioned enactment (*c*).

Suggestion for, when necessary.

Unless the statute required it, no suggestion on the roll was in general requisite to entitle the party to these costs (*d*). But where he could not, but for the statute, have been entitled to costs at all, a suggestion was necessary. If a suggestion was necessary, leave of the Court or a Judge must be obtained to enter it, showing such a case as would entitle the party to these costs (*e*). Under the present practice an application should be made to the judge at the trial to order payment of the costs given by the statute. If this be not done, an application by summons would be the proper course.

Certificate for, when granted, &c.

Where a statute required a Judge's certificate to entitle the party to double or treble costs, such certificate need not, in general, have been given immediately after the trial of the cause (*f*). Of course the Master could not in such a case tax the double or treble costs until the certificate was obtained (*g*).

2. *Taxation of Costs.*

Taxation of costs.

Review of Taxation.]—The taxation of costs, and the scales and amounts allowable, and other matters connected therewith, are regulated by the *R. of S. C., Ord. LXV.*

The taxation of a solicitor's bill of costs as between him and his client has been fully considered *ante*, p. 139 *et seq.*, and the subject of taxation of costs, in particular instances, is incidentally noticed in many parts of the work. We will now consider the practice of taxation as between party and party.

Former practice preserved.

By *R. of S. C., Ord. LXV. r.* 27 (37), it is provided that "the rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Principal Act, shall, in so far as they are not inconsistent with the Principal Act and these rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal." (*See further, as to the maintenance of the old rules, ante*, p. 200.)

By whom.

In the Queen's Bench Division costs are taxed by one of the

(*b*) An Act passed since this Act, the 8 & 9 V. c. 100, gives double costs.

(*c*) *Newnham* v. *Bever*, 8 C. B. 560; 7 D. & L. 253; 19 L. J., C. P. 129.

(*d*) *Forman* v. *Dawes*, 11 M. & W. 739; 1 D. & L. 299; 12 L. J., C. P. 197. And see *Maberley* v. *Titterton*, infra.

(*e*) *Maberley* v. *Titterton*, 7 M. & W. 540; 9 Dowl. 234; *Wells* v. *Ody*, 3 Dowl. 792; 2 C. M. & R. 128; *Fosbrook* v. *Holt*, 1 M. & W. 205; 4 Dowl. 700.

(*f*) *Norman* v. *Danger*, 3 Y. & J. 203.

(*g*) See *Penny* v. *Slade*, 7 Dowl. 440; 5 Bing. N. C. 469.

Masters (*i*). Where final judgment is signed in a district registry, the costs are taxed in the registry, unless the Court or a Judge otherwise orders (*Ord. XXXV. r.* 4) (*i*).

Taxing masters to assist each other.

By *Ord. LXV. r.* 19, "The taxing Masters shall be respectively assistant to each other, and in the discharge of their duties; and, for the better despatch of the business of their respective offices, any taxing Master may tax or assist in the taxation of a bill of costs which has been referred to any other taxing Master for taxation, and for ascertaining what is due in respect of such costs, and in such case shall certify accordingly."

Reference from one master to another.

This rule enables a Master of the Queen's Bench Division to refer to the taxing officer of the Chancery Division parts of a bill relating to matters done in the latter Division before an action was transferred to the former Division (*k*), and in all other cases where such a reference is desirable.

When to be taxed.

When to be taxed.]—Where a party is entitled to sign judgment for costs, he can tax his costs (*l*). It seems that a Judge can compel a person who has obtained a judgment in his favour, and who is entitled to recover costs from his opponent, to deliver his bill of costs to be taxed (*m*).

Refusal to bring in bill.

By *Ord. LXV. r.* 27 (28), "When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect."

Notice of taxation, when necessary.

Notice of Taxation, &c.]—In general it is necessary to give a notice of the taxation to the opposite party. The notice should be indorsed on the bill. Notice of taxation is not necessary upon a *cognovit*, where it is given in a sum certain for the amount of debt and costs; for, as to the costs of the action, they are already fixed at a certain sum (*n*); and as to the costs of signing judgment, a fixed sum is always marked without taxation (*o*). And by *Ord. LXV. r.* 17, "*Notice of taxing costs* shall not be necessary in any case where the defendant has not appeared in *person*, or by *his solicitor* or *guardian*" (*p*). But notice of taxation is, it seems, necessary, where defendant has done that which is equivalent to appearing, such as consenting to a Master's order for judgment, or

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(*i*) As to taxation of costs by a district registrar, see post, Vol. 2, Ch. CXXIV., and *In re Wilson*, *Wilson* v. *Alltree*, 27 Ch. D. 242.

(*k*) *Ross* v. *Ashwin*, W. N. 1884, 86; Bitt. Ch. Cas. 49, which see as to the practice on review of taxation in such cases; and see ante, p. 150.

(*l*) As to the meaning of the term "taxed costs," see *Morgan* v. *West*, 13 M. & W. 388.

(*m*) *Baker* v. *Saunders*, 7 C. B., N. S. 858; 29 L. J., C. P. 158.

(*n*) It would be different if they were not, see per *Patteson*, J., 2 Dowl. 143.

(*o*) *Griffiths* v. *Liversedge*, 2 Dowl. 143: *Clothier* v. *Ess*, 3 M. & Sc. 216: *Clarke* v. *Jones*, 3 Dowl. 277.

(*p*) See *Bolton* v. *Manning*, 5 Dowl. 769: *Burch* v. *Pointer*, 3 M. & W. 310; 6 Dowl. 387.

the like (*q*). Taking out a summons for time to plead does not render the notice unnecessary (*r*).

Length of notice, &c.

By *r.* 16, "One day's notice (*s*) of taxing costs, together with a copy of the bill of costs and affidavit of increase (if any), shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor, in all cases where a notice to tax is necessary" (*t*). Service of the notice at any time before six o'clock at night for a taxation on the next day is sufficient (*u*). This notice, or the first appointment made by the Master, is *peremptory*, and he can proceed *ex parte* thereon, unless sufficient cause is shown for a postponement; but, as a general rule, the Master will require a second appointment to be made and notice given. Any reasonable costs incurred in serving the notice will be allowed (*x*).

Consequence of omitting to give notice.

Omitting to give this notice when requisite, it seems, will not afford a ground for setting aside the judgment and execution. All the Court or a Judge will do, when no notice has been given, is to refer it to the Master to retax the costs; and if, upon the taxation, there be any reduction of the amount, they will make the party whose costs are taxed pay the costs of the order, or, if nothing be taxed off, they will not allow costs on either side (*y*).

Waiving irregularity in.

The solicitor for the opposite party, by attending the taxation, waives any irregularity in the notice (*z*).

Where several defendants.

As a general rule, where there are several defendants who defend separately and obtain a verdict generally, the costs of all need not be taxed at the same time (*a*); and it seems, that, in such a case, upon the taxation of the costs of one defendant the other defendant need not in general be present (*b*).

Affidavit of increase.

The Master will tax the costs upon a view of the proceedings, but if there be extra expenses incurred, which do not appear upon the face of the proceedings, such as witnesses' expenses, fees to counsel, attendances, Court fees, &c., *an affidavit should be made of these extra costs*, otherwise the Master will not be warranted in allowing them (*c*). The witnesses should be actually paid before the affidavit is made (*d*). As to giving a copy of the affidavit of increase to the opposite party or his solicitor, *see Ord. LXV. r.* 16, *supra*. The copy of the affidavit must in every respect be correct; and a

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(*q*) *Lloyd* v. *Kent*, 5 Dowl. 125.

(*r*) *Welch* v. *Vickery*, 15 M. & W. 59.

(*s*) See form, Chit. Forms, p. 362.

(*t*) See *Griffiths* v. *Liversedge*, 2 Dowl. 143.

(*u*) *Edmunds* v. *Cates*, 4 M. & W. 66: *Grant* v. *Mackenzie*, 1 Ex. 12, where a notice wrongly dated was held sufficient. On a Saturday notices must be served before 2 p.m.

(*x*) *Thorp* v. *Wordy*, 2 C. & J. 488.

(*y*) *Field* v. *Partridge*, 7 Ex. 689; 21 L. J., Ex. 269: *Lloyd* v. *Kent*, 5 Dowl. 125: *Bolton* v. *Manning*, 5 Dowl. 769: *Ilderton* v. *Sill*, 2 C. B. 249. See *Wheldale* v. *Eastern Counties R. Co.*, 13 M. & W. 9; 13 L. J., Ex. 258.

(*z*) *Wilkins* v. *Perkins*, 2 M. & W. 315; 5 Dowl. 461.

(*a*) *Brueford* v. *Griffin*, 6 Ex. 461; 2 L. M. & P. 363; 20 L. J., Ex. 287. See *Smith* v. *Campbell*, 6 Bing. 637.

(*b*) *Brueford* v. *Griffin*, supra, per *Parke*, B.

(*c*) See forms, Chit. Forms, p. 364. In the Chancery Division an affidavit of increase is only required when the Master, in the exercise of his discretion, requires one. *Smith* v. *Day*, 16 Ch. D. 728; 28 W. R. 712, *Fry*, J.

(*d*) *Trent* v. *Harrison*, 2 D. & L. 941.

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copy, with the words "sworn, &c." instead of copying the jurat at length, would be bad (*e*). *See also Ord. LXVI. r.* 7.

Delivery of copy of bill to opposite party.

A copy of the bill of costs must, where notice to tax is necessary, be given to the opposite party or his solicitor (*f*). If such copy is not delivered when requisite, the irregularity is waived by attending the taxation (*g*). The omission to deliver the copy of the bill is not a ground for setting aside the judgment; it is only a ground for an order to review the taxation (*h*), and for payment of the costs of the application, if any deductions be made; if not, each party pays his own costs (*i*).

Indorsements to be made on bill left for taxation.

By *R. of S. C., Ord. LXV. r.* 27 (58), "Every bill of costs which shall be left for taxation shall be endorsed with the name and address of the solicitor by whom it is so left, and also the name and address of the solicitor, if any, for whom he is agent, including any solicitor who is entitled or intended to participate in the costs to be so taxed."

Fees for taxing.

As to the fees to be paid for taxing a bill of costs, and as to the mode of paying such fees by stamps, *see Ords. in App., Vol.* 2.

The taxation.

The Taxation.]—The proceedings on the taxation are similar to those on a taxation between solicitor and client, as to which *see ante*, p. 149 *et seq.*

Power of taxing officer as to oaths, &c.

By *Ord. LXV. r.* 27, *sub-r.* 25, "The taxing officers of the Supreme Court, or of any Division thereof, shall for the purpose of any proceeding before them, have power and authority *to administer oaths*, and shall, in relation to the taxation of costs, *perform all such duties* as have heretofore been or are by general orders directed to be performed by any of the Masters, taxing Masters, registrars, or other officers of any of the Courts whose jurisdiction is by the Principal Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Principal Act were, or by general orders are, vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a Judge."

—As to attendance of parties.

By *Ord. LXV. r.* 27, *sub-r.* 27, "The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest

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(*e*) *Wheldale* v. *Eastern Counties R. Co.*, supra, n. (*y*).

(*f*) See Ord. LXV. r. 16, ante, p. 695: *Burch* v. *Pointer*, 3 M. & W. 310; 6 Dowl. 387.

(*g*) *Wilkins* v. *Perkins*, 2 M. & W. 315; 5 Dowl. 461.

(*h*) *Taylor* v. *Murray*, 6 Dowl. 80: *Wheldale* v. *Eastern Counties R. Co.*, 13 M. & W. 9; 13 L. J., Ex. 259, cases decided under the repealed rule.

(*i*) See *Lloyd* v. *Kent*, 5 Dowl. 125.

of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested."

—In case of neglect, delay, &c.

By *Ord. LXV. r.* 27, *sub-r.* 55, "Where, in proceedings before the taxing officer, any party is guilty of neglect or delay, or puts any other party to any unnecessary or improper expense relative to such proceedings, the taxing officer may direct such party or his solicitor to pay such costs as he may think proper, or deal with them under Regulation 21." (*See Reg.* 21, *post*, p. 706.)

—To require delivery of copies of bill.

By *sub-r.* 56, "Where in any cause or matter any bill of costs is directed to be taxed for the purpose of being paid or raised out of any fund or property, the taxing officer may, if he shall consider there is a reasonable ground for so doing, require the solicitor to deliver or send to his clients, or any of them, free of charge, a copy of such bill, or any part thereof, previously to such officer completing the taxation thereof, accompanied by any statement such officer may direct, and by a letter informing such client that the bill of costs has been referred to the taxing officer, giving his name and address for taxation, and will be proceeded with at the time the officer shall have appointed for this purpose, and such officer may suspend the taxation for such time as he may consider reasonable."

—As to time for proceedings.

By *sub-r.* 57, "The taxing officer shall have power to limit or extend the time for any proceeding before him, and where, by any general order, or any order of the Court or a Judge, a time is appointed for any proceeding before or by a taxing officer, unless the Court or Judge shall otherwise direct, such officer shall have power from time to time to extend the time appointed upon such terms (if any) as the justice of the case may require, and although the application for the same is not made until after the expiration of the time appointed, it shall not be necessary to make a certificate or order for this purpose, unless required for any special purpose."

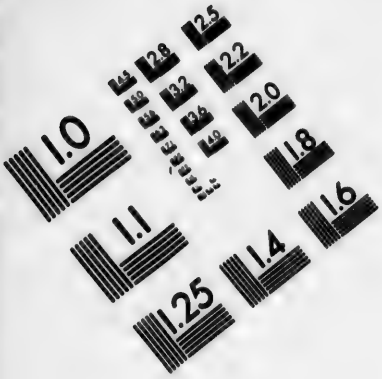
The certificate or allocatur.

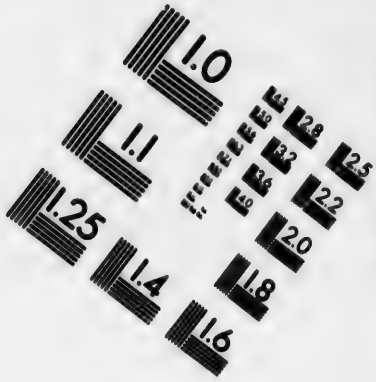
The Certificate or Allocatur.]—After the taxation is concluded the Master gives a certificate or allocatur certifying that he has taxed the costs and stating how much he finds to be due. In the case of taxation as between party and party a certificate is given, and as between solicitor and client an allocatur.

The taxation is not considered as finished until the allocatur is made (*k*), or certificate signed. The allocatur generally states the amount of the bill or bills, the subject of the taxation, the sum deducted, or added, on the taxation, the costs of the taxation, and the amount of the monies paid on account, and then finds the balance due to the solicitor, or, as the case may be, the amount to be refunded to the client or party applying for the taxation. By the 6 & 7 *V. c.* 73, *ss.* 37, 43, the allocatur (unless set aside or altered by order, decree or rule of Court) is final and conclusive as to the amount thereof; but it does not preclude the Court from going behind it for the purpose of investigating charges of misconduct (*l*). The allocatur is generally indorsed on the order for

(*k*) *Cleaver* v. *Hargrave*, 2 Dowl. 689.

(*l*) *Ex p. Harper*, 20 Ch. D. 685 (C. A.).





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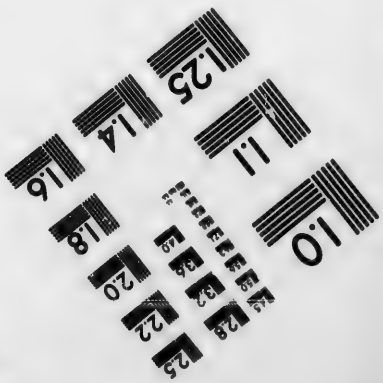

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taxation. The certificate is a separate document which is filed when the amount certified to be due is entered on the judgment. The Master may in all cases certify specially any circumstance relating to the bill, and upon which the Court or a Judge may make such order as they may think right respecting the payment of the costs (*n*).

Objections to taxation.

Objections to Taxation.]—If any party objects to the allowance or disallowance by the Master of any item or items in the bill he must carry in objections.

By *R. of S. C., Ord. LXV. r.* 27, *sub-r.* 39, "Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time *before the certificate or allocatur is signed*, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items, or parts thereof, objected to, and the grounds and reasons for such objections, and may thereupon apply to the taxing officer to review the taxation in respect of the same."

By *sub-r.* 40, "Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto."

Under these rules the practical course to be adopted by a party who objects to the allowance or disallowance of any item or items in a bill of costs, is to state in writing the item or items to which the objection applies, and sign the same and deliver the writing to the Master by whom the costs are taxed (*o*). This must be done before the certificate or allocatur is signed. When the general principle on which the taxation proceeded is objected to, it is not necessary to specify the items objected to (*p*). The writing stating the items objected to must also state the grounds and reasons for the objection (*q*). Upon this writing being delivered to him, the Master will reconsider his taxation, and give his decision on the points raised, and if the party objecting requires him to do so, will state in writing the grounds and reasons for his decision. No application to the Court or a Judge can be made unless the taxation has been first objected to in this manner.

(*n*) *Ex p. Harper*, supra: *Phillips* v. *Broadley*, 9 Q. B. 744: *Whalley* v. *Glover*, 3 C. & K. 13.

(*o*) See form, Chit. F. 45. The Judge will not, in general, before the taxation of costs, make an order as to the principle on which they are to be taxed, if objection be taken to that course. *Head* v. *Baldry*, 8 E. & E. 605: *Burton* v. *Burton*, 29 L. J., Ex. 291: *Sellman* v. *Boorn*, 8 M. & W. 552: *Cleaver* v. *Hargrave*, 2 Dowl. 689.

(*p*) *Sparrow* v. *Hill*, 7 Q. B. D. 362; 50 L. J., Q. B. 410; reversed in C. A. on another point, 8 Q. B. D. 479; 50 L. J., Q. B. 675.

(*q*) *Simmons* v. *Storer*, 14 Ch. D. 154; 49 L. J., Ch. 121.

By person not party to taxation.

A person who is not a party to the order for taxation, and who desires to have the taxation reviewed, must apply to have the order set aside and cannot apply to have the taxation reviewed (*r*).

Review of taxation.

Review of Taxation.]—By *Ord. LXV. r.* 27, *sub-r.* 41, "Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been *objected to as aforesaid*, may *within fourteen days from the date of the certificate or allocatur, or such other time as the Court or Judge or taxing officer, at the time he signs the certificate or allocatur, may allow*, apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as the Judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

By *sub-r.* 42, "Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct."

After the application to the Master to review has been made, and after he has stated the grounds and reasons for his decision and given his certificate or allocatur, a party objecting to the taxation may apply to a Judge at Chambers for an order that the taxation be reviewed in respect of the item or items objected to before the Master. This application is made by a summons (*s*). It must be made within fourteen days from the date of the certificate or allocatur, unless the Master allows further time (*t*). The application should be supported by an affidavit showing that the Master's certificate or allocatur has been granted. The Judge's decision is subject to an appeal to the Divisional Court. The costs of the appeal will be allowed to the successful party (*u*).

The Court or Judge will not generally interfere with the taxation upon a matter of discretion (*x*). They will do so only when the Master has been clearly and substantially wrong (*y*), or when he has considered himself bound by an inflexible rule or principle, which in fact does not exist or was not inflexible (*z*), or when the question is one of principle (*a*).

(*r*) *Charlton* v. *Charlton*, W. N. 1882, 183; 30 W. R. 237.

(*s*) See *Millard* v. *Burroughes*, W. N. 1879, 198.

(*t*) See sub-r. 41, supra: cp. *In re Tibbitts*, W. N. 1881, 168.

(*u*) *Sparrow* v. *Hill*, 7 Q. B. D. 362, 368. This was otherwise before the Jud. Acts, when the mistake was with the Master. *Ward* v. *Bell*, 2 Dowl. 76: *Parsons* v. *Pitcher*, 6 Dowl. 600: *Bartholomew* v. *Carter*, 4 M. & Gr. 612; 5 Sc. N. R. 498.

(*x*) *Wakefield* v. *Brown*, L. R., 9 Ex. 410: *Hargreaves* v. *Scott*, 4 C. P. D. 21: *Brown* v. *Sewell*, 16 Ch. D. 517; 44 L. T. 41 (C. A.), counsel's fees: *Harrison* v. *Wearing*, 11 Ch. D. 206; 41 L. T. 376, refreshers: *The Neera*, 5 P. D. 118, fees. See *Kirkwood* v. *Webster*, 9 Ch. D. 239, where the Judge allowed the costs of a third counsel, which had been disallowed by the Master.

(*y*) *Potter* v. *Rankin*, L. R., 5 C. P. 518: *Clarke* v. *Tyne Improvement Commissioners*, L. R., 3 C. P. 230: *Yglesias* v. *Royal Exchange, &c. Corporation*, L. R., 5 C. P. 141.

(*z*) *Bell* v. *Adkin*, L. R., 3 C. P. 320: *Sinclair* v. *G. E. R. Co.*, L. R., 5 C. P. 135: *Turnbull* v. *Jackson*, W. N. 1878, 96.

(*a*) *In re Allen, Davies* v. *Chatwood*, 11 Ch. D. 244, 246, per *Bacon*, V.-C.

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In general, the Master is the sole judge as to what costs shall be allowed for the getting up of evidence, and for the expenses of witnesses and matters relating to them; and the discretion exercised by him on taxation will not be reviewed by the Judge, unless it is clear that the Master has come to a wrong conclusion (*b*). The Judge will not interfere where the amount alleged to be improperly allowed is very trifling (*c*), as where the amount in dispute was 40*s.* (*c*). A review of the Master's taxation will be ordered where he has clearly made an error of calculation, or in the construction of an order as to the allocation of costs between the parties (*d*). Where the Master had been induced by false affidavits to allow a large sum as the fees and expenses of commissioners for the examination of witnesses, it was referred back to the Master to inquire, by such means as he should think fit, what sums had actually been paid, and to review the taxation if necessary (*e*). Where there is an error in the deductions made on the taxation of costs, and the Master's allocatur is made in ignorance of such fact, the party affected by such error is not at liberty to make an alteration in order to set it right, the proper course being to apply to the Master (*f*). It is not competent to the party showing cause to point out counter-mistakes made by the Master (*g*).

Sect. 3. *What Costs allowed on Taxation.*

What costs allowed.

What costs are to be allowed and the amount to be allowed are matters dealt with by the Master on the taxation. In many cases special rules are laid down by *R. of S. C., Ord. LXV. r.* 27 (which will be found *post*, p. 702 *et seq.*), both as to the proceedings in respect of which costs are to be allowed and the amount to be allowed. In other cases the old rules and fees are observed (*see sub-r.* 37, *post*, p. 708). In many instances these and fees (which will be found *post*, p. 702 *et seq.*) have been subject of decision of the Courts. Special provision is made for the guidance of the Master in cases where he has to exercise a discretion (*see sub-r.* 38, *post*, p. 708). Costs which the Master deems to have been incurred unnecessarily are not to be allowed (*see sub-r.* 20, *post*, p. 705.)

19 & 20 Vict. c. 108, s. 36, does not apply.

It may be useful to state that it has been held that the 36th section of the County Courts Act, 1856 (19 & 20 *V. c.* 108), which fixes a limit to costs as between solicitor and client in actions where no more than 20*l.* is claimed, does not apply to proceedings in the High Court (*h*).

Party and party. Solicitor and client.

There is a material difference between taxation between party and party and that between a solicitor and his client. Many charges are allowed in the latter case which would not be allowed in the former. Before a solicitor incurs expenses which would not, in the ordinary course, be allowed on taxation between party and party, he should explain to his client that the proposed expenses

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(*b*) See *Rennie* v. *Mills*, 5 Bing. N. C. 249; 8 L. J., C. P. 148: *Doe* v. *Webber*, 4 N. & M. 381; 2 A. & E. 448.

(*c*) *Newton* v. *Boodle*, 4 C. B. 359.

(*d*) *Levett* v. *Rothwell*, 27 L. J., Ex. 6: *Knight* v. *Gravesend R. Co.*, Id. 8: *Pobjoy* v. *Rich*, Id. 10.

(*e*) *Barnes* v. *Attwood*, 5 C. B. 164. See *Pembray* v. *Jones*, 11 Jur. 589, B. C.

(*f*) *Levy* v. *Drew*, 5 D. & L. 307.

(*g*) *Re Smith*, 8 Jur. 1143, Ex.

(*h*) *In re Copp*, 6 Q. B. D. 607; 50 L. J., Q. B. 233; 44 L. T. 48; 29 W. R. 390.

would not be so allowed, and obtain his authority for incurring them (*i*). If he fails to explain this, the costs may be disallowed on taxation between himself and his client, even although he had the client's express authority for incurring them (*i*). The special provisions and allowances provided by the *R. of S. C. Costs*, apply to taxation between solicitor and client as well as those between party and party (*j*).

Higher or lower scale.

Higher or Lower Scale of Costs.]—*Appendix N.* to the *R. of S. C.* (*post*, p. 719), contains a list of amounts to be allowed on taxation, divided into two columns, one headed "higher scale" and the other "lower scale." The amounts in the latter column are those ordinarily allowed, but in special cases costs on the higher scale may be obtained.

Lower scale in ordinary cases.

By *Ord. LXV. r.* 8, "In causes and matters commenced after these Rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'lower scale' in Appendix N. in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this Order otherwise provided for; and in causes and matters pending at the time when these Rules come into operation, to which the higher scale of costs previously in force was applicable, the same scale shall continue to be applied."

Higher scale—By order or under directions of Judge or Court.

By *r.* 9, "The fees set forth in the column headed 'higher scale' in Appendix N. may be allowed, either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if, on *special grounds* arising *out of the nature and importance, or the difficulty or urgency of the case*, the Court or a Judge shall, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so *order;* or if the taxing officer, under *directions* given to him for that purpose by the Court or a Judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid."

Under the former rules which specified more particularly the cases in which costs on the higher scale should be allowed, an order for taxation on that scale was granted in an action for breach of covenant and injunction involving a question of right (*k*); also in an action on a bill of exchange involving difficult questions as to partnership (*l*); also in an action founded on fraudulent misrepresentation in the prospectus of a company (*m*). But the order was refused in an action for trespass involving important questions when the plaintiff recovered nominal damages only (*n*); also in an action for trespass where an injunction was asked for and

(*i*) *Re Blyth*, 10 Q. B. D. 207; 52 L. J., Q. B. 186; 47 L. T. 610 (C. A.), shorthand notes—evidence of experts.

(*j*) *Re Chapman*, 10 Q. B. D. 54; 52 L. J., Q. B. 75; 47 L. T. 426 (C. A.).

(*k*) *Horner* v. *Oyler*, 49 L. J., C. P. 655. See *Goodhart* v. *Ayscough*, 10 Q. B. D. 71.

(*l*) *Pooley* v. *Driver*, 5 Ch. D. 458, 493; 36 L. T. 79.

(*m*) *Harrison* v. *Leutner*, 24 Ch. D. 594; 52 L. J., Ch. 927; 49 L. T. 91; 31 W. R. 837.

(*n*) *Duke of Norfolk* v. *Arbuthnot*, 6 Q. B. D. 279; 50 L. J., Q. B. 384.

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obtained (*n*); also in an action for recovery of land where fraud on the part of the defendant was alleged (*o*); also in a salvage action (*p*). The amount in dispute does not alone constitute sufficient special grounds (*q*). The Court refused to order costs to be taxed on the higher scale on an application for an interlocutory injunction, though the question was one of importance (*r*). An appeal lies from the decision of a Judge as to the scale on which costs are to be taxed; but the Court of Appeal will not interfere unless the Judge has proceeded on a wrong principle or made a clear error (*s*).

—Allowance of, by taxing officer on taxation of solicitor's bill.

By *r.* 10, "Upon any reference to a taxing officer to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof from the person to be charged therewith, if such bill shall include charges for business done in any cause or matter, the *taxing officer may allow* the fees set forth in the column headed 'higher scale' in Appendix N. in respect of such cause or matter, or in respect of any particular application made or business done therein, if on such special grounds, as are in the last preceding Rule mentioned, he shall think that such allowance ought to be so made."

Special allowances and general regulations.

Special Allowances and General Regulations.]—The allowance of costs in many particular cases is regulated by *Ord. LXV. r.* 27, which contains several sub-rules, and is headed "special allowances and general regulations," and which provides that the following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature (*t*):—

Writs of summons.

1. As to writs of summons requiring special indorsement, and as to special cases, pleadings and affidavits in answer to interrogatories, and other special affidavits, and admissions under Ord. XXXII. r. 4, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, and attendances, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

Special cases, pleadings, affidavits, &c.

Drawing pleadings, documents.

2. As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent or client, or for counsel to settle.

Instructions to sue or defend.

3. As to instructions to sue or defend, or the preparation of briefs, if the taxing officer shall on special grounds consider the fee in either scale provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

Affidavits—several deponents, &c.

4. As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go

(*n*) *Chapman* v. *Midland R. Co.*, 5 Q. B. D. 431; 49 L. J., Q. B. 449 (C. A.). See also *Hudson* v. *Osgerby*, 50 L. T. 323; 32 W. R. 566, where the defendant submitted to a perpetual injunction against the use of a trade mark.

(*o*) *Re Terrell*, 22 Ch. D. 473; 47 L. T. 588 (C. A.). See also *Rogers* v. *Jones*, 7 Ch. D. 345; 38 L. T. 17: *In re Sanderson*, 7 Ch. D. 176; 38 L. T. 379.

(*p*) *The Horace*, 53 L. J., P. 64; 50 L. T. 595; 32 W. R. 755.

(*q*) *In re Spettigue's Trusts*, 32 W. R. 385.

(*r*) *Grafton* v. *Watson*, 51 L. T. 141.

(*s*) *In re Terrell* (C. A.), supra.

(*t*) These rules apply to taxation between solicitor and client as well as to those between party and party. *In re Chapman*, 10 Q. B. D. 54; 47 L. T. 426 (C. A.).

to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

Affidavit in answer to interrogatories, &c.

5. The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over.

Delivery of pleadings, &c.

6. As to delivery of pleadings, services and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service.

Perusals.

7. As to perusals the fees are not to apply where the same solicitor is for both parties.

Same solicitor for several defendants.

8. Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

Evidence.

9. As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence (*u*), and the attendance of witnesses are to be allowed (*x*).

Agency correspondence.

10. As to agency correspondence, in country agency causes, and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at

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(*u*) Costs incurred in "qualifying witnesses," so as to enable them to give evidence at the trial, are included in this rule. *Mackley* v. *Chillingworth*, 2 C. P. D. 273; 46 L. J., C. P. 484: *Turnbull* v. *Janson*, 3 C. P. D. 264. Before this rule, the Master would not allow the expense of witnesses for inspecting premises, or making surveys, in order to enable them to give evidence in the cause (*Severn* v. *Olive*, 3 B. & B. 72; 6 Moore, 235: *May* v. *Selby*, 1 Dowl., N. S. 708: *Laing* v. *Bowes*, 3 M. & Sel. 89: *Nolan* v. *Copeman*, 42 L. J., Q. B. 44; L. R., 8 Q. B. 84), or the like. Nor would he allow for the expense of chemical experiments necessary to enable scientific men to give evidence in the cause (*May* v. *Selby*, 1 Dowl., N. S. 708; 4 M. & G. 142; 4 Sc. N. R. 727: *Gravatt* v. *Attwood*, 21 L. J., Q. B. 215: *Lamb* v. *Simpson*, 4 Ex. 85; 18 L. J., Ex. 377: *Ormerod* v. *Thompson*, 16 M. & W. 860), or the expense of searching for a subscribing witness. It seems that before the above rule the costs of inquiries as to the novelty of an invention, in an action for the infringement of a patent, would not be allowed as between party and party. *Curtis* v. *Platt*, 33 L. J., C. P. 255. So, before this rule, expenses incurred by a witness in seeking for the defendant, in order to identify him as the party who had committed the wrong of which the plaintiff complained in his action, would not be allowed. *Small* v. *Batho*, 21 L. J., Q. B. 254. Nor would the Master, it seems, allow the expenses of an inrolment of bankruptcy proceedings. *Butcher* v. *Addison*, 1 Sc. N. R. 175. But he would allow the expenses of successful searches for pedigree (*Johnson* v. *Lawson*, 2 Bing. 341); also the expense of making searches for, obtaining office copies of, and translating records. *Bastard* v. *Smith*, 10 A. & E. 213: *Duke of Beaufort* v. *Earl of Ashburnham*, 32 L. J., C. P. 97; 13 C. B., N. S. 598. See *Churton* v. *Frewer*, 36 L. J., Ch. 660. Costs of preparing plans for the better elucidating of the case before the Court and jury may be allowed, at the discretion of the Master. *Pilgrim* v. *Southampton and Dorchester R. Co.*, 8 C. B. 25: *Holmes* v. *Holmes*, 9 Moore, 158; 2 Bing. 75.

(*x*) The effect of this rule is to give the Master a discretion as to what allowances should be made for the attendance of witnesses in Court untrammeled by the old scale of charges. *Turnbull* v. *Janson*, 3 C. P. D. 264; 47 L. J., C. P. 384.

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liberty to make such special allowance in respect thereof as in his discretion he may think proper.

Attendance upon registrars in Chancery Division.

11. As to the attendance of solicitors upon the registrars in the Chancery Division for the purpose of settling the terms of and passing judgments or orders, the taxing officer may, in such cases as are provided for by Ord. LXII. r. 15, make such special allowances in respect thereof as he shall consider reasonable.

Attendances at Judges' Chambers.

12. As to attendances at the Judges' Chambers, where, from the length of the attendance, or from the difficulty of the case, the Judge or Master shall think the highest of the fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the Judge or Master in Chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the Judge or Master may allow such fee, in lieu of the fee of 1*l.* 1*s.* provided, not exceeding 2*l.* 2*s.*, or where the higher scale is applicable 3*l.* 3*s.*, or in proceedings to wind up a company 5*l.* 5*s.*, as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a Judge at Chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the Judge to deserve higher remuneration than the ordinary fees, the Judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the Judge, specifying distinctly the grounds of such allowance, such fee, not exceeding 10 guineas, as in his discretion he may think fit, instead of the fees of 2*l.* 2*s.*, 3*l.* 3*s.*, and 5*l.* 5*s.*

13. As to attendances at the Judges' Chambers, where by reason of the non-attendance of any party (unless it be considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without any useful progress being made, the Judge may order such an amount of costs (if any) as he shall think reasonable, to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested.

Meaning of folio.

14. A folio is to comprise seventy-two words, every figure comprised in a column, or authorized to be used, being counted as one word.

Fees to counsel for advising and settling.

15. Such costs of procuring the advice of counsel on the pleadings, evidence and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

Counsel's attendance at Chambers.

16. As to counsel attending at Judge's Chambers, no costs thereof shall in any case be allowed, unless the Judge certifies it to be a proper case for counsel to attend (*y*).

(*y*) This applies as between solicitor and client. *Re Chapman*, 10 Q. B. D. 54; 47 L. T. 426 (C. A.).

17. As to inspection of documents under Ord. XXXI. r. 15, no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection. Inspection of documents.

18. As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4*d.* per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof. Charge for copies made by one party for another.

19. Where any petition in a cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be 1*l.* 10*s.* The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition, without appearing thereon, he is to be allowed a fee not exceeding the amount aforesaid. Appearance on petition in Chancery Division after notice not to appear (*z*).

20. The Court or Judge may, at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in Court or at Chambers, and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length (*b*), or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, it shall be the duty (*c*) of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in Costs of unnecessary or improper matter in pleadings, &c. may be disallowed (*a*). —Duty of taxing officer.

(*z*) Trustees who are respondents to a petition for payment of money out of Court, and who are tendered 30*s.* under the rule, are not, as a rule, entitled to any costs of appearing on the petition. *Re Sutton*, 21 Ch. D. 855.

(*a*) See Ord. LXV. r. 11, ante, p. 184.

(*b*) See *Cracknall* v. *Janson*, 11 Ch. D. 1, 12; *Bull* v. *Jones*, W. N. 1880, 65.

(*c*) See *Baines* v. *Wormsley*, 47 L. J., Ch. 844; 47 L. T. 85.

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any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so; and in the Queen's Bench Division the Master shall make such order as may be required to effect the object of this regulation.

Setting off costs, &c. (*c*).

21. In any case in which, under the last preceding regulation, or any other rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered (*c*).

Note in Chancery Division of question under Reg. 20.

22. Where in the Chancery Division any question as to any costs is under Regulation 20 dealt with at Chambers, the chief clerk is to make a note thereof, and state the same on his allowance of the fees for attendances at Chambers, or otherwise, as may be convenient for the information of the taxing officer.

Unnecessary or improper appearance.

23. Where any party appears upon any application or proceeding in Court or at Chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or Judge shall expressly direct such costs to be allowed.

Applications for time.

24. The costs of applications to extend the time for taking any proceedings shall be in the discretion of the taxing officer, unless the Court or Judge shall have specially directed how the costs are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary, and could not, with due diligence, have been avoided. The costs of a summons to extend time shall not be allowed in cases to which Rule 8 of Ord. LXIV. (*d*) applies, unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent, to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application; and in case the taxing officer shall not allow the costs of such summons, and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment or deal with such costs in the manner provided by Regulation 21.

25. *Powers of Taxing Officers as to Oaths, &c. See this Regulation, ante*, p. 696.

Taxation of

26. Where an account consists in part of any bill of costs, the

Set off of costs.

(*c*) The power of setting off costs given by this rule is confined to costs due in respect of the same action (*Barker* v. *Hemming*, 5 Q. B. D. 609; 43 L. T. 678 (C. A.). It cannot be enforced in respect of costs of separate proceedings between the same parties. Id.: *Wilde* v. *Walford*, 52 L. J., Ch. 436; 48 L. T. 352; 31 W. R. 518. As to setting off debt against costs, see *Pringle* v. *Gloag*, 10 Ch. D. 676; 48 L. J., Ch. 380. As to the effect of the solicitor's lien on the power to set off costs, see Ord. LXV. r. 14, ante, p. 166. As to set off of costs of proceedings against costs of proceedings in bankruptcy, see *Ex p. Griffin, In re Adams*, 14 Ch. D. 37.

(*d*) See post, Ch. CXXVI.

Court or Judge may direct the taxing officer to assist in settling such costs, not being the ordinary costs of passing the account of a receiver, and the taxing officer, on receiving such direction, shall proceed to tax such costs, and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing officer by an order; and he shall return the same, with his opinion thereon, to the Court or Judge by whose direction the same were taxed.

bill forming part of account.

27. *Power of Taxing Officer as to Attendance of Parties.* *See this Regulation, ante*, p. 696.

28. *Refusal or Neglect to bring in Bill for Taxation.* *See this Regulation, ante*, p. 694.

Costs incurred unnecessarily, negligently, &c.

29. As to costs to be paid or borne by *another party*, no costs are to be allowed (*e*) which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party (*f*).

Work, &c. not specially provided for.

30. As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

Costs of amendments.

31. Where the plaintiff is directed to pay to the defendant the costs of the cause, the costs occasioned to a defendant by any amendment of the plaintiff's pleadings shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which shall appear to have been rendered necessary by the default of such defendant); but there shall be deducted from such costs any sum which may have been paid by the plaintiff according to the course of the Court at the time of any amendment.

32. Where upon taxation a plaintiff who has obtained a judgment with costs is not allowed the costs of any amendment of his pleadings on the ground of the same having been unnecessary, the defendant's costs occasioned by such amendment shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

Taxation on dismissal or refusal with costs.

33. Where an action or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order directed to be paid, the taxing officer may tax such costs without any order referring the same for taxation, unless the Court or a Judge upon the application of the party alleging himself to be aggrieved prohibits the taxation of such costs.

Where costs to be taxed in case parties differ.

34. Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the office of the proper taxing officer, and give notice of his having so done to the other party, and at

(*e*) This renders it obligatory on the taxing Master to consider whether any costs are within this rule, and to disallow any which are. *Simmons* v. *Storer*, 14 Ch. D. 154; 49 L. J., Ch. 121: *Warner* v. *Mosses*, 19 Ch. D. 72; 51 L. J., Ch. 86, costs of copies of pleadings on interlocutory applications.

(*f*) A general direction to tax does not interfere with the exercise of the discretion given by this rule. *Simmons* v. *Storer*, 14 Ch. D. 154. See *Warner* v. *Mosses*, supra: *Jones* v. *Roberts*, 2 Dowl. 374: *Heane* v. *Battersby*, 3 Dowl. 213: *Lewis* v. *Woolryeh*, Id. 692: *Ward* v. *Bell*, 2 Dowl. 76.

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any time within eight days after such notice such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or before the expiration of the eight days, or such further time as the taxing officer shall in his discretion allow, such other party shall either agree to pay the costs or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs; but where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing officer shall proceed to tax the costs; and where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs.

—Where costs to be paid out of money in Court.

35. Where any costs are by any judgment or order directed to be taxed and to be paid out of any money or fund in Court, the taxing officer in his certificate of taxation shall state the total amount of all such costs as taxed without any direction for that purpose in such judgment or order.

Fees to conveyancing counsel, accountants, &c.

36. The allowances in respect of fees to the conveyancing counsel of the Court, and to any accountants, merchants, engineers, actuaries and other scientific persons to whom any question is referred, shall be regulated by the taxing officers, subject to appeal to the Court or Judge, whose decision shall be final.

Former rules in force.

37. The rules, orders and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Principal Act, shall, in so far as they are not inconsistent with the Principal Act and these rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal (*g*).

As to fees in discretion of officer.

38. As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances: and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment.

39—42. *Objections to and Review of Taxation.* *See these Regulations, ante,* pp. 698-9 *et seq.*

Proceedings in District Registries.

43. When a writ of summons for the commencement of an action shall be issued from a district registry, and when an action proceeds in a district registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued at the Central Office, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the district registry.

(*g*) As to the effect of this rule, see *Pringle* v. *Gloag*, 10 Ch. D. 676, from which it appears that it does not apply all the principles adopted by the common law Courts to the Chancery Division. See also *Smith* v. *Day*, 16 Ch. D. 726.

44. No retaining fee to counsel shall be allowed on taxation as between party and party. Retainers to counsel.

45. Fees for conferences are not to be allowed in any cause or matter in addition to the solicitor's and counsel's fees for drawing and settling, or perusing any pleadings, affidavits, deeds or other proceedings or abstracts of title, or for advising thereon, unless it shall appear to the taxing officer for some special reason that a conference was necessary or proper. Conferences.

46. In any case in which under rule 12 of this order the scale of costs in County Courts is applicable, the costs of brieting more than one counsel shall not be allowed, unless the taxing officer shall, for special reasons, be of opinion that brieting more than one counsel was proper. One counsel in cases within Rule 12.

47. Where the costs of retaining two counsel may properly be allowed, such allowance may be made although both such counsel may have been selected from the outer bar. Two counsel, both juniors.

48. As to refresher fees, when any cause or matter is to be tried or heard upon *vivâ voce* evidence in open Court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:— Refresher fees.

To the leading counsel . . . from 5 to 10 guineas.
To the second, if three counsel . . ,, 3 to 7 ,,
To the third, if three counsel, or the second, if only two . . . ,, 3 to 5 ,,

The like allowances may be made where the evidence in chief is not taken *vivâ voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used.

49. Where a cause or matter shall not be brought on for trial or hearing, the costs of and consequent on the preparation and delivery of briefs shall not be allowed if the taxing officer shall be of opinion that such costs were prematurely incurred. Preparation of briefs where no trial.

50. Where a cause or matter which stands for trial is called on to be tried, but cannot be decided by reason of a want of parties or other defect on part of the plaintiff, and is therefore struck out of the paper, and the same cause is again set down, the defendant shall be allowed the taxed costs, occasioned by the first setting down, although he does not obtain the costs of the cause or matter. Where cause struck out for non-attendance, &c.

51. The following fees are to be allowed to counsel's clerks:— Fees to counsel's clerks.

	£	s.	d.
Upon a fee under 5 guineas . . .	0	2	6
5 guineas and under 10 guineas . . .	0	5	0
10 guineas and under 20 guineas . . .	0	10	0
20 guineas and under 30 guineas . . .	0	15	0
30 guineas and under 50 guineas . . .	1	0	0
50 guineas and upwards per cent. . .	2	10	0
On consultations, senior's clerk . . .	0	5	0
On consultations, junior's clerk . . .	0	2	6
On conferences	0	5	0
On retainers (where allowed):			
General retainer	0	10	6
Common retainer	0	2	6

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Counsel's signature for fees.

52. No fee to counsel shall be allowed on taxation unless vouched by his signature (*g*).

Office copies.

53. In cases in which an original affidavit can be used, and to which Ord. XXXVIII. r. 15 (*h*), applies, it shall not be necessary to take an office copy.

54. It shall not be necessary to take an office copy of an affidavit of discovery of documents, and the copy delivered by the party filing it may be used as against such party.

55—57. *Proceedings on Taxation of Costs.* *See these Regulations, ante*, p. 697.

58. *Indorsements on Bill of Costs left for Taxation.* *See this Regulation, ante*, p. 696.

Costs of particular proceedings.

Costs of Particular Proceedings, &c.]—A solicitor is entitled to his costs for writing a letter to defendant demanding the debt, before writ issued (*i*). The usual practice is to allow for one letter only (*k*).

Letters, &c.

The plaintiff is entitled to the allowance of a sum sworn to have been paid by him for the postage of foreign letters, as being solely applicable to the cause (*i*). As to agency correspondence, *see ante*, p. 187.

Notice of action.

The reasonable expenses of a notice of action, where it was necessary to give the same, may be allowed (*m*).

Writs.

The Master, it would seem, in his discretion may allow the costs of concurrent writs of summons (*n*).

Pleadings.

The costs of all necessary pleadings will, of course, be allowed to the party who succeeds on them (*o*). So will the costs of copies of the pleadings for use on interlocutory applications (*p*).

Orders.

The party who substantially (*q*) succeeds on a Master's or other order, which forms part of the regular proceedings in the cause, no mention of costs being made, will be entitled, if he also succeed in the cause, to have the costs of the order allowed him as costs in the cause (*r*). Thus, the costs of an unsuccessful application for a new trial are costs in the cause (*s*). But the successful party will not be so entitled to the costs of a rule merely collateral to the action; for instance, a rule to discharge the defendant out of

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(*g*) This rule is not retrospective. *Perks* v. *Gillott*, W. N. 1883, 189.

(*h*) See ante, p. 470.

(*i*) *Morrison* v. *Summers*, 1 Dowl. 325; 1 B. & Ad. 559. Where the debt is tendered before action, the defendant is not bound to pay the costs of the solicitor's letter. *Cause* v. *Coulson*, 32 L. J., Ex. 97; 7 L. T. 836: cp. *Holmes* v. *Stephens*, 6 Jur., N. S. 124.

(*k*) *Capel* v. *Staines*, 5 Dowl. 770; 2 M. & W. 850. See *Kirton* v. *Braithwaite*, 1 Id. 310.

(*l*) *Lopez* v. *De Tastet*, 7 Moore, 120; 3 B. & B. 292.

(*m*) *Kent* v. *Great Western R. Co.*, 3 C. B. 714; 16 L. J., C. P. 72. See ante, Ch. XII.

(*n*) *Morris* v. *Hunt*, 1 Chit. 544; ante, p. 229. See *Angus* v. *Coppard*, 6 Dowl. 137; 3 M. & W. 57. As to costs of service of writ abroad, see *White* v. *Brett*, 28 L. J., Ex. 32.

(*o*) *Morris* v. *Hunt*, 1 Chit. 544. As to disallowing unnecessary statements in pleadings, &c., see ante, p. 281.

(*p*) *Warner* v. *Mosses* (C. A.), 19 Ch. D. 72; 50 L. J., Ch. 86; 45 L. T. 359.

(*q*) A party who partly succeeds and partly fails in a rule in the cause does not do so. *M'Andrew* v. *Adams*, 3 Dowl. 120: *Barnes* v. *Hayward*, 25 L. J., Ex. 318.

(*r*) See *Goodall* v. *Ray*, 4 Dowl. 1; 1 H. & W. 333: *Mummery* v. *Campbell*, 2 Dowl. 798: *Pugh* v. *Kerr*, infra.

(*s*) *Eyre* v. *Thorpe*, 6 Dowl. 768: *Delisser* v. *Towne*, 1 Q. B. 333.

custody on the ground of coverture, or arrest in a wrong name (*t*). If an order be discharged, or made absolute expressly "without costs," the costs of the rule or order cannot afterwards be deemed costs in the cause; or if discharged or made absolute "with costs," although the costs in that case are costs in the cause, the party is entitled to have them taxed and paid at once, and that remedy in practice is generally resorted to, instead of waiting the event of the cause, and then including those costs in the judgment. If a rule or order be made absolute, or dismissed on the terms that the costs of it, or the application, are to be "costs in the cause," the costs will be taxed for the successful party. Where a rule or order is granted on payment of costs, and the party, instead of paying the costs, chooses to abandon the rule or order, these costs are not costs in the cause (*u*). If a solicitor show cause on his own behalf against a rule, his client not appearing, the costs of the solicitor will not be costs in the cause (*x*). Where the defendant obtained a rule to deliver up the bill on which the action was brought, or the like, on payment of costs, this did not make him liable to the costs of previous collateral rules which had been decided against him, but without mention of costs (*y*). Costs of orders made after judgment are not costs in the cause (*z*).

Preparing for trial.

The costs of preparing for trial will not be allowed until after notice of trial is given (*a*).

Costs of trial.

As to the costs at the trial:—Where a London agent has been appointed to attend the trial of a cause, it is a matter within the discretion of the Master, and with which, it seems, the Court will not in general interfere, whether the costs of a journey to London by the country solicitor to attend the trial or a reference of the cause shall be allowed (*b*). In one exceptional case the Court of Common Pleas allowed the costs of both the London agent and the country solicitor (*c*). As between solicitor and client, where proceedings are conducted by a London agent, the costs of the attendance in town of the country solicitor may be allowed where the solicitor has authority from his client to attend, and it is proper that he should do so (*d*). The usual fee for necessary (*e*) attendance

Attendance of solicitor, &c.

(*t*) *Mummery* v. *Campbell*, 2 Dowl. 798.

(*u*) *Pugh* v. *Kerr*, 8 Dowl. 218; 6 M. & W. 17.

(*x*) *Southee* v. *Terry*, 2 Dowl. 522.

(*y*) *Hannah* v. *Willis*, 5 Bing. N. C. 385.

(*z*) *Newton* v. *Boodle*, 4 C. B. 361, per *Wilde*, C. J.

(*a*) *Cooper* v. *Boles*, 5 H. & N. 188, discontinuance before notice of trial, instructions for brief not allowed: *Freeman* v. *Springham*, 14 C. B., N. S. 197; 32 L. J., C. P. 249, judgment in default of defence after defendant under terms to take short notice of trial, instruction for brief, briefs and opinion on evidence disallowed: *Curtis* v. *Platt*, 16 C. B., N. S. 465; 33 L. J., C. P. 255, discontinuance beyond notice of trial, but after order giving plaintiff liberty to set down cause before issue joined, and putting defendant under terms to take short notice. See *Knight* v. *Gravesend R. Co.*, 27 L. J., Ex. 8: *Mann* v. *Harbord*, L. R., 5 Ex. 17; 39 L. J., Ex. 27, provisional entry of cause at assizes.

(*b*) *Parsloe* v. *Foy*, 2 Dowl. 181: *Archer* v. *Marsh*, 7 Dowl. 541. See *Chapman* v. *Rodway*, 27 L. J., Ex. 7: *Sollery* v. *Flewker*, 27 L. J., Ex. 11: *Madison* v. *Bacon*, 5 Bing. N. C. 246: *In re Jonas Foster*, W. N. 1878, 92, country solicitor attending appeal in London allowed.

(*c*) *Bell* v. *Aitken*, L. R., 3 C. P. 320; 37 L. J., C. P. 168. And see *Potter* v. *Rankin*, L. R., 4 C. P. 76.

(*d*) *In re Storer*, 26 Ch. D. 189; 53 L. J., Q. B. 872; 50 L. T. 583; 32 W. R. 767.

(*e*) *Leaver* v. *Whalley*, 2 Dowl. 80.

at the trial will be allowed, though the solicitor be a party to the cause (*f*). Where a member of the same firm as the solicitor who conducted the cause attended as a witness, the Court held that his expenses were properly allowed (*g*). As to costs of several solicitors where there are several defendants, *see ante*, p. 703. Where the Master having allowed the expenses of plaintiff's solicitor's attendance at the trial as a witness for plaintiff, to support an issue upon which he was successful, he not attending as solicitor, but the cause being conducted by a competent clerk; the Court refused to interfere (*h*). It seems, that the expenses of a witness called to translate and explain an ancient record or foreign letters which are evidence in the cause (*i*), will be allowed (*k*). A charge for a document tendered, but not received in evidence, will not be allowed (*l*).

Shorthand notes.

The cost of shorthand notes of the proceedings at the trial will not be allowed in the absence of a special order made at the hearing or an agreement between the parties (*m*). The Court may, however, under special circumstances, allow the costs of them on an application for a new trial (*n*). They will not be allowed even on taxation between solicitor and client, even although the client has expressly authorized them, unless the solicitor has informed the client that they will probably be disallowed as between party and party (*o*). As to the allowance of shorthand notes of judgment on appeal, *see post, Ch. LXXXV.*

Fees to counsel.

With regard to fees to counsel on the trial the Master exercises a discretion, regulated by the nature and magnitude of the cause, and the number of witnesses to be examined (*p*). His discretion will not ordinarily be interfered with (*q*). A plaintiff may be allowed for fees to three counsel in a case of difficulty or length (*r*),

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(*f*) *Jervis* v. *Dewes*, 4 Dowl. 764. But see *London Scottish Building Society* v. *Chorley*, ante, p. 94.

(*g*) *Butler* v. *Hobson*, 5 Bing. N. C. 128; 5 Sc. 824; 7 Dowl. 157.

(*h*) *Butler* v. *Hobson*, supra. See *Madison* v. *Bacon*, 5 Bing. N. C. 246: *Archer* v. *Marsh*, 7 Dowl. 541: *Marshall* v. *Parsons*, 4 Jur. 1017, Ex.

(*i*) See *Lopez* v. *De Tastet*, 3 B. & B. 292; 7 Moore, 120.

(*k*) *Bastard* v. *Smith*, 10 A. & E. 213.

(*l*) *Bagnall* v. *Underwood*, 11 Price, 510.

(*m*) *Earl de la Warr* v. *Miles*, 19 Ch. D. 80; 45 L. T. 424; 30 W. R. 35: *Mostyn* v. *Lancaster*, 51 L. J., Ch. 696, 705: *Thorley's Food for Cattle Co.* v. *Massam*, 41 L. T. 513: *Collyer* v. *Isaacs*, 30 W. R. 70, 71: *Ex p. Harris*, 30 W. R. 560: *Croom* v. *Gore*, 1 H. & N. 14; 25 L. J., Ex. 267: *Duke of Beaufort* v. *Earl of Ashburnham*, 13 C. B., N. S. 598; 32 L. J., C. P. 97.

(*n*) *Watson* v. *Great West. R. Co.*, 6 Q. B. D. 163; 50 L. J., Q. B. 302. See *Lee Conservancy Board* v. *Button*, 12 Ch. D. 383.

(*o*) *Re Blyth*, 10 Q. B. D. 207; 47 L. T. 610 (C. A.).

(*p*) *Sharp* v. *Ashby*, 1 D. & L. 998; 12 M. & W. 732: *Lockstone* v. *London and Brighton R. Co.*, 12 C. B., N. S. 243: *Robb* v. *Connor*, 9 Ir. R. Eq. 373: *Smith* v. *Buller*, L. R., 19 Eq. 473; 45 L. J., Ch. 69. There is no rule which on the taxation of costs as between party and party forbids the allowance of a further fee to counsel on the occasion of delivering a further brief, although such further brief contain no new matter, but only a new arrangement in a more compendious form of matter which was in the first brief: *Wakefield* v. *Brown*, L. R., 9 C. P. 410; 43 L. J., C. P. 222.

(*q*) *Brown* v. *Sewell*, 16 Ch. D. 517; 44 L. T. 41: *Cousens* v. *Cousens*, L. R., 7 Ch. 48; 41 L. J., Ch. 166. See cases cited ante, p. 699, n. (*x*).

(*r*) *Kirkwood* v. *Webster*, 9 Ch. D. 239; 47 L. J., Ch. 880: *Morris* v. *Hunt*, 1 Chit. 544: *Cousens* v. *Cousens*,

but ordinarily only two will be allowed for (*s*). Where, in a case of difficulty, the Master allowed for one counsel only, the Court ordered his taxation to be reviewed (*t*). And the same where, in taxing defendant's costs on a new trial, in an action to recover 1,000*l*., where strict cross-examination was necessary, the Master disallowed the costs of a second brief and fees, on the ground that it did not appear that defendant had any witnesses to call (*u*). Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master may allow for fees to counsel on the second trial, with reference to the amount of those given on the first (*x*). Refreshers to counsel may and will generally be allowed after the case has lasted five hours on any one or more days for each clear day after the day on which such five hours expired (*y*).

Retainer fees are allowed in the Admiralty Division (*z*).

The costs of the attendance of counsel before a Judge or Master at Chambers will not be allowed, even as between solicitor and client, unless the Judge or Master certifies that the case was a fit one to be attended by counsel (*a*).

Brief copies, &c.

The Master will exercise his discretion as to what length of brief ought to be allowed for (*b*). Where, in actions on a policy of insurance against several, the solicitor had only made out a full brief in one case, and short statements in the others, but the

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L. R., 7 Ch. 48; 41 L. J., Ch. 168: *Betts* v. *Cleaver*, L. R., 7 Ch. 513; 41 L. J., Ch. 663.

(*s*) *Mason* v. *Brentini*, 42 L. T. 726: *Wegnan* v. *Corcoran*, 41 L. T. 792: *Merchant Banking Co.* v. *Maud*, L. R., 20 Eq. 452; 44 L. J., Ch. 581: *Smith* v. *Buller*, L. R., 19 Eq. 473; 45 L. J., Ch. 69: *Millard* v. *Burroughs*, W. N. 1880, 4, *Fry*, J.: *Llanover* v. *Homfray*, W. N. 1884, 134, *Pearson*, J. The mere fact that the junior who drew the pleadings has been made a Q. C. is not a sufficient reason for allowing the costs of a third counsel. *Memo*, L. R., 10 Ch. 540: cp. *Cousens* v. *Cousens*, supra: *Betts* v. *Cleaver*, L. R., 7 Ch. 513; 41 L. J., Ch. 663; *In re Laffitte*, L. R., 20 Eq. 650; 44 L. J., Ch. 633.

(*t*) *Grindall* v. *Godman*, 5 Dowl. 378.

(*u*) *Madison* v. *Bacon*, 5 Bing. N. C. 240. Only one counsel on each side will in general be allowed for on an arbitration. *Hawkins* v. *Rigby*, 8 C. B., N. S. 271; 29 L. J., C. P. 228. But in very exceptional cases two may be allowed. *Sinclair* v. *Great Eastern R. Co.*, L. R, 5 C. P. 135; 39 L. J., C. P. 165; 22 L. T. 652. By R. T. T. 1870, "On taxation of costs on a writ of inquiry the Master should allow only for one counsel, unless in the exercise of his discretion on all the circumstances of the case, including the amount in dispute, he is satisfied that there was more to do in the case than could reasonably be imposed on one counsel only." Cp. *Frost* v. *London, B. & S. C. R. Co.*, L. R., 5 Ex. 201; 39 L. J., Ex. 54, decided before this rule. As to the allowance of the costs of counsel on a commission, see *Yglesias* v. *Royal Exchange Assurance (Corporation)*, L. R., 5 C. P. 141; 39 L. J., C. P. 173.

(*x*) *Wilkinson* v. *Malin*, 2 Dowl. 65. See *Lord* v. *Wardle*, 6 Dowl. 174.

(*y*) Ord. LXV. r. 27; reg. 48, ante, p. 709: cp. *Lawrie* v. *Wilson*, L. R., 10 C. P. 152; 44 L. J., C. P. 87: *Harrison* v. *Wearing*, 11 Ch. D. 206; 48 L. J., Ch. 365: *Brown* v. *Sewell*, 16 Ch. D. 517; 44 L. T. 41. Subject to reg. 48, ante, p. 709, the amount of the refresher depends on the amount marked on fee and the nature of the case. *The Neera*, 5 P. D. 118; 42 L. T. 743.

(*z*) *The Neera*, 5 P. D. 118.

(*a*) See reg. 16, ante, p. 704.

(*b*) See *Pilgrim* v. *Southampton and Dorchester R. Co.*, 8 C. B. 25: *May* v. *Tarne*, 12 M. & W. 730.

Master allowed for the full briefs in all, the Court ordered him to review his taxation (*d*). In general briefs will not be allowed for before joinder of issue (*e*). As to allowing for a portion of the brief only, *see ante*, p. 688, n.

The Master has a discretion as to allowing the costs of copies of all the documents referred to in the affidavits of documents, and should not allow the costs of any which are not really material (*f*).

Witnesses, &c.

The Master will allow the expenses of all necessary witnesses (*g*); and this, although they were also subpœnaed and paid by the other party (*h*), and although they were not called at the trial (*i*), or were disbelieved by the jury (*k*). The successful party to a cause will be entitled to his expenses as a witness if he was a necessary one, but not otherwise (*l*). Although the evidence of particular witnesses be not in strictness admissible, yet if there was reasonable ground for believing it to be admissible, the Master will allow the expenses of them (*m*), even though they were not examined at the trial (*n*). But the Master will not allow the expenses of witnesses whose testimony is clearly inadmissible (*o*), or whose testimony would not have supported any issue in the cause (*p*). And where there is a defence to the statement of claim which is found for the defendant, he will not in general be entitled to the expenses of witnesses subpœnaed for reducing the

What witnesses allowed for.

(*d*) *Martinue* v. *Barnes*, 1 Tidd. 666: *Severn* v. *Olive*, 6 Moore, 235; 3 B. & B. 72. See *Mucklow* v. *Whitehead*, 9 Ex. 384; 23 L. J., Ex. 97, where two plaintiffs brought separate actions, and recovered damages against the same defendant in respect of a distinct injury sustained by each of them from the same cause.

(*e*) *Knight* v. *Gravesend R. Co.*, 27 L. J., Ex. 8: *Freeman* v. *Springham*, 14 C. B., N. S. 197; 32 L. J., C. P. 249; ante, p. 711, as to the costs of preparing for trial not being allowed before notice of trial given.

(*f*) *Millard* v. *Burroughs*, W. N. 1880, 4.

(*g*) The costs of experts, where such costs were disallowed on taxation between party and party, and the solicitor for the party calling them had, previously to doing so, informed his client that the costs would not be allowed, were allowed as between solicitor and client. *Re Blyth*, 10 Q. B. D. 207; 47 L. T. 610.

(*h*) *Benson* v. *Schneider*, 7 Taunt. 337; 1 Moore, 21, 76.

(*i*) *Morrison* v. *Harmer*, 5 Sc. 410: *Miller* v. *Thompson*, 4 M. & G. 260: *Paddock* v. *Forrester*, 2 Dowl., N. S. 125: *Stert* v. *Platel*, 8 Sc. 397: *Adamson* v. *Noel*, 2 Cnit. 200: *Bagnall* v. *Underwood*, 11 Price, 510.

(*k*) *Dods* v. *Evans*, 33 L. J., C. P. 146.

(*l*) *Howes* v. *Barber*, 18 Q. B. 588; 21 L. J., Q. B. 254: *Flower* v. *Gardner*, 3 C. B., N. S. 185; 27 L. J., C. P. 56.

(*m*) *Rushworth* v. *Wilson*, 1 B. & C. 267: *Hutchinson* v. *Alcock*, 1 D. & R. 165. And see *Andrews* v. *Thornton*, 8 Bing. 431: *Curling* v. *Fitzgerald*, 9 Dowl. 394; 2 M. & G. 349, nom. *Curling* v. *Evans*; *Dods* v. *Evans*, 33 L. J., C. P. 146.

(*n*) *Bagnall* v. *Underwood*, 11 Price, 511: *Adamson* v. *Noel*, 2 Chit. 200: *Benson* v. *Schneider*, 7 Taunt. 337: *Webb* v. *Tripp*, 1 Dowl., N. S. 589: *Miller* v. *Thompson*, 3 M. & G. 577; 11 L. J., C. P. 224: *Paddock* v. *Forrester*, 2 Dowl., N. S. 125.

(*o*) *Fisher* v. *Berrell*, 1 Dowl., N. S. 565.

(*p*) *Jones* v. *Tobin*, 4 Bing. N. C. 123: *Speeding* v. *Young*, 33 L. J., C. P. 286. It is a general rule to disallow the expenses of a witness rejected by the Judge at the trial, as between party and party. *Galloway* v. *Keyworth*, 15 C. B. 228; 23 L. J., C. P. 218. The same rule applies to a witness rejected by an arbitrator. *S. C.* The materiality of a witness is *primâ facie* a question for the Master; but the Court may review his decision. *S. C.*

damages (*q*). So, where a party objected to the evidence of witnesses, on the ground of their not being competent, and they were accordingly rejected, it was held, that he was not entitled to the costs of witnesses who had been in attendance for him to rebut such evidence (*r*). If by an alteration in the state of the pleadings after notice of trial certain witnesses are rendered unnecessary, the party who subpœnaed them must make reasonable efforts to prevent their attendance, or their expenses will not be allowed (*s*). The Master is in general the sole judge of the number of witnesses to be allowed in support of the same matter (*t*). If a bill of exchange on which an action has been brought is inadvertently burnt by a clerk of the plaintiff's solicitor, it seems doubtful whether the costs of witnesses to prove its destruction, so as to admit secondary evidence ought to be allowed (*u*). We have already seen, *ante*, p. 479, that no costs of a witness called to prove any document are to be allowed, except in certain cases. As to the costs of witnesses in qualifying themselves to give evidence, *see ante*, p. 703, n. (*u*). As to the costs of examining witnesses under a *mandamus* or commission, *see ante*, p. 559.

Commission.

The amount to be allowed for a witness is in the discretion of the taxing master (*x*). If the witness live within the bills of mortality, and be required to attend at Westminster, a shilling only is usually given to him (*y*), and the Master will allow only that sum on the taxation of costs. But if he live at a greater distance, or if required to attend at the assizes, then the Master will allow his travelling expenses, "according to the sums reasonably and actually paid, but in no case shall exceed 1*s.* per mile one way" (*z*). "If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause they will be entitled to a proportionate part in each cause only" (*a*). The travelling expenses of a foreign witness brought from abroad and returning to his country after the trial may be allowed (*b*). An allowance will also be made for the witness's necessary stay at the place of trial (*c*). And as a party in general is bound to have his witnesses in attendance from the commencement of the assizes,

Amount allowed for witnesses.

(*q*) *Hodgkinson* v. *Wyatt*, 4 Q. B. 749; 1 D. & L. 668; 13 L. J., Q. B. 73.

(*r*) *Fisher* v. *Berrell*, 1 Dowl., N. S. 565; 11 L. J., Q. B. 130.

(*s*) *Allport* v. *Baldwin*, 2 Dowl. 599.

(*t*) *Pilgrim* v. *Southampton and Dorchester R. Co.*, 8 C. B. 25.

(*u*) *Matthews* v. *Livesey*, 11 Exch. 221; 24 L. J., Ex. 252.

(*x*) *Thomas* v. *Parry*, W. N. 1880, 184.

(*y*) Ante, p. 562.

(*z*) See the directions to the Masters of H. T. 1853. See *Hunter* v. *Liddell*, 16 Q. B. 402; 20 L. J., Q. B. 200.

(*a*) See the above directions. A plaintiff having been brought up by *habeas corpus* to give evidence in one cause, when at the assizes gave evidence in another cause against the same defendant; the plaintiff having succeeded in the first and failed in the second cause, it was held that, on the taxation of the costs of the first cause, he was entitled only to one moiety of the costs of the *habeas corpus*. *Griffin* v. *Hoskyns*, 1 H. & N. 95.

(*b*) *Picasso* v. *Trustees of Maryport Harbour*, W. N. 1884, 85; Bitt. Ch. Cas. 47: *Thelluson* v. *Staples*, 2 Doug. 438. See *Hagedorn* v. *Alnutt*, 3 Taunt. 379: *Cotton* v. *Witt*, 4 Id. 55: *Schimmel* v. *Lousada*, Id. 695: *Sturdy* v. *Andrews*, Id. 697: *Tremaine* v. *Barrett*, 6 Taunt. 88; 1 Marsh. 463. See *Evans* v. *Watson*, 3 C. B. 327; 4 D. & L. 193; 15 L. J., C. P. 256.

(*c*) See ante, p. 563.

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their expenses from such time will generally be allowed (*d*). So the expenses of keeping a witness at home in a foreign country, so as to come over for the trial, may be allowed (*e*). The witness's station in life will be taken into consideration by the Master in making such allowances. An auctioneer employed to give evidence as a professional witness was held entitled to first-class travelling expenses (*f*). The witness's expenses must be paid to him in money (*g*) before they will be allowed on taxation (*h*). This applies to a plaintiff suing *in formâ pauperis* (*i*). The Master, subject to the above, is in general the sole judge for what expenses and for what loss of time witnesses should be allowed (*k*).

Compensation for loss of time.

If the witness be of such a profession, that, from the nature of his avocations, he cannot find a substitute, the Master will allow a reasonable compensation for his loss of time (*l*). Thus, he will allow payment for loss of time to physicians, surgeons, and solicitors (*m*), or auctioneers (*n*), or officers of the different Courts (*o*); but not, in general, to any other professional or scientific men (*p*), or to merchants (*q*), masters of vessels (*r*), brokers (*s*), or the like. As to the allowance for the attendance of a solicitor for the parties, *see ante*, p. 711. The Master may allow for the loss of time of a foreign witness, if in a situation to require it, and this in

(*d*) *Cosgrave* v. *Evans*, 2 Dowl. 443: *Platt* v. *Greene*, 2 Dowl. 216: *Thomas* v. *Saunders*, 3 N. & M. 752. It is in the discretion of the Master whether he will allow the expenses of witnesses caused by their arriving at the assize town before the commission day. *Harvey* v. *Divers*, 25 L. T. 147, C. P. See *Fryer* v. *Sturt*, 16 C. B. 218; 24 L. J., C. P. 154, where a cause was referred, and a question arose whether witnesses' expenses were costs in the cause or costs of the reference. Where the assizes last a long time, as at Liverpool, and the cause is entered low in the list, a party ought not to keep his witnesses at the assize town during the whole of the assizes unless absolutely necessary. Inquiry should be made as to the course that is to be pursued in trying the causes, and the witnesses' attendance should be regulated accordingly.

(*e*) *Picasso* v. *Trustees of Maryport Harbour*, W. N. 1884, 85; Bitt. Ch. Cas. 47.

(*f*) *In re Working Men's Mutual Society*, 21 Ch. D. 831; 51 L. J., Ch. 850.

(*g*) *Cross* v. *Durrell*, 29 L. J., Ex. 473.

(*h*) *Trent* v. *Harrison*, 14 L. J., Q. B. 210. And see *Collins* v. *Godefroy*, 1 B. & Ad. 950: *Lopez* v. *De Tastet*, 3 B. & B. 292; 7 Moore, 120: *Radcliffe* v. *Hall*, 3 Dowl. 802.

(*i*) *Freeman* v. *Rosher*, 6 D. & L. 517; 18 L. J., Q. B. 105.

(*k*) *Thomas* v. *Parry*, W. N. 1880, 184: *Skelton* v. *Steward*, 1 Dowl. 411: *Doe* d. *Smith* v. *Webber*, 4 N. & M. 381; 2 A. & E. 448.

(*l*) MS. M. 1814: *In re Working Men's Mutual Society*, 21 Ch. D. 831, per *Kay*, J., at p. 833: *S. C.*, 51 L. J., Ch. 850; 30 W. R. 938. A professional witness is entitled to his expenses as a professional man, though he is not called upon to give professional evidence. *Parkinson* v. *Atkinson*, 31 L. J., C. P. 199.

(*m*) Per *Tindal*, C. J., *Park*, J., and *Gaselee*, J., *Lonergan* v. *Royal Exchange Assurance Co.*, infra, n. (*n*): and per Cur., *Moor* v. *Adam*, 5 M. & S. 156.

(*n*) *In re Working Men's Mutual Society*, supra.

(*o*) *Bentall* v. *Sydney*, 10 A. & E. 163: *Bastard* v. *Smith*, Id. 213. As to the payment to be made and as to the mode of payment when an officer of the Court is subpœnaed, see Ords. in App., post, Vol. 2.

(*p*) *Severn* v. *Olive*, 3 B. & B. 72; 6 Moore, 235. But see *In re Working Men's Mutual Society*, supra, where an auctioneer was allowed compensation for loss of time.

(*q*) *Moor* v. *Adam*, 5 M. & Sel. 156.

(*r*) *White* v. *Brazier*, 3 Dowl. 499.

(*s*) *Lopez* v. *De Tastet*, 3 B. & B. 292; 7 Moore, 120.

addition to the expense of his conveyance from and back to his own country, and his maintenance here according to his station in life (*t*): and this, notwithstanding he might have been examined under a commission (*u*). The Master, however, will exercise his discretion as to this.

Contingent losses.

Any contingent losses the witnesses may have suffered by obeying the subpœna will not be allowed for (*x*).

Maintenance before trial.

If a person, although he is not a seafaring man, remain in this country, in order to give evidence, the Master may be justified in allowing for his maintenance from the service of the subpœna until the trial (*y*): at least if there is a satisfactory reason for not examining him before trial (*ante*, p. 534) (*z*). In one case, the plaintiff, the captain of a vessel, who remained in this country for the purpose of being examined on the trial, was allowed, under circumstances, for his maintenance from the service of the writ until the day of trial (*a*).

Costs of special jury.

The party at whose instance (*b*) the action is tried by a special jury, has to bear all the expenses occasioned by the trial by such special jury (*c*), and is not allowed, upon taxation of costs, any more or other costs than he would have been entitled to if the cause had been tried by a common jury, unless the Judge immediately after the verdict certifies upon the back of the record, that it was a proper cause to be tried by a special jury (*d*). The words "immediately after the verdict" mean within a reasonable time after it is pronounced (*e*). Where a Judge, during the absence of the jury to consider their verdict, had intimated his intention of certifying for a special jury, but, in consequence of the delivery of the verdict taking place while the Judge was engaged in another cause, his signature to the indorsement made by the officer of the

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(*t*) *Lonergan* v. *Royal Exchange Assurance Co.*, infra: *Tremaine* v. *Barrett*, 6 Taunt. 88; *Schimmel* v. *Lousada*, 4 Id. 695.

(*u*) *Evans* v. *Watson*, infra: *M'Alpine* v. *Coles* (or *Poles*), 2 Dowl. 299; 1 C. & M. 795.

(*x*) *Moor* v. *Adam*, 5 M. & Sel. 156. And see *Willis* v. *Peckham*, 1 B. & B. 515; 4 Moore, 300.

(*y*) *Berry* v. *Pratt*, 2 D. & R. 424; 1 B. & C. 276: *Ansett* v. *Marshall*, 22 L. J., Q. B. 118: *Lonergan* v. *Royal Exchange Ass. Co.*, 7 Bing. 725; 1 Dowl. 223. And see *Mount* v. *Larkins*, 8 Bing. 195; 1 M. & Sc. 357; 1 Dowl. 262: *Temperly* v. *Scott*, 1 M. & Sc. 601; 8 Bing. 392: *Stewart* v. *Steele*, 5 Sc. N. R. 517; 4 M. & G. 669: *White* v. *Brazier*, 3 Dowl. 499.

(*z*) *Evans* v. *Watson*, 3 C. B. 327; 4 D. & L. 193; 15 L. J., C. P. 256. In this case the witness was detained 300 days, the opposite party having intimated an intention of calling witnesses to impeach his character.

(*a*) *Howes* v. *Barber*, 18 Q. B. 588; 21 L. J., Q. B. 254. See *Ansett* v. *Marshall*, 22 L. J., Q. B. 118; *Calvert* v. *Scinde R. Co.*, 18 C. B., N. S. 306: *Potter* v. *Rankin*, L. R., 5 C. P. 518. As to allowing the expense of the maintenance of a witness, between the time of granting under the former practice of a rule nisi for a new trial and the time of its discharge, see *Dowdell* v. *Australian Royal Steam Navigation Co.*, 3 E. & B. 902; 23 L. J., Q. B. 369. And see Ch. LXVIII.

(*b*) See *Jones* v. *Tobin*, 4 Bing. N. C. 123; 6 Dowl. 251.

(*c*) See *Wilson* v. *Butler*, 2 M. & Rob. 78.

(*d*) 6 G. 4, c. 50, s. 34. See ante, p. 653. And see 24 G. 2, c. 18, s. 1. See Sayer, Costs, 181; 2 Stra. 1080; Barnes, 123; Tidd, 9th ed. 762: *Cursum* v. *Durham*, 2 Chit. Rep. 154: *Calvert* v. *Gordon*, 3 M. & Ry. 124.

(*e*) *Christie* v. *Richardson*, 2 Dowl., N. S. 503; 10 M. & W. 688; overruling *Waggett* v. *Shaw*, 3 Camp. 316. See *Grace* v. *Clinch*, 12 L. J., Q. B. 273; 4 Q. B. 606; 3 G. & D. 591.

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Court was not then applied for, and was supplied some weeks afterwards; it was held, that the Judge had not certified in time (*f*). It is impossible to lay down any general rule as to what is a proper case to be tried by a special jury (*g*). Where the case turned solely on a question of law, and there was no fact in dispute between the parties, *Abbott*, C. J., refused to certify for a special jury (*h*). The statute does not, it seems, extend to a case where the record is withdrawn, but only where the cause is tried (*i*). Nor, before 3 & 4 *W.* 4, *c.* 42, did it extend to a case where the plaintiff was nonsuited (*k*); but now by *Ord. LXV. r.* 1 (*ante*, p. 676), the defendant will be entitled to those costs in cases where the plaintiff is nonsuited, as well as where a verdict is found against him. In an old case where a declaration in trespass contained five counts to all of which defendant pleaded not guilty and not possessed, and a rule for a special jury was then obtained for plaintiff; but defendant, before trial, amended his pleas, and suffered judgment by default as to the last two counts, and at the trial plaintiff had a verdict upon the plea of not guilty, and defendant upon the plea of not possessed, and the damages were assessed at 40*s.* as to the last two counts, and the Judge certified for a special jury; it was held, that plaintiff was not entitled to the costs of the special jury (*l*). As to an arbitrator certifying for the costs of a special jury, *see Vol.* 2, *Ch. CXXXVI.*

Where plaintiff nonsuited.

Where the cause is made a *remanet*, the costs incurred in bringing up witnesses, attendances, &c., are generally allowed to the party ultimately successful (*n*). But if a Judge, of his own authority, discharged a jury from giving a verdict on the ground of their not being able to agree, the party ultimately successful was held formerly not entitled to the costs of the first attempt at trial (*o*), but this is otherwise now. Where, during the trial of a cause, one of the jury absconded, and the others were accordingly discharged, and a second trial was afterwards had, when a verdict was found for plaintiff, it was held that he was entitled to the costs of the first trial (*p*). As to the costs when a new trial is granted, *see post*, *Ch. LXVIII.*

Of remanet, &c.

(*f*) *Grace* v. *Clinch*, supra. See *Serrell* v. *Derbyshire, &c. Rail. Co.*, 10 C. B. 910, where the certificate was given after a special case argued in pursuance of an agreement at the trial. See *Leech* v. *Lamb*, 11 Ex. 437; 25 L. J., Ex. 17.

(*g*) *Orme* v. *Crockford*, 1 Car. & P. 537.

(*h*) *Wemyss* v. *Greenwood*, 2 Car. & P. 483.

(*i*) *Clements* v. *George*, 11 Moore, 510: *Greaves* v. *Eastern Counties Rail. Co.*, 28 L. J., Q. B. 290.

(*k*) *Wood* v. *Grimwood*, 10 B. & C. 689; 5 M. & W. 622.

(*l*) *Walters* v. *Howells*, 8 Exch. 284; 22 L. J., Ex. 96.

(*n*) *Standen* v. *Hall*, Say, 272; 1 Ld. Ken. 338: *Sparrow* v. *Turner*, 2 Wils. 366. See *Waller* v. *Blacklock*, 15 L. J., Ex. 333; 15 M. & W. 715: *Bentley* v. *Carver*, 2 C. B. 217; 15 L. J., C. P. 173.

(*o*) *Seely* v. *Powers*, 3 Dowl. 372: *Wall* v. *London and South Western Rail. Co.*, 25 L. J., Ex. 93: *Waite* v. *Spurgin*, 4 Dowl. 575. And see *Brown* v. *Clarke*, 12 M. & W. 25: *Bird* v. *Appleton*, 1 East, 111: *Wood* v. *Duncan*, 5 M. & W. 87 (overruling *Burchall* v. *Bellamy*, 5 Burr. 2693): *Bostock* v. *North Staffordshire Rail. Co.*, 18 Q. B. 777; 21 L. J., Q. B. 384, where counsel consented to the discharge.

(*p*) *Harrison* v. *Bennett*, 1 C. & M. 203.

As to the disallowance of costs where the solicitor for the suitor is uncertificated or disentitled thereto, *see ante*, p. 84. Where solicitor uncertificated, &c.

Interest on costs runs from the date of the judgment (*q*). Interest on costs.

Amounts allowable in Particular Cases.]—Appendix N. to the R. of S. C. contains a list of the amounts allowable on taxation. This appendix is as follows:— Amounts allowed in particular cases.

	Higher Scale (*r*).			Lower Scale (*r*).		
WRITS, SUMMONSES, AND WARRANTS.	£	*s.*	*d.*	£	*s.*	*d.*
Writ of summons for the commencement of any action	0	13	4	0	6	8
And for indorsement of claim, if special	0	5	0	0	5	0
Concurrent writ of summons	0	6	8	0	6	8
Renewal of a writ of summons	0	6	8	0	6	8
Notice of a writ for service in lieu of writ out of jurisdiction	0	5	0	0	4	0
Writ of inquiry	1	1	0	1	1	0
Writ of mandamus	1	1	0	0	10	0
Or per folio	0	1	4	0	1	4
Writ of subpœna ad testificandum or duces tecum.	0	6	8	0	6	8
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Writ or writs of subpœna ad testificandum for any number of persons not exceeding three, and the same for every additional number not exceeding three	0	6	8	0	6	8
Writ of distringas, pursuant to stat. 5 Vict. c. 5.	0	13	4	0	13	4
Writ of execution, or other writ to enforce any judgment or order	0	10	0	0	7	0
And if more than four folios, for each folio beyond four	0	1	4	0	1	4
Procuring a writ of execution or notice to the sheriff, marked with a seal of renewal	0	6	8	0	6	8
Notice thereof to serve on sheriff	0	5	0	0	4	0
Any writ not included in the above	0	10	0	0	7	0
These fees include all indorsements and copies, or præcipes, for the officer sealing them, and attendances to issue or seal, except where otherwise provided, but not the court fees.						
Summonses to attend at judges' chambers	0	6	8	0	3	0
Or if special, at taxing officer's discretion, not exceeding	1	1	0	0	13	4
Copy for the judge, when required	0	2	0	0	2	0
Or per folio	0	0	4	0	0	4
Originating summons for proceedings in chambers in the Chancery Division at taxing officer's discretion, not exceeding	1	1	0	1	1	0
And attending to get same and duplicate sealed, and at the proper office to file duplicate and get copies for service stamped	0	13	4	0	13	4
Copy for the judge	0	2	0	0	2	0
Or per folio	0	0	4	0	0	4
Indorsing same and copies under Ord. LV. r. 22.	0	6	8	0	6	8

(*q*) *Pyman* v. *Burt*, W. N. 1884, 108: *Landowners' West of England &c. Co.* v. *Ashford*, 33 W. R. 365; 35 L. T. 850, contra, is wrong. *Schroder* v. *Clough*, 46 L. J., C. P.

(*r*) See ante, p. 701.

	Higher Scale. £ s. d.	Lower Scale. £ s. d.
SERVICES AND NOTICES.		
Service, or filing in lieu of service, of any writ, summons, warrant, interrogatories, petition, order, or notice on a party who has not entered an appearance, and if not authorized to be served by post	0 5 0	0 5 0
If served at a distance of more than two miles from the nearest place of business, or office of the solicitor serving the same, for each mile beyond such two miles therefrom	0 1 0	0 1 0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition	0 7 0	0 7 0
Where more than one attendance is necessary to effect service, or to ground an application for substituted service, such further allowance may be made as the taxing officer shall think fit.		
For service out of the jurisdiction such allowance is to be made as the taxing officer shall think fit.		
Service where an appearance has been entered on (*sic*) the solicitor or party	0 2 6	0 2 6
Or if authorized to be served by post	0 1 6	0 1 6
Where any writ, order, and notice, or any two of them, have to be served together, one fee only for service is to be allowed.		
In addition to the above fees, the following allowances are to be made:—		
As to writs, if exceeding two folios, for copy for service, per folio beyond such two	0 0 4	0 0 4
As to summons to attend at the judges' chambers, for each copy to serve	0 2 0	0 1 0
Or per folio	0 0 4	0 0 4
As to notices in proceedings to wind up companies, for preparing or filling up each notice to creditors to attend and receive debts, and to contributories to settle list of contributories	0 1 0	0 1 0
And for preparing or filling up each notice to contributories to be served with a general order for a call, or an order for payment of a call	0 1 0	0 1 0
And for drawing notice to be served on contributories or creditors of a meeting, per folio	0 1 0	0 1 0
For each copy of the last-mentioned notice to serve, per folio	0 0 4	0 0 4
For preparing or filling up for service in any other cause or matter, each notice to creditors to prove claims, and each notice that cheques may be received, specifying the amount to be received for principal and interest, and costs, if any	0 1 0	0 1 0
For preparing notice to produce on the trial or hearing of an action, or notice to admit	0 7 6	0 5 0
If special or necessarily long, such allowance as the taxing officer shall think proper, not exceeding per folio	0 1 0	0 0 8
And for each copy, such allowance as the taxing officer shall think proper, not exceeding per folio	0 0 4	0 0 4
For preparing notice of motion	0 5 0	0 3 0
Or per folio	0 1 0	0 1 0

	Higher Scale. £ s. d.	Lower Scale. £ s. d.
Copy for service	0 1 0	0 1 0
Or per folio	0 0 4	0 0 4
For preparing any necessary or proper notice, not otherwise provided for, or any demand, pursuant to Ord. VII. rr. 1 and 2	0 1 6	0 1 6
Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three	0 1 0	0 1 0
And for each copy for service, per folio, beyond such three	0 0 4	0 0 4
Copies for service of interrogatories and petitions, and of orders with necessary notices (if any) to accompany, per folio	0 0 4	0 0 4
Except as otherwise provided, the allowances for services include copies for service.		
Where notice of filing affidavits is required, only one notice is to be allowed for a set of affidavits filed, or which ought to be filed together.		
In proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than 3*l.*		
Where any appointment is or ought to be adjourned, service of a notice of the adjournment, or next appointment, is not to be allowed.		
APPEARANCES.		
Entering any appearance	0 6 8	0 6 8
If entered at one time, for more than one person, for every defendant beyond the first	0 2 0	0 1 0
If a person appearing to a writ of summons to recover land limits his defence by his memorandum of appearance, in addition to the above	0 6 8	0 6 8
INSTRUCTIONS.		
To sue or defend	0 13 4	0 6 8
For statement of claim or special case	2 2 0	0 13 4
For indorsement of writ of summons when no further statement of claim	1 1 0	0 13 4
For originating summons 6*s.* 8*d.*, or not to exceed	1 1 0	1 1 0
For defence or further defence	0 13 4	0 6 8
For counter-claim	0 13 4	0 6 8
For reply when defendant sets up a counter-claim	1 1 0	0 13 4
For reply or further reply in any other case with or without joinder of issue	0 13 4	0 6 8
For confession of defence	0 13 4	0 6 8
For joinder of issue without other matter	0 13 4	0 6 8
For special petition, any other pleading (not being a summons), and interrogatories for examination of a party or witness	0 13 4	0 6 8
To amend any pleading	0 13 4	0 6 8
For affidavit in answer to interrogatories, and other special affidavits	0 6 8	0 6 8
To appeal against order of court or judge, and to appear thereon	1 1 0	0 13 4
To add parties by order of court or judge	0 13 4	0 6 8

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	Higher Scale. £	s.	d.	Lower Scale. £	s.	d.
For counsel to advise on evidence when the evidence in chief is to be taken orally	0	6	8	0	6	8
Or not to exceed	1	1	0	1	1	0
For counsel to make any application to a court or judge where no other brief	0	10	0	0	6	8
For brief on motion for special injunction	1	1	0	0	13	4
For brief on hearing or trial of action upon notice of trial or notice for judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages	2	2	0	1	1	0
For such brief, and for brief on the hearing of an appeal when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances, if any, for attendances on witnesses and procuring evidence.						
The fees for instructions for brief are to apply to a hearing on further consideration in court only where an order for accounts and inquiries was made without such hearing or trial, as above mentioned.						
DRAWING PLEADINGS AND OTHER DOCUMENTS.						
Statement of claim	1	1	0	0	10	0
Or per folio	0	1	0	0	1	0
Defence	0	10	0	0	5	0
Or per folio	0	1	0	0	1	0
Counter-claim	1	1	0	0	5	0
Or per folio	0	1	0	0	1	0
Reply, with or without joinder of issue, confession of defence, joinder of issue without other matter, and any other pleading (not being a petition or summons) and amendments of any pleading	0	10	0	0	5	0
Or per folio	0	1	0	0	1	0
Particulars, breaches and objections, when required, and one copy to deliver	0	6	8	0	5	0
Or such amount as the taxing officer shall think fit, not exceeding per folio	0	1	0	0	0	8
If more than one copy to be delivered, for each other copy, per folio	0	0	4	0	0	4
Special case, whether original or in an action, affidavits in answer to interrogatories and other special affidavits, special petitions and interrogatories, per folio	0	1	0	0	1	0
Brief, on trial or hearing of cause, issue of fact, assessment of damages, examination of witnesses, special case and petition before a court or judge, sheriff, commissioner, referee, examiner, or officer of the court, when necessary and proper in addition to pleadings, including necessary and proper observations, per folio	0	1	0	0	1	0
Brief on application to add parties	0	10	0	0	6	8
Or per folio	0	1	0	0	1	0

	Higher Scale. £ s. d.	Lower Scale. £ s. d.
Brief on further consideration, per sheet of 10 folios	0 6 8	0 6 8
Accounts, statements, and other documents for the judges' chambers, when required, not exceeding per folio	0 1 0	0 0 8
Advertisements to be signed by judge's clerk, including attendance therefor	0 13 4	0 6 8
Bills of costs for taxation, including copy for the taxing officer	0 0 8	0 0 8
COPIES (*s*).		
Of pleadings, briefs, and other documents where no other provision is made, at per folio	0 0 4	0 0 4
Where, pursuant to rules of court any pleading, special case or petition of right, or evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer (except when made by the officer of the court), at per folio	0 0 4	0 0 4
And for examining the proof print, at per folio	0 0 2	0 0 2
And for printing the amount actually and properly paid to the printer, not exceeding per folio	0 1 0	0 1 0
And in addition for every 20 beyond the first 20 copies, at per folio	0 0 1	0 0 1
And where any part shall properly be printed in a foreign language, or as a fac-simile, or in any unusual or special manner, or where any alteration in the document being printed becomes necessary after the first proof, such further allowance shall be made as the taxing officer shall think reasonable.		
These allowances are to include all attendances on the printer.		
The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor.		
In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (videlicet):		
Of any pleading for delivery to the opposite party, or filing in default of appearance		
Of any special case for filing		
Of any petition of right for presentation, if presented in print, and for the solicitor of the treasury, and service on any party		
Of any pleading, special case, or petition of right, for the use of the court or judge		
Of any affidavit to be sworn to in print		

(*s*) Copies of the pleadings are allowed on an interlocutory application to the Court of Appeal. *Warner v. Mosses*, 19 Ch. D. 72; 51 L. J., Ch. 86. As to the costs of copies and perusals by defendant of his co-defendant's defence, see *Great Eastern R. Co.* v. *Norwich, &c. R. Co.*, W. N. 1881, 92.

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	Higher Scale. £ s. d.	Lower Scale. £ s. d.
And of any pleading, special case, petition of right, or evidence for the use of counsel in court, and in country agency causes when proper to be sent as a close copy for the use of the country solicitor, at per folio	0 0 3	0 0 2
Such additional allowances for printed copies for the court or judge, and for counsel, are not to be made where written copies have been made previously to printing, and are not in any case to be made more than once in the progress of the cause.		
Close copies, whether printed or written, are not to be allowed as of course, but the allowance is to depend on the propriety of making or sending the copies, which in each case is to be shown and considered by the taxing officer.		
Inserting amendments in a printed copy of any pleading, special case, or petition of right, when not reprinted	0 5 0	0 1 0
Or per folio	0 0 4	0 0 4
PERUSALS (*t*).		
Of statement of claim, defence, reply, joinder of issue, and other pleading (not being a petition in a pending cause or matter, or summons other than an originating summons), by the solicitor of the party to whom the same are delivered	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of amendment of any such pleading in writing	0 6 8	0 6 8
Or per folio	0 0 4	0 0 4
If same reprinted	0 13 4	0 6 8
Or per folio of amendment	0 0 4	0 0 4
Of interrogatories to be answered by a party by his solicitor	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of special case by the solicitor of any party except the one by whom it is prepared	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of copy order to add parties, notice of defendant's claim against any person not a party to the action under Ord. XVI. r. 49, and of defendant's defence and counter-claim served on a person not a party under Ord. XXI. r. 13, by the solicitor of the party served therewith, and in these several cases the perusal of the plaintiff's statement of claim is also to be allowed unless the solicitor has been previously allowed such perusal	0 13 4	0 6 8
Or per folio	0 0 4	0 0 4
Of notice to produce on trial or hearing of action, and notice to admit by the solicitor of the party served	0 13 4	0 6 8
Or (if to admit facts) under Ord. XXXII. r. 4, per folio	0 1 0	0 1 0

(*t*) The costs of perusals of exhibits to affidavits are not allowed without a special order. *Re De Rosas, Rymer* v. *De Rosas*, 24 Ch. D. 684; 49 L. T. 133.

	Higher Scale. £ s. d.	Lower Scale. £ s. d.
Of affidavit in answer to interrogatories by the solicitor of the party interrogating, and of other special affidavits by the solicitor of the party against whom the same can be read, per folio ..	0 0 4	0 0 4
ATTENDANCES.		
To obtain consent of next friend to sue in his name or of a guardian *ad litem*	0 13 4	0 6 8
To deliver, or file in lieu of delivery, any pleading (not being a petition or summons) and a special case	0 6 8	0 3 4
To inspect, or produce for inspection, documents pursuant to a notice to admit	0 13 4	0 6 8
Or per hour	0 6 8	0 6 8
To examine and sign admissions	0 13 4	0 6 8
To inspect, or produce for inspection, documents referred to in any pleading, notice in lieu of pleading, or affidavit, pursuant to notice under Ord. XXXI. r. 14	0 6 8	0 6 8
Or per hour	0 6 8	0 6 8
To obtain or give any necessary or proper consent.	0 6 8	0 6 8
To obtain an appointment to examine witnesses ..	0 6 8	0 6 8
On examination of witnesses before any examiner, commissioner, officer, or other person.....	0 13 4	0 13 4
Or according to circumstances, not to exceed	2 2 0	2 2 0
Or if without counsel, not to exceed	3 3 0	3 3 0
On deponents being sworn, or by a solicitor or his clerk to be sworn, to an affidavit in answer to interrogatories or other special affidavit.....	0 6 8	0 6 8
On a summons at judges' chambers.....	0 6 8	0 6 8
Or according to circumstances, not to exceed	1 1 0	1 1 0
In the Chancery Division, all allowances for attending at the judges' chambers are to be by the judge or chief clerk as heretofore.		
To file chief clerks' and taxing masters' certificates, and get copy marked as an office copy	0 6 8	0 6 8
On counsel with brief or other papers—		
If counsel's fee one guinea	0 6 8	0 3 4
If more and under five guineas.....	0 6 8	0 6 8
If five guineas and under twenty guineas	0 13 4	0 6 8
If twenty guineas	1 1 0	0 13 4
If forty guineas or more.....	2 2 0	—
On consultation or conference with counsel	0 13 4	0 13 4
To enter or set down action, special case, or appeal, for hearing or trial	0 6 8	0 6 8
In court on motion of course and on counsel and for order	0 13 4	0 10 0
To present petition for order of course and for order	0 13 4	0 10 0
In court on every special motion, each day	0 13 4	0 6 8
On same when heard each day.....	0 13 4	0 13 4
Or according to circumstances, not to exceed	2 2 0	2 2 0
On special case, or special petition, or application adjourned from the judges' chambers, when in the special paper for the day, or likely to be heard	0 10 0	0 6 8
On same when heard	1 1 0	0 13 4

PART VIII.

	Higher Scale. £	s.	d.	Lower Scale. £	s.	d.
Or according to circumstances, not to exceed	2	2	0	2	2	0
On hearing or trial of any cause, or matter, or issue of fact, in London or Middlesex, or the town where the solicitor resides or carries on business, whether before a judge with or without a jury, or commissioner, or referee, or on assessment of damages, when in the paper.....	0	10	0	0	10	0
When heard or tried	1	1	0	0	13	4
Or according to circumstances, not to exceed	3	3	0	3	3	0
When not in London or Middlesex, nor in the town where the solicitor resides or carries on business, for each day (except Sundays) he is necessarily absent	3	3	0	3	3	0
And expenses (besides actual reasonable travelling expenses) each day, including Sundays	1	1	0	1	1	0
Or if the solicitor has to attend on more than one trial or assessment at the same time and place, in each case	1	11	6	1	1	0
The expenses in such case to be rateably divided.						
To hear judgment when same adjourned	0	13	4	0	6	8
Or according to circumstances	1	1	0	0	13	4
To deliver papers (when required) for the use of a judge prior to a hearing.....	0	6	8	0	6	8
If more than one judge	0	13	4	0	13	4
On taxation of a bill of costs.....	0	6	8	0	6	8
Or according to circumstances, not to exceed	2	2	0	2	2	0
Unless the same shall necessarily occupy so much time that the taxing officer shall consider such amount inadequate, in which case he may allow such further fee as he shall think proper.						
In actions and matters for purposes within the cognizance of the Court of Chancery before the Principal Act came into operation, such further fee as the taxing officer may think fit, not exceeding the allowances heretofore made.						
To obtain or give an undertaking to appear	0	6	8	0	6	8
To present a special petition, and for same answered	0	6	8	0	6	8
On printer to insert advertisement in Gazette	0	6	8	0	6	8
On printer to insert same in other papers, each printer	0	6	8	—		
Or every two	—			0	6	8
On registrar to certify that a cause set down is settled, or for any reason not to come into the paper for hearing	0	6	8	0	6	8
For an order drawn up by chief clerk, and to get same entered	0	6	8	0	6	8
On counsel to procure certificate that cause proper to be heard as a short cause, and on registrar to mark same	0	6	8	0	6	8
To mark conveyancing counsel or taxing master ..	0	6	8	0	6	8
For preparing and drawing up an order made at chambers in proceedings to wind up a company and attending for same, and to get same entered	0	13	4	0	13	4
And for engrossing every such order, per folio....	0	0	4	0	0	4

NOTE.—An order of course means an order made on an *ex parte* application, and to which a party is entitled as of right on his own statement and at his own risk.

	Higher Scale. £ s. d.	Lower Scale. £ s. d.	CHAP. LXVII.
To examine an abstract of title with deeds, per hour, in a cause or matter	0 10 0	0 10 0	
To produce deeds for such purpose, per hour	0 6 8	0 6 8	
OATHS AND EXHIBITS.			
Commissioners to take oaths or affidavits. For every oath, declaration, affirmation, or attestation upon honour in London or the country	0 1 6	0 1 6	
The solicitor for preparing each exhibit in town or country	0 1 0	0 1 0	
The commissioner for marking each exhibit	0 1 0	0 1 0	
TERM FEES.			
For every term commencing on the day the sittings in London and Middlesex of the High Court of Justice commence, and terminating on the day preceding the next such sittings, in which a proceeding in the cause or matter by or affecting the party, after appearance entered, shall take place	0 15 0	0 15 0	
And further, in country agency causes or matters, for letters	0 6 0	0 6 0	
Where no proceeding in the cause or matter is taken which carries a term fee, a charge for letters may be allowed, if the circumstances require it.			
In addition to the above an allowance is to be made for the necessary expense of postages, carriage and transmission of documents.			

Sect. 4. *Recovery of Costs.*

Execution, &c.

Where costs are directed to be paid, the judgment or order containing the direction may be enforced by execution (*u*). *Ord. XLII. r.* 18 (*post*, p. 793), enables the judgment creditor to issue separate writs for the debt and for the costs (*x*).

It has been held that an order for payment of costs cannot be enforced by attachment of debts (*y*); but it is very respectfully submitted that this decision is not good law now. Such an order may be enforced by a charging order (*z*).

By *R. of S. C., Ord. XLIII. r.* 7, "No subpœna for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment shall be issued" (*a*).

Action.

An action or counterclaim will lie for costs payable by a Judge's order (*b*), or by an order of the House of Lords directing an un-

(*u*) **R. of S. C., Ord. XLII. r. 17.** See post, p. 788.

(*x*) Execution for the debt does not bar the right to tax the costs. *Harris* v. *Jewell*, W. N. 1884, 216.

(*y*) *Cremetti* v. *Crom*, 4 Q. B. D. 225; 48 L. J., Q. B. 337: cp. however, *Whittaker* v. *Whittaker*, 7 P. D. 15; 51 L. J., P. 80.

(*z*) *Burns* v. *Irving*, 46 L. J., Ch. 423, V.-C. H.

(*a*) In *Snow* v. *Bolton*, 17 Ch. D. 433; 50 L. J., Ch. 743, leave to issue a sequestration to enforce the payment of costs was granted.

(*b*) *Philpott* v. *Lehain*, 35 L. T. 855. See Ord. XLII. r. 24: and cp. *Sheehy* v. *Professional Life Insurance Co.*, 2 C. B., N. S. 211.

PART VIII.

successful appellant to pay the respondent's costs (*c*), or for the costs of an indictment for libel to which the person indicted and acquitted is entitled under 6 & 7 *V. c.* 96, *s.* 8 (*d*), or for the costs of an appeal from quarter sessions (*e*), or for costs ordered to be paid by an order of the Privy Council (*f*).

Revivor.

By stat. 33 & 34 *V. c.* 28, *s.* 19, "Whenever any decree or order shall have been made for payment of costs in any suit, and such suit shall afterwards become abated, it shall be lawful for any person interested under such decree or order to revive such suit, and thereupon to prosecute and enforce such decree or order, and so on from time to time as often as any such abatement shall happen," *see post, Ch. LXXXVIII.*

Taxation not a condition precedent.

It is not generally a condition precedent to the right to recover costs by action or otherwise that they should be taxed (*g*).

Stay of proceedings.

The Court will not, in general, stay proceedings until the costs of interlocutory proceedings which a plaintiff has been ordered to pay are paid (*h*).

As to staying proceedings until the costs of a former action for the same cause are paid, *see ante*, p. 368; and *see post, Ch. CVI.*, "*Ejectment.*"

Contribution.

Where co-defendants are decreed to pay the costs of an action, one co-defendant cannot by action obtain contribution in respect of such costs against the other (*i*).

Interest.

Interest on the amount at which costs are taxed is recoverable and runs from the date of the judgment or order and not merely from the date of the certificate of taxation (*k*).

In general, the Court has no power to order a person who is not a party to an action to pay the costs of it, although he be the real party interested (*l*).

It may be added, that if one of several defendants obtain an order for the payment of costs, the payment should be made to him only and not to others (*m*).

As to appealing against an order as to costs only, *see post, Ch. LXXXV.*, "*Appeal.*"

As to setting off costs against costs, *see post*, p. 783.

As to when security for costs may be compelled to be given, *see ante*, p. 395.

As to a solicitor's remedy for costs against his client, *see ante*, p. 155 *et seq.*

(*c*) *Marbella Iron Ore Co., Limited* v. *Allen*, 47 L. J., C. P. 601; 38 L. T. 815.

(*d*) *Richardson* v. *Willis*, L. R., 8 Ex. 69; 42 L. J., Ex. 68.

(*e*) *Lear* v. *Botting*, 44 L. T. 57.

(*f*) *Hutchinson* v. *Gillespie*, 11 Ex. 798; 25 L. J., Ex. 103.

(*g*) *Lear* v. *Botting*, 44 L. T. 57: *Metropolitan District R. Co.* v. *Sharpe*, 5 App. Cas. 425; 50 L. J., Q. B. 14: *Holdsworth* v. *Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289.

(*h*) *Morton* v. *Palmer*, 9 Q. B. D. 89; 51 L. J., Q. B. 307.

(*i*) *Dearsley* v. *Middlewick*, 18 Ch. D. 236; 50 L. J., Ch. 777.

(*k*) *Landowners' West of England, &c. Co.* v. *Ashford*, 33 W. R. 41: *Pynan* v. *Burt*, W. N. 1884, 100. But see *Schroder* v. *Clough*, 46 L. J., C. P. 365; 35 L. T. 850.

(*l*) See cases cited ante, p. 675, n. (*x*).

(*m*) *Showler* v. *Stoakes*, 2 D. & L. 2; 13 L. J., Q. B. 230.

PART IX.

NEW TRIAL—JUDGMENT.

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CHAPTER LXVIII.

NEW TRIAL.

In certain cases, which will be presently noticed, the Court will grant a new trial or a new assessment of damages (*a*). The practice on this subject will be stated under the following heads:—

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*** As to new trial on writ of inquiry, *see post, Vol.* 2, *Ch. CXV.* In interpleader, *see post, Vol.* 2, *Ch. CXXI.* In actions remitted to County Courts, *see post, Vol.* 2, *Ch. CXXXIII.*

(*a*) As to the origin and history of the practice of granting new trials, see per Lord *Blackburn*, *S. East. R. Co.* v. *Smitherman*, 47 J. P. 773, 774.

1. *In what Cases granted.*

PART IX.

Mistake, &c. of the Judge.

Mistake, Misdirection, &c. of the Judge.]—For certain mistakes made by the Judge during the course of the trial, a new trial may be granted.

By *Ord. XXXIX. r.* 6, "A new trial shall not be granted on the ground of misdirection (*a*), or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage (*b*) has been thereby occasioned in the trial (*c*); and if it appear to such Court that such wrong or miscarriage affects part (*d*) only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties."

The onus of showing that no substantial wrong or miscarriage of justice was occasioned is on the party opposing the application for a new trial, and he must show it by proper evidence (*e*).

Wrong admission or rejection of evidence.

Subject to the above rule, if a Judge at the trial admit improper evidence (*f*), or reject evidence which ought to be admitted (*g*), by which means the result of the trial may have been affected, the Court will, in general, grant a new trial (*h*). In some cases, however, the Court may refuse a new trial, though evidence has been improperly rejected; as where the fact which such evidence was offered to establish was proved by other means, or was not disputed (*i*), or was admitted by the opposite counsel (*k*); or, where, assuming the rejected evidence to have been received, a verdict in favour of the party offering it would have been clearly and manifestly against the weight of evidence, and certainly set aside, on application to the Court, as an improper verdict (*l*). The Court

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(*a*) It would seem that this does not apply to the case of a nonsuit, see *Hall* v. *Jupe*, 43 L. T. 411, per *Grove*, J., at p. 414. But see per *Coleridge*, C. J., at p. 417; *S. C.*, 49 L. J., C. P. 721.

(*b*) See *Chapleo* v. *Brunswick Building Society*, 5 Q. B. D. 696, 714; 44 L. T. 449, 453.

(*c*) See *Jenkins* v. *Morris*, 14 Ch. D. 674; 42 L. T. 817 (C. A.).

(*d*) Before the Jud. Acts, in such a case a new trial of the whole action must have been granted. See r. 7, post, p. 741.

(*e*) *Anthony* v. *Halstead*, 37 L. T. 433.

(*f*) *Tutton* v. *Andrews*, Barnes, 448: *Baron de Rutzen* v. *Farr*, 4 A. & E. 53; 5 N. & M. 617: *Doe* d. *Tatham* v. *Wright*, 1 H. & W. 729; 7 A. & E. 313.

(*g*) *Smedley* v. *Hill*, 2 W. Bl. 1105: *Boyle* v. *Wiseman*, 10 Ex. 647.

(*h*) See *Robinson* v. *Williamson*, 9 Price, 136: *Freeman* v. *Arkell*, 2 B. & B. 494: *Gravener* v. *Woodhouse*, 1 Bing. 31: *Crease* v. *Barrett*, 1 C. M. & R. 919: *Bailey* v. *Haines*, 19 L. J., Q. B. 73, where it was held to be immaterial that the jury professed to have given their verdict independently of the evidence improperly received.

(*i*) *Edwards* v. *Evans*, 3 East, 451: *Rex* v. *Teal*, 11 East, 311: *Alexander* v. *Barker*, 2 C. & J. 133: *Strudt* v. *Roberts*, 5 D. & L. 460, B. C.: *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497.

(*k*) *Mortimer* v. *M'Callan*, 6 M. & W. 58. See *Stracey* v. *Blake*, 1 M. & W. 168.

(*l*) Per *Parke*, B., 1 C. M. & R. 933: *Baron de Rutzen* v. *Farr*, 4 A. & E. 53; 5 N. & M. 617: *Doe* d. *Tatham* v. *Wright*, 1 H. & W. 729; 7 A. & E. 313: *Bosanquet* v. *Shortridge*, 19 L. J., Ex. 221: *Horford* v.

refused a new trial upon the ground that the under-sheriff refused to allow the defendant's solicitor to cross-examine some of the plaintiff's witnesses, it appearing that the cross-examination was not necessary (*m*). A new trial will not be granted where evidence is prematurely admitted if it becomes admissible at a later period of the trial (*n*).

Wrong ruling as to stamp.

It should here be stated, that, by *Ord. XXXIX. r.* 8, "A new trial shall not be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp" (*o*).

Misdirection of the Judge.

And, subject to the above rules, if the Judge misdirect the jury (*p*), even in a penal action (*q*), a new trial may be granted. Where the Judge's direction was correct, but the Court thought the jury might have misunderstood it, a new trial was granted, the costs to abide the event (*r*). An incorrect direction to the jury upon a point which could not have influenced their verdict, is not a ground for a new trial (*s*). Nor is a wrong observation by the Judge on a matter of fact, which is left to the jury (*t*). And the Court refused a new trial when there had been a misdirection with respect to one item only of the plaintiff's demand, the plaintiff consenting to reduce the damages by the whole sum in respect of which the misdirection took place (*u*). If the Judge does not give the jury a sufficient direction a new trial may sometimes be granted (*x*). A mere refusal to direct a finding does not amount to a misdirection (*y*).

Leaving to jury what Judge ought to decide.

If the Judge leaves a question to the jury which he ought to decide himself as a point of law, and the jury decide the question correctly, the Court will not grant a new trial (*z*).

Where objection not raised or waived at Nisi Prius.

The Court will not grant a new trial for an objection, either to the direction of the Judge at the trial (*a*), or to the admission (*b*) or

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Wilson, 1 Taunt. 12: *Doe* d. *Tynham* v. *Tyler*, 6 Bing. 561; 4 M. & P. 377.

(*m*) *Power* v. *Horton*, 3 Hodg. 14.

(*n*) *Faund* v. *Wallace*, 35 L. T. 361.

(*o*) See *Eames* v. *Smith*, 1 Jur., N. S. 1025, Ex.

(*p*) *Anon.*, 2 Salk. 649: *How* v. *Strode*, 2 Wils. 269, 273.

(*q*) *Wilson* v. *Rastall*, 4 T. R. 753: *Brooke* v. *Middleton*, 1 Camp. 450: *Calcraft* v. *Gibbs*, 5 T. R. 19: *Gregory* v. *Taverner*, 1 C. M. & R. 310.

(*r*) *Toulmin* v. *Hedley*, 2 C. & K. 157. See *Lord* v. *Wardle*, 4 Sc. 402.

(*s*) *Bessey* v. *Windham*, 6 Q. B. 166.

(*t*) *Taylor* v. *Ashton*, 11 M. & W. 401; 12 L. J., Ex. 363.

(*u*) *Moore* v. *Tuckwell*, 1 C. B. 607; 15 L. J., C. P. 153. See *Mayfield* v. *Wadsley*, 3 B. & C. 357. See Ord. XXXIX. r. 6, ante, p. 730.

(*x*) *Elliott* v. *The South Devon R. Co.*, 17 L. J., Ex. 262: *Hadley* v. *Baxendale*, 23 L. J., Ex. 179. As to the effect of non-direction, see *Ford* v. *Lacey*, 30 L. J., Ex. 351: *Great Western R. Co. of Canada* v. *Braid*, 1 Moore, P. C. C., N. S. 101; 9 Jur., N. S. 339.

(*y*) *Greene* v. *Bateman*, L. R., 5 H. L. 591.

(*z*) *Doe* d. *Strickland* v. *Strickland*, 8 C. B. 725; 19 L. J., C. P. 89.

(*a*) *Robinson* v. *Cook*, 6 Taunt. 336: *Morrish* v. *Murray*, 13 M. & W. 52; 2 D. & L. 199: *Wardman* v. *Belhouse*, 9 M. & W. 596: *Hazeldine* v. *Grove*, 3 Q. B. 997: *Brown* v. *Storey*, 1 Sc. N. R. 9: *Doe* d. *Strickland* v. *Strickland*, 8 C. B. 725: *Horlor* v. *Carpenter*, 27 L. J., C. P. 1.

(*b*) *Malin* v. *Taylor*, 2 Hodg. 3: *Williams* v. *Wilcox*, 8 A. & E. 314: *Walker* v. *Needham*, 1 Dowl., N. S. 220: *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102: *Doe* d. *Phillips* v. *Benjamin*, 9 A. & E. 649: *Foss* v. *Wagner*, 7 A. & E. 116, n.: *Kenn* v. *Neck*, 3 Dowl. 163.

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rejection (*c*) of evidence, unless such objection was distinctly raised at the trial. Where evidence is tendered for a purpose for which it is not admissible, and is rejected, a new trial will not be granted merely because such evidence was admissible for another purpose, not stated at the trial (*d*). An objection to the admissibility of evidence must be made before the summing up (*e*). If a defendant neglect to point out on the trial a limitation in a covenant which would have protected him from part of the damages given against him, the Court will not grant a new trial (*f*). Nor will they do so upon an objection which has been waived at Nisi Prius (*g*).

Refusal to allow recall of witness.

As to a Judge refusing to allow a witness to be recalled, *see ante*, p. 641.

Improper discharge of jury.

Where there were two issues, and the jury found upon both, but the Judge under a misapprehension that the finding upon the first issue rendered the second useless, discharged the jury upon the second issue, it was held, that the proper course was to apply to the Judge to have the verdict entered according to his notes, and not to move for a new trial (*h*).

Postponement of trial refused.

It seems a new trial may be granted if the Judge improperly refuse to postpone the trial (*i*).

Amendment refused.

As to granting a new trial, when the Judge has improperly allowed or refused to allow an amendment at the trial, *see ante*, p. 646.

Right to begin.

As to granting a new trial, when the Judge has improperly allowed a party to begin, *see ante*, p. 630.

Default, &c. of officer of the Court.

Default or Misconduct, &c. of Officer of the Court.]—Where the Judge's marshal entered the action by mistake, in a wrong list, and the action was consequently tried as undefended in the absence of the defendant, the Court granted a new trial (*k*). And the same where the under-sheriff who returned the panel was solicitor for the opposite party (*l*); and the same where the sheriff returned prisoners for debt taken out of custody on purpose to serve at an inquest on a writ of inquiry; and the Court would have made the sheriff pay the costs, had he been a party to the rule (*m*). In some

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(*c*) *Gibbs* v. *Pike*, 9 M. & W. 351; 1 Dowl., N. S. 409: *Goslin* v. *Corry*, 8 Sc. N. R. 24: *Sorden* v. *Cowton*, 3 Jur. 1027. If a document has been rejected as not being evidence, a new trial will not be refused merely because it was not duly stamped, if it can be stamped at the trial. *Whitehouse* v. *Hemmant*, 27 L. J., Ex. 295. See 33 & 34 Vict. c. 97, s. 16, ante, p. 647.

(*d*) *Rex* v. *Grant*, 3 N. & M. 106: *Doe* d. *Kinglake* v. *Bevis*, 18 L. J., C. P. 628: *Doe* d. *Gord* v. *Needs*, 2 M. & W. 129.

(*e*) *Abbott* v. *Parsons*, 7 Bing. 563.

(*f*) *Short* v. *Kalloway*, 11 A. & E. 28.

(*g*) *Shirley* v. *Matthews*, 1 Jur. 57: *Melin* v. *Taylor*, 2 Hodg. 3: *Morrish* v. *Murray*, supra: *Fabrigas* v. *Mostyn*, 2 W. Bl. 929; Cowp. 161. See *Minchin* v. *Clement*, 1 B. & Ald. 252: *Adams* v. *Andrews*, 20 L. J., Q. B. 39.

(*h*) *Iles* v. *Turner*, 3 Dowl. 211; post, p. 733.

(*i*) *Goldient* v. *Beagin*, 11 Jur. 544, Ex., where it was contended that certain observations made by the Judge before the trial were calculated to prejudice the case.

(*k*) *Hunter* v. *Hornblower*, 3 Dowl. 491.

(*l*) *Baylis* v. *Lucas*, Cowp. 112. But see *Mason* v. *Vickery*, 1 Smith, 364. See *Briggs* v. *Sowton*, 9 Dowl. 105, where the deputy-sheriff, who tried the cause, was solicitor for the defendant, and the Court refused a new trial on that ground.

(*m*) *Stainton* v. *Beadle*, 4 T. R. 473.

cases, where there has been a mistake in the taking or entry of the verdict, a new trial will be granted (*n*). On a motion for a new trial, upon the ground that the verdict was entered by mistake, the Court will receive the affidavit of a juryman as to what occurred in open Court upon the delivery of the verdict (*o*).

Default or misconduct of the jury.

Default or Misconduct of the Jury.]—If a juror have been sworn on the jury by a wrong surname (particularly if he be not the person summoned or intended to be sworn), a new trial may be granted (*p*); but otherwise if sworn by a wrong christian name (*q*). It is discretionary, however, with the Court to grant a new trial in such a case or not; and they will not do so unless the mistake as to the juror has been productive of some injustice (*r*). Where there had been a view, and the jury who had viewed were engaged in another Court, and the trial was had before a jury who had not viewed, a new trial was granted (*s*).

Where sworn by wrong name.

Jury who had not viewed.

Where jury interested.

In an action against a provisional committeeman of a proposed railway company, for goods supplied in the course of the formation, in which there was a verdict for the defendant, the Court granted a new trial upon the ground that the foreman of the jury was a provisional committeeman of the same company, but only on payment of costs, as it appeared that the plaintiff's solicitor was aware of the foreman's interest (*t*). The Court refused to set aside a trial upon the ground that one of the jurors had served the defendant with process in the action (*u*).

Perverse verdict.

If the jury return a perverse verdict, the Court will grant a new trial, and, in general, without payment of costs (*v*). In an action

(*n*) See *Bentley* v. *Fleming*, 1 C. B. 479; 14 L. J., C. P. 174, where the associate received the verdict in the absence of the Judge.

(*o*) *Roberts* v. *Hughes*, 7 M. & W. 399; 1 Dowl., N. S. 82: *Dauntley* v. *Hyde*, 6 Jur. 133, Ex. See *Davis* v. *Taylor*, 2 Chit. Rep. 268. The affidavit of a juryman to the effect that he would not have agreed to the answers given by the foreman of the jury to the Court, if he had known they would have entitled the plaintiff to a verdict, held, if admissible, no ground for disturbing the verdict. *Raphael* v. *The Bank of England*, 25 L. J., C. P. 33. As to when the affidavit of a juryman is inadmissible, see post, p. 737.

(*p*) *Norman* v. *Beaumont*, Willes, 484; Barnes, 453: *Wray* v. *Thorn*, Id. 454: *Parker* v. *Thornton*, 1 Str. 640; 2 Ld. Raym. 1410. And see *Dovey* v. *Hobson*, 6 Taunt. 460: *Gee* v. *Swann*, 9 M. & W. 686, per *Parke*, B.

(*q*) *Hill* v. *Yates*, 12 East, 231, n. And see *Wray* v. *Thorn*, Willes, 488.

(*r*) *Wells* v. *Cooper*, 30 L. T. 721, C. P.: *Hill* v. *Yates*, 12 East, 229. See *Dickenson* v. *Blake*, 7 Bro. P. C. 177: *Torbock* v. *Lainy*, 5 Jur. 318, Q. B., where the objection was taken before the verdict was recorded. *Earl of Falmouth* v. *Roberts*, 1 Dowl., N. S. 663; 9 M. & W. 469. As to granting a new trial upon the ground that a person who appeared on the jury was not on the panel, see *Wells* v. *Cooper*, 30 L. T. 721: *Carne* v. *Nicholl*, 3 Dowl. 115: *Hill* v. *Yates*, 12 East, 229: *Dovey* v. *Hobson*, 6 Taunt. 460: *Doe* d. *Ashburnham* v. *Michael*, 16 Q. B. 620; 20 L. J., Q. B. 76.

(*s*) *Kingston Union* (*Guardians*) v. *Landed Estates Co.*, 28 L. T. 644, Ex.

(*t*) *Bailey* v. *Macaulay*, 19 L. J., Q. B. 73. The Court refused to receive affidavits from the jurymen that the foreman did not influence the verdict. See *Williams* v. *The Great Western R. Co.*, 28 L. J., Ex. 2.

(*u*) *Prime* v. *Titchmarsh*, 7 Jur. 202, Ex.

(*v*) See *Harrison* v. *Fane*, 1 Sc. N. R. 287: *Gibson* v. *Muskett*, 3 Sc. N. R. 427: *Mould* v. *Griffiths*, 8 Jur. 1010, Ex.: *Parker* v. *Great Western R. Co.*, 3 Railw. Cas. 17, C. P.

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against an infant, an Oxford student, for the hire of horses, &c., the jury having, contrary to the opinion of the Judge, found for the plaintiff upon an issue whether they were necessaries or not, the Court granted a new trial, without costs (*x*). But the Court refused to set aside a verdict as perverse, because the jury had, contrary to the direction of the Judge, given more than nominal damages, for the avowed purpose of enabling the plaintiff to obtain the costs of the action (*y*).

Where it is against evidence.

If the jury find a verdict contrary to the evidence, the Court will in general grant a new trial (*z*), even in the case of a trial at bar (*a*). But not so if the verdict be such as the justice of the case required (*b*), or unless it is manifestly wrong (*c*). The question in these cases is whether the verdict is such as reasonable men ought to have come to, and not whether the Judge is or is not dissatisfied with it (*d*). The order was refused where the credibility of a witness was left to the jury, and they found a verdict against his evidence, although there was no evidence to impeach his credit (*e*). Where the evidence is conflicting, a new trial will seldom be granted, unless the evidence against the verdict very strongly preponderate (*f*). When, however, the dispute involves a question of science, about which there is *bonâ fide* doubt, this rule does not apply, and the Court will look more closely into the evidence (*g*). And this is so also when the matter involves novel questions of public importance (*h*). In a question relating to real property, where the inheritance would have been for ever bound by the verdict, the Court granted a new trial, although the case had been left to the jury upon conflicting evidence (*i*). In granting a new

(*x*) *Harrison* v. *Fane*, supra: *Hope* v. *West*, 7 Sc. 876.

(*y*) *Chilvers* v. *Greaves*, 6 Sc. N. R. 539; 5 M. & Gr. 578.

(*z*) *Bright* v. *Eynon*, 1 Burr. 390: *Miller* v. *Taylor*, 4 Sc. 513: *Levy* v. *Milne*, 12 Moore, 418: *Morris* v. *Cleasby*, 1 M. & Sel. 576. See *Glynn* v. *Houston*, 2 Sc. N. R. 548.

(*a*) *Musgrave* v. *Nevinson*, 2 Ld. Raym. 1358.

(*b*) *Wilkinson* v. *Payne*, 4 T. R. 468: *Sampson* v. *Appleyard*, 3 Wils. 272: *Goslin* v. *Wilcock*, 2 Id. 302: *Aylett* v. *Lowe*, 2 W. Bl. 1221: *Foxcroft* v. *Devonshire*, 2 Burr. 936: *Dean* v. *Barnard*, Cowp. 597: *Boulton* v. *Pritchard*, 4 D. & L. 117, B. C. But see 3 B. & Ald. 692: *Mackrow* v. *Hull*, 1 Burr. 11: *Farewell* v. *Chaffey*, Id. 54: *Reaveley* v. *Mainwaring*, 3 Id. 1306: *Dunkley* v. *Wade*, 2 Salk. 653: *Smith* v. *Brampston*, Id. 644; 1 Ld. Raym. 62; 5 Mod. 87: *Sparks* v. *Spicer*, 2 Salk. 648. As to granting a new trial in a penal action, on the ground that the verdict was against the evidence, see supra.

(*c*) *Jenkins* v. *Morris*, 49 L. J., Ch. 392; 42 L. T. 817 (C. A.): *Connecticut, &c. Insurance Co.* v. *Moore*, 6 App. Cas. 644.

(*d*) *Solomon* v. *Bitton*, 8 Q. B. D. 176.

(*e*) *Lacy* v. *Forrester*, 3 Dowl. 688. But see the observations of *Tenterden*, C. J., and *Bayley*, J., in *Davis* v. *Hardy*, 6 B. & C. 231.

(*f*) *Ashley* v. *Ashley*, 2 Str. 1142: *Doe* d. *Mason* v. *Mason*, 3 Wils. 63: *Swain* v. *Hall*, Id. 45: *Anon.*, 1 Id. 22. See *Norris* v. *Freeman*, 3 Id. 38: *Mellin* v. *Taylor*, 3 Bing. N. C. 109. See as to the weight due to the consideration that the conduct and demeanour of the witnesses form material elements in judging of their credibility, *Bigsby* v. *Dickinson*, 4 Ch. D. 24; 46 L. J., Ch. 200. *Robertson* v. *Robertson*, 6 P. D., per *Jessel*, M. R., at p. 121: *The Arizona*, 5 P. D. 123; 49 L. J., P. 54: *Arkwright* v. *Newbold*, 17 Ch. D., per *Cotton*, L. J., at p. 321.

(*g*) *Metropolitan Asylum District* v. *Hill*, 47 J. P. 148; 47 L. T. 29, H. L., 22nd May, 1882.

(*h*) Id.

(*i*) *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91. See Id. 232: *Lee* v. *Shore*, 2 D. & R. 198; 1 B. &

trial upon the ground that the verdict is against the evidence, the Court are to a considerable extent guided by whether the Judge who tried the cause is satisfied with the verdict or not (*k*), but the question whether he is or is not satisfied is not the true criterion, nor is the mere fact that he is dissatisfied sufficient to justify the granting of a new trial (*l*).

The Court will not, except under special circumstances, interfere if the damages recovered do not exceed 20*l.* (*m*).

Where damages are excessive.

For excessive damages the Court will grant a new trial or a new assessment of damages (*n*) as of course, or will set aside the execution of a writ of inquiry, in all cases where the damages may be ascertained by mere calculation (*o*); and in other cases of actions *ex contractû*, if it appear clearly that the damages are excessive (*p*). And where the value on which the damages were calculated was assented to by both sides at the trial, the Court refused to reduce the damages, on the ground that the basis of the calculation was erroneous (*q*). In actions *ex delicto*, such as actions for trespass (*r*), for diverting a watercourse (*s*), seduction (*t*), battery (*u*), false imprisonment (*x*), or other personal torts (*y*), malicious prosecution (*z*), slander (*a*), or the like, where there is no certain measure of damages (*b*), a new trial or new assessment is seldom granted on this account, unless the damages are outrageous (*c*), or the

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C. 94: *Hodgson* v. *Forster*, 2 D. & R. 221; 1 B. & C. 110: *Lowden* v. *Hierons*, 2 Moore, 102.

(*k*) *Leeke* v. *Deer*, 1 Jur. 983: *Allaway* v. *Bennett*, 6 Jur., N. S. 347: per *Jessel*, M. R., *Jenkins* v. *Morris*, 42 L. T. at p. 820.

(*l*) *Solomon* v. *Bitton*, 8 Q. B. D. 176.

(*m*) *Joyce* v. *Metrop. Board of Works*, 44 L. T. 811.

(*n*) See post, Vol. 2, Ch. CXV.

(*o*) See *Day* v. *Edwards*, 1 Taunt. 491: *Sowerby* v. *Lockerby*, 1 Jur. 796: cp. *Forsdike* v. *Stone*, L. R., 3 C. P. 607.

(*p*) 3,500*l.* against a gentleman of considerable property for breach of promise of marriage has been held not excessive. *Wood* v. *Hurd*, 2 Bing. N. C. 166: *Berry* v. *Da Costa*, L. R., 1 C. P. 331. And see *Harrison* v. *Cage*, Carth. 467: *Sealby* v. *Powis*, 1 H. & W. 2: *Lambkin* v. *South Eastern R. Co.*, 5 App. Cas. 352.

(*q*) *Hilton* v. *Fowler*, 5 Dowl. 312.

(*r*) *Benson* v. *Frederick*, 3 Burr. 1845: *Ducker* v. *Wood*, 1 T. R. 277: *Merest* v. *Harvey*, 5 Taunt. 442; 1 Marsh. 139: *Lockley* v. *Pye*, 8 M. & W. 133.

(*s*) *Pleydell* v. *Earl of Dorchester*, 7 T. R. 529; 1 Chit. Rep. 729 a.

(*t*) *Irwin* v. *Dearman*, 11 East, 23: *Tullidge* v. *Wade*, 3 Wils. 18: cp. *Berry* v. *Da Costa*, supra.

(*u*) *Jones* v. *Sparrow*, 5 T. R. 257: *Grey* v. *Grant*, 2 Wils. 252, 200*l.* for an assault.

(*x*) *Huckle* v. *Money*, 2 Wils. 205: *Leeman* v. *Allen*, Id. 160: *Beardmore* v. *Carrington*, Id. 244, 1,000*l.* for false imprisonment, under warrant of secretary of state: *Edgell* v. *Francis*, 1 Sc. N. R. 118, 200*l.* for a night in the cage.

(*y*) *Fabrigas* v. *Mostyn*, 2 W. Bl. 929: *Gilbert* v. *Burtenshaw*, Cowp. 230. In *Bland* v. *Bland*, 1 H. & W. 167, 1,000*l.* for a forcible entry into a dwelling-house, and staying there three or four days, and distraining, to enforce an unfounded claim to the property, was held not to be excessive.

(*z*) *Leith* v. *Pope*, 2 W. Bl. 1327: *Norriss* v. *Tyler*, 1 Cowp. 37.

(*a*) *Smith* v. *Brampston*, 2 Salk. 644.

(*b*) See *Bennett* v. *Allcott*, 2 T. R. 166: *Day* v. *Holloway*, 1 Jur. 794.

(*c*) *Price* v. *Severne*, 7 Bing. 316; 5 M. & P. 135: *Sharpe* v. *Brice*, 2 W. Bl. 942: *Leith* v. *Pope*, Id. 1327: *Pleydell* v. *Earl of Dorchester*, 7 T. R. 529: *Bruce* v. *Rawlings*, 3 Wils. 61: *Williams* v. *Currie*, 1 C. B. 841: *Britton* v. *South Wales R. Co.*, 27 L. J., Ex. 355: *Lambkin* v. *South Eastern R. Co.*, 5 App. Cas. 352.

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Court is satisfied that the jury acted under the influence of undue motives, or of gross error or misconception (*d*); and the same upon the execution of writs of inquiry (*e*). A very clear case of excess must be made out (*f*). And it may be here mentioned, that, for this purpose, the Courts will not receive affidavits of the defendant's witnesses, to explain or add to evidence given by them at the trial (*g*). It is usual, where an excessive verdict has been given, for the Judge to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial or new assessment (*h*); and the Court may refuse the new trial on the plaintiff's consenting to the damage being reduced to a given amount, notwithstanding that the defendant refuses to consent to such reduction (*i*).

Where damages too small.

A new trial or new assessment of damages (*k*) will sometimes also be granted, or the execution of a writ of inquiry set aside, and a fresh inquiry granted, if it appears clear to the Court that the damages are too small (*l*); or if the smallness of the damages has arisen from some mistake upon the part either of the Court (*m*) or the jury (*n*), or from some unfair practice upon the part of the defendant (*o*). Where, in an undefended action on a mortgage deed, a verdict was taken for the plaintiff by mistake for the principal only, the Court refused to increase the damages by adding the interest, but offered to grant a new trial (*p*). But, as a general rule, the Court will not grant a new trial or new assessment of damages in an action for a tort, on account of the smallness of the damages (*q*). And this rule particularly applies in actions of libel or slander (*r*). As to when the Court will increase or reduce the amount of the damages, *see ante*, p. 665.

(*d*) *Chambers* v. *Caulfield*, 6 East, 244: *Edgell* v. *Francis*, 1 Sc. N. R. 118: *Creed* v. *Fisher*, 9 Exch. 472: *Poole* v. *Whitcomb*, 12 C. B., N. S. 770: *Lambkin* v. *South Eastern R. Co.*, supra.

(*e*) *Benson* v. *Frederick*, 2 Burr. 1845: *Bruce* v. *Rawlings*, 3 Wils. 61, 63: *Irwin* v. *Dearman*, 11 East, 23.

(*f*) *Lathbury* v. *Brown*, 10 Moore, 106.

(*g*) *Phillips* v. *Hatfield*, 8 Dowl. 882: *Berry* v. *Da Costa*, L. R., 1 C. P. 331.

(*h*) Per *Alderson*, J., 7 Bing. 320. See *Leeson* v. *Smith*, 4 N. & M. 301.

(*i*) *Belt* v. *Lawes* (C. A.), 12 Q. B. D. 356; 53 L. J., Q. B. 249; 50 L. T. 441; 32 W. R. 607.

(*k*) See Ord. XXXIX. r. 7, post, p. 741; Ord. XL. r. 10, post, p. 750.

(*l*) *Phillips* v. *South Western R. Co.*, 5 Q. B. D. 78; 49 L. J., Q. B. 233 (C. A.): cp. *S. C.*, 5 C. P. D. 280; 49 L. J., C. P. 233 (C. A.): *Armytage* v. *Haley*, 4 Q. B. 917; 12 L. J., N. S., Q. B. 323: *Wilson* v. *Hicks*, 26 L. J., Ex. 242: *Nichol* v. *Bestwick*, 28 L. J., Ex. 4.

(*m*) *Markham* v. *Middleton*, 2 Str. 1259: *Noble* v. *Kennaway*, 2 Doug. 510.

(*n*) *Phillips* v. *South Western R. Co.*, supra: *Woodford* v. *Eades*, 1 Str. 425: *Levy* v. *Baillie*, 7 Bing. 349; 5 M. & P. 208: *Falvey* v. *Stanford*, L. R., 10 Q. B. 54; 44 L. J., Q. B. 7, compromise among jury.

(*o*) *Wits* v. *Polehampton*, 2 Salk. 647. See *Hall* v. *Stone*, 1 Str. 515.

(*p*) *Baker* v. *Brown*, 2 M. & W. 199; 5 Dowl. 313.

(*q*) *Manton* v. *Bates*, 1 C. B. 444: *Gibbs* v. *Turmaley*, Id. 640: *Mauricet* v. *Brecknock*, 2 Doug. 509: *Richards* v. *Rose*, 9 Ex. 218; 23 L. J., Ex. 3: *Apps* v. *Day*, 14 C. B. 112: *Gibbs* v. *Turmaley*, 1 C. B. 640: *Howard* v. *Barnard*, 11 C. B. 653: *Mostyn* v. *Coles*, 7 H. & N. 872; 31 L. J., Ex. 151: *Bradlaugh* v. *Edwards*, 11 C. B., N. S. 377.

(*r*) *Armytage* v. *Haley*, supra: *Rendall* v. *Hayward*, 5 Bing. N. C. 424; 7 Sc. 487: *Hayward* v. *Newton*, 2 Str. 940: *Forsdike* v. *Stone*, L. R., 3 C. P. 607: *Kelly* v. *Shirlock*, L. R., 1 Q. B. 686; 35 L. J., Q. B. 209: *Falvey* v. *Stanford*, L. R., 10 Q. B. 54; 44 L. J., Q. B. 7, new trial

Misconduct of jury.

For the misconduct of the jury, also, the Court will, in general, grant a new trial, if the misconduct be such as to satisfy the Court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution of the important duties of jurymen. Thus, if the jurors eat or drink, after the summing up, at the expense of the party for whom they afterwards find a verdict; or if they determine their verdict by lots; or if the verdict is obviously the result of a compromise (*s*); or if they or any of them have previously declared that the plaintiff should never have a verdict (*t*), or the like; the Court may set aside the verdict, and grant a new trial (*u*). Where two of the jury, during the progress of a trial, which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and consequently before the summing up, the Court held that it was discretionary with them whether they would set aside the verdict and grant a new trial; and as the party making the application declared that he did not entertain any belief that the jurors, in giving their verdict, were influenced by their visit, and there were no grounds for suspicion of unfairness, the Court refused to do so (*x*).

The Court will not receive affidavits made by any of the jurymen (*y*), or affidavits of what any of the jurors have said, to prove, or in respect of such misconduct (*z*); it must be proved in some other way (*a*). And this is the case, though the misconduct is in some degree confirmed *aliunde* (*b*). Though it seems that, when affidavits are used in moving for a new trial, imputing personal misconduct to a jury, affidavits of any of the jury rebutting such imputation may be used in answer (*c*). As to the Court receiving the affidavit of a juryman to show that the verdict has been entered by mistake for the wrong party, *see ante*, p. 733.

Absence, &c. of counsel or solicitor.

Absence, &c. of Counsel or Solicitor.]—If the cause be tried in the order in which it is inserted in the cause list, in the absence of the

granted, on ground that verdict was the result of compromise amongst jury: *Mears* v. *Griffin*, 2 Sc. N. R. 15; 1 M. & G. 796.

(*s*) *Falvey* v. *Stanford*, supra.

(*t*) *Dent* v. *Hundred of Hertford*, 2 Salk. 645; 2 Comyn, 601. See *Gainsford* v. *Blachford*, 6 Price, 36.

(*u*) Ante, p. 651. See *Hughes* v. *Budd*, 8 Dowl. 315: *Cooksey* v. *Haynes*, 27 L. J., Ex. 371. See a case where all the jury were not present when the verdict was given, *Rex* v. *Wooler*, 2 Stark. 111; 6 M. & S. 366.

(*x*) *Morris* v. *Vivian*, 10 M. & W. 137; 2 Dowl., N. S. 235. See *R.* v. *Kinnear*, 2 B. & A. 468; 1 Chit. Rep. 401.

(*y*) *Harvey* v. *Hewitt*, 8 Dowl. 598: *Roberts* v. *Hughes*, 7 M. & W. 399: *Vaise* v. *Delaval*, 1 T. R. 11: *Onions* v. *Naish*, 7 Price, 203: *Hartwright* v. *Badham*, 11 Price, 383: *R.* v. *Wooler*, 6 M. & S. 366: *Bridgwood* v. *Wynn*, 1 H. & W. 574: *Bailey* v. *Macauley*, 19 L. J., Q. B. 73.

(*z*) *Harvey* v. *Hewitt*, 8 Dowl. 598: *Straker* v. *Graham*, 7 Dowl. 223; 4 M. & W. 721: *Burgess* v. *Langley*, 6 Sc. N. R. 518; 1 D. & L. 21; 12 L. J., N. S., C. P. 257: *Addison* v. *Williamson*, 5 Jur. 466: *Davis* v. *Taylor*, 2 Chit. Rep. 268.

(*a*) See *Harvey* v. *Hewitt*, 8 Dowl. 598, where affidavits were made by persons who witnessed the jury drawing lots for their verdict.

(*b*) *Owen* v. *Warburton*, 1 N. R. 326. See *Hindle* v. *Birch*, 8 Taunt. 26; 1 Moore, 455.

(*c*) *Standewicke* v. *Watkins*, 2 D. & L. 592. See *Taylor* v. *Webb*, Trials per Pais, 24.

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opposite party (*d*) or his counsel, the Court will not grant a new trial, except under very special circumstances; in which case, as a general rule, it will be granted only on an affidavit of merits, and on payment of costs (*e*). In an action for crim. con., where the plaintiff was nonsuited by the accidental absence of his solicitor, and a fresh action would have been barred by the Statute of Limitations, a new trial was granted on payment of costs as between solicitor and client (*f*). Where a cause was called on and tried as an undefended cause in consequence of the defendant's solicitor neglecting to deliver his briefs, the Court granted a new trial, but ordered the defendant's solicitor to pay the costs, as between solicitor and client, out of his own pocket (*g*). Where a cause which stood thirty off at the assizes, was taken out of its turn as undefended, in the absence of the defendant's solicitor, who was casually absent, no notice having been given that it would be taken as an undefended cause, the Court set aside the verdict and granted a new trial, the costs to abide the event (*h*). But where a cause in the written list for the day was tried out of its order as an undefended cause, in the absence of the defendant's solicitor, the Court granted a new trial only upon payment of costs and an affidavit of merits (*i*).

Default or misconduct of the opposite party.

Improperly influencing the jury.

Default or Misconduct of the Opposite Party.]—If the party for whom a verdict is afterwards given, deliver to the jury after they have left the bar, evidence which has not been shown to the Court, a new trial will be granted (*k*). So, if he have laboured the jury, or used improper influence with them, to induce them to give a verdict in his favour, a new trial will be granted. Where handbills reflecting on the plaintiff's character were distributed in Court, and shown to the jury on the day of trial, a verdict against him was set aside, and a new trial granted, although the defendant, by

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(*d*) See *Cook* v. *Beardsall*, 29 L. J., Ex. 35, where the defendant intended to conduct his cause in person, and there were two Courts sitting.

(*e*) See *Anon.*, 2 Salk. 645: *Third* v. *Goodier*, 1 Pr. Rep. 717, Ex.: *Bland* v. *Warren*, 7 A. & E. 13: *Watson* v. *Reeve*, 5 Bing. N. C. 112; 7 Dowl. 127: *Breach* v. *Casterton*, 7 Bing. 224; 4 M. & P. 867: *Masters* v. *Barnwell*, Id. n.: *Gwilt* v. *Crawley*, 8 Bing. 144; 1 M. & Sc. 229: *R.* v. *Richardson*, 8 Dowl. 511: *Nash* v. *Swinburn*, 4 Sc. N. R. 326; 3 M. & G. 630; 1 Dowl., N. S. 190, where the defendant's solicitor's clerk misread the notice of trial: *Curtis* v. *Marsh*, 28 L. J., Ex. 36, where the clocks differed: *Townley* v. *Jones*, 29 L. J., C. P. 299, where the plaintiff was, in consequence of the absence of his solicitor, nonsuited, and a new trial was granted on the solicitor undertaking to pay the costs of the day.

(*f*) *Ayling* v. *Goldinny*, 1 C. B. 635.

(*g*) *De Rouffigny* v. *Peale*, 3 Taunt. 484: *Greatwood* v. *Sims*, 2 Chit. Rep. 269: *Townley* v. *Jones*, 8 C. B., N. S. 289. But see *Moody* v. *Dick*, 2 B. & B. 395; 5 Moore, 164: *Watson* v. *Reeve*, 5 Bing. N. C. 112. In general a solicitor cannot be ordered to pay costs unless he is a party to the application.

(*h*) *Aust* v. *Fenwick*, 2 Dowl. 246: *Dorriers* v. *Howell*, 1 Sc. 508; 6 Bing. N. C. 245; 8 Dowl. 277.

(*i*) *Fourdrinier* v. *Bradbury*, 3 B. & Ad. 328: *Cottam* v. *Banks*, 1 B. C. Rep. 302: *Banks* v. *Newton*, 4 D. & L. 632. See *Sprigger* v. *Rutherford*, 2 Dowl. 429: *Blackhurst* v. *Bulmer*, 5 B. & A. 907; 1 D. & R. 553: *De Medina* v. *Sharpnell*, 12 L. J., N. S., C. P. 37. See, as to the affidavit of merits, *Nash* v. *Swinburn*, supra, n. (*e*).

(*k*) Ante, p. 651.

his affidavit, denied all knowledge of the handbills (*t*). But merely desiring a juror to attend at the trial of the cause is no ground for a new trial (*m*).

Misleading or taking by surprise the opposite party.

Where, by a fraudulent trick upon the part of the defendant, the plaintiff's counsel were taken by surprise, and the defendant thereby obtained a verdict, the Court granted a new trial (*n*). Where a plaintiff was nonsuited in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence which had been agreed to be admitted by the defendant's solicitor's agent, the Court granted a new trial, with costs to be paid by the defendant (*o*). And where a cause, marked as a special jury cause, was tried by a common jury, in the absence of the defendant's solicitor (without any default upon the part of the plaintiff's solicitor) the Court set aside the trial and verdict, and granted a new trial with costs, to be paid by the plaintiff (*p*). When an action is entered as undefended, and notice is given to the plaintiff's solicitor that it is defended, it is his duty to inform the Court of this, and a new trial will be ordered if he does not, and the case is taken as undefended (*q*).

Where no notice of trial given.

As to granting a new trial where no notice of trial or an insufficient one has been given, *see ante*, p. 581.

Default or misconduct of witnesses.

Non-attendance of.

Default or Misconduct of Witnesses.]—A new trial has been granted on account of the non-attendance of a material witness; and the Court in one case granted it without costs, where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff, to prevent him from being served with a subpœna; but in a later case, where a witness for the plaintiff was kept out of the way by the contrivance of the defendant, the Court refused a new trial, observing that the plaintiff ought to have applied for a postponement of the trial, or withdrawn the record (*r*). And the general rule is, that a new trial will not be granted on the ground that evidence has not been given that might have been given at the trial (*s*), and the Court will not, on motion for a new trial, hear an affidavit of any facts which might have been brought forward at Nisi Prius (*t*). The plaintiff ought, if unprepared with his evidence, either to make application to put off the trial before the jury are sworn, or to withdraw the record, and not to take the chance of a verdict (*u*).

(*l*) *Coster* v. *Merest*, 3 B. & B. 272; 7 Moore, 87. And see *Spencer* v. *De Willott*, 3 Smith, 321.

(*m*) *Snell* v. *Timbrell*, 1 Str. 643.

(*n*) MS., E. 1814. See *Anderson* v. *George*, 1 Burr. 352: *Edie* v. *East India Co.*, 1 W. Bl. 298: *Hewlett* v. *Cruchley*, 5 Taunt. 277: *Lernane* v. *Mealin*, 11 Jur. 168, B. C. And see *Long* v. *Bilke*, 1 Sc. N. R. 176, where the effect of a judgment produced in evidence was misrepresented.

(*o*) *Doe* d. *Tindal* v. *Roe*, 2 Dowl. 420.

(*p*) *Hague* v. *Hall*, 6 Sc. N. R. 705.

(*q*) *Wolff* v. *Goldring*, 44 L. J., C. P. 214; 32 L. T. 161.

(*r*) *Turquand* v. *Dawson*, 1 C. M. & R. 709. And see *Edwards* v. *Dignum*, 2 Dowl. 642: *Packham* v. *Newman*, 3 Id. 165: *Henning* v. *Samuel*, 2 Dowl. 766; 3 M. & Sc. 818. As to withdrawing the record, see ante, p. 624.

(*s*) *Cooke* v. *Berry*, 1 Wils. 98. And see 1 C. M. & R. 710, n.: *Macbeath* v. *Ellis*, 4 Bing. 578.

(*t*) *Hope* v. *Atkins*, 1 Price, 143.

(*u*) *Harrison* v. *Harrison*, 9 Price, 89: *Edwards* v. *Dignum*, 2 Dowl. 642: *Elmslie* v. *Wildman*, 8 Taunt. 236; 2 Moore, 179. See *Hoare* v. *Silverlock*, 19 L. J., C. P. 215.

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Perjury of witness.

The Court have granted a new trial where it appeared clearly that the plaintiff's case was a mere fiction supported by perjury, which the defendant could not, at the time of the trial, be prepared to answer (*x*). The Court, however, will not in general be satisfied with the mere affidavit of the party making the application, contradicting the witnesses on the other side (*y*); the witnesses must in general be indicted and convicted (*z*), or some other satisfactory proof of the perjury must be offered to the Court. Even where the witnesses were indicted, we have seen that the Court refused to stay execution until the indictment should be tried (*a*). It is no ground for a new trial, that a witness who described himself as a Christian, and by a wrong name, and was sworn on the New Testament, was really a Jew, unless objected to at the trial, for he may be indicted for perjury (*b*).

Mistake of witness.

Where a witness made a mistake in his evidence, by reason of which a verdict was given against the party who called him, the Court refused a new trial, although the mistake was explained to them by the affidavit of the witness himself (*c*); but in a more recent case, under similar circumstances, the Court of Common Pleas granted a new trial (*d*). Where a defendant insisted that he was surprised by a mis-statement made by one of the plaintiff's witnesses, the Court refused a new trial, the mis-statement having been made in answer to a question that was collateral and beside the issue (*e*).

Party taken by surprise.

Party taken by Surprise.]—In some cases, where a party is taken by surprise at the trial, the Court will grant a new trial (*f*). Thus, they will grant it if, by a fraudulent trick upon the part of the defendant, the plaintiff's counsel was taken by surprise, and the defendant thereby obtained a verdict (*g*). But the Court never grant a new trial upon the ground of surprise, unless satisfied that the verdict was substantially wrong (*h*). And they refused to grant it where, by reason of the defendants having insufficiently disclosed their case to their solicitors, the latter were taken by surprise, and unprepared to prove a certain document at the trial, and a verdict was given for the plaintiff (*i*). So, a party nonsuited for non-production of a document from a public office, is not entitled to a new trial on the ground of surprise, where he has served a clerk in the office with a *subpœna duces tecum* to produce

(*x*) *Fabrilius* v. *Cock*, 3 Burr. 1771. If the plaintiff has sworn falsely on a matter not material to the merits of the cause a new trial will not be granted. *Honeyman* v. *Lewis*, 23 L. J., Ex. 204.

(*y*) *Feize* v. *Parkinson*, 4 Taunt. 640. See *Aliken* v. *Howell*, 1 N. & M. 191: *Sprague* v. *Mitchell*, 2 Chit. 271. But see *Lister* v. *Mundell*, 1 B. & P. 427.

(*z*) *Beerfield* v. *Petrie*, 2 Tidd, 938: *Seeley* v. *Mayhew*, 4 Bing. 561: *Hampshire* v. *Harris*, 3 Jur. 980, C. P.

(*a*) Ante, p. 377: *Warwick* v. *Bruce*, 4 M. & S. 140. See *Thurtell* v. *Beaumont*, 1 Bing. 339; 8 Moore, 612.

(*b*) *Sells* v. *Hoare*, 3 B. & B. 232.

(*c*) *Huish* v. *Sheldon*, Say. 27.

(*d*) *Richardson* v. *Fisher*, 7 Moore, 546; 1 Bing. 145.

(*e*) *Magnay* v. *Knight*, 2 Sc. N. R. 71; 1 M. & G. 944.

(*f*) See *Todd* v. *Emby*, 2 Dowl., N. S. 570: *Belle* v. *Thompson*, 2 Chit. 194: *Harrison* v. *Harrison*, 9 Price, 89: *Long* v. *Bilke*, 1 Sc. N. R. 176.

(*g*) Ante, p. 739.

(*h*) *Tharpe* v. *Stallwood*, 6 Sc. N. R. 730; 1 D. & L. 24, per *Coltman*, J.

(*i*) *Tharpe* v. *Stallwood*, supra.

the document, but has omitted to apply to the head of the office for permission for its production (*k*). And where, at the trial, the defendant produced a deed which he had had notice to produce, and there being an attesting witness to it who was not called, the plaintiff was nonsuited: it was held, that the plaintiff was not entitled to a new trial, on the ground of surprise, though he was not aware, before the trial, that there was an attesting witness; it not appearing that he had made any inquiry upon the subject (*l*). The application should be supported by affidavits showing clearly the grounds of surprise (*m*).

Fresh evidence, &c.

Fresh Evidence, &c.]—A new trial will seldom be granted where a verdict has been given against a party, or a plaintiff has been nonsuited, for want of evidence which might have been produced at the trial, because it would tend to introduce perjury (*n*); even although the evidence was briefed, and his counsel thought fit not to produce it (*o*); unless the verdict is manifestly against the justice and equity of the case (*p*). If new evidence be discovered after the trial, such as to satisfy the Court that, if the party had had it at the trial, he must have had a verdict, the Court will grant a new trial upon payment of costs, in order to do justice between the parties (*q*); but it must be shown that there is a reasonable probability of a different verdict (*r*).

Examination of witness stopped.

A cause having been stopped while a witness was under examination, and the plaintiff nonsuited, upon a statement by his counsel of the facts he was prepared to prove, the Court granted a new trial on payment of costs, upon an affidavit that the witnesses could have proved a more complete case than that presented by the counsel (*s*).

Where defendant aware of defence at first trial.

The Court will not as a general rule grant a new trial, to let the party set up a defence of which he was aware at the first trial (*t*).

Where one of several questions wrongly decided.

Where one of several Issues, &c. wrongly decided.]—By *R. of S. C., Ord. XXXIX. r.* 7, "A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question." *See also r.* 6, *ante*, p. 730.

Irregularity in proceedings.

Irregularity or Error in Proceedings or Pleadings, &c.]—In some cases, where the Nisi Prius record (that is to say, the copy of

(*k*) *Austin* v. *Evans*, 4 M. & G. 430; 2 Dowl. 408.

(*l*) *Rearden* v. *Minter*, 2 M. & G. 204; 9 Sc. N. R. 237. See now C. L. P. Act, 1854, s. 26.

(*m*) *Dow* v. *Dickinson*, W. N. 1881, 52.

(*n*) *Cooke* v. *Berry*, 1 Wils. 98: *King* v. *Alberton*, 3 Salk. 361. See *Wits* v. *Polehampton*, 2 Salk. 647.

(*o*) *Spong* v. *Hogg*, 2 W. Bl. 802: *Hall* v. *Stothard*, 2 Chit. 267.

(*p*) *Martyn* v. *Podger*, 5 Burr. 2631. See *Shedden* v. *Att.-Gen.*, 1 L. R., H. L. (Sc.) 470, 545.

(*q*) *Broadhead* v. *Marshall*, 2 W. Bl. 955: *Weak* v. *Calloway*, 7 Price, 677: *Thurtell* v. *Beaumont*, 1 Bing. 339: *Dickenson* v. *Blake*, 7 Bro. P. C. 177.

(*r*) *Anderson* v. *Titmas*, 36 L. T. 711.

(*s*) *Edger* v. *Knapp*, 6 Sc. N. R. 707; 1 D. & L. 73.

(*t*) *Vernon* v. *Hankey*, 2 T. R. 113. See *Buxton* v. *Mardin*, 1 T. R. 84: *Ritchie* v. *Bowsfield*, 7 Taunt. 309; *Pickering* v. *Dawson*, 4 Taunt. 779: *Bodington* v. *Harris*, 1 Bing. 187.

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the pleadings left with the officer when the cause is entered for trial) varies in a material particular from the pleadings, the Court might grant a new trial. In several cases for trifling variances, the Court have refused it (*u*). Where a Welsh cause was tried in Monmouthshire instead of Hereford, the Court refused to set aside the verdict on that account, as the notice for trial was for Monmouthshire, and the defendant did not object to it; besides which, the objection appeared upon the record, and, therefore, if well founded, the party had another remedy (*x*). As to the other cases in which, for errors in different proceedings, the Court will grant a new trial, see the different titles throughout this work. Where an interpleader issue, which had been directed to be tried before a Judge and jury, was tried before a Judge alone, a new trial was ordered (*y*).

Error in pleadings.

In some cases, where a party has failed by reason of a defect in the pleadings, a new trial will be granted, and an amendment in the pleadings allowed (*z*). In one case, the Court granted the defendant a new trial, and allowed him, upon terms, to amend a plea of a right of way, by stating the right according to the finding of the jury, or in such other manner as he might be advised (*a*). And where there was no definite issue, and a verdict had been found for the plaintiff, the Court granted a new trial, with liberty for both parties to amend (*b*). And where, by mistake, the damages had been laid at 10*l*., and the jury at the trial had found for the plaintiff, damages 150*l*., the Court granted a new trial on payment of costs, with liberty to the plaintiff to amend (*c*). Before the Judicature Acts, an error which might be taken advantage of on motion in arrest of judgment or by taking proceedings in error, was not a ground for a new trial (*d*).

Defect in special case.

As to granting a new trial when a verdict is taken subject to the opinion of the Court on a *special case*, which turns out to be so defectively stated that the Court cannot give judgment upon it, &c., *see ante*, p. 660.

Where the action or defence is trifling or vexatious.

Where the Action or Defence is Trifling or Vexatious.]—The Court will not, in general, grant a new trial, where the value of the matter in dispute, or the amount of damages to which the plaintiff would be fairly entitled, is too inconsiderable to merit a second examination (*e*). The value or amount must, in general, be 20*l*.,

(*u*) *Mather* v. *Brinker*, 2 Wils. 243: *Doe* d. *Cotterill* v. *Wylde*, 2 B. & A. 472: *Jones* v. *Tatham*, 8 Taunt. 634: *Suker* v. *Neal*, 17 L. J., Ex. 56.

(*x*) *Ambrose* v. *Rees*, 11 East, 370.

(*y*) *Hamlyn* v. *Batteley*, 6 Q. B. D. 63.

(*z*) See *Halhead* v. *Abrahams*, 3 Taunt. 81: *Williams* v. *Pratt*, 5 B. & A. 896, S. P.: *Brown* v. *Knill*, 4 N. & M. 348: *Kirby* v. *Simpson*, 3 Dowl. 791: *Taverner* v. *Little*, 5 Bing. N. C. 678: *Hart* v. *Crowley*, 12 A. & E. 378: *Edwards* v. *Broxton*, 2 C. & J. 18.

(*a*) *Higham* v. *Rabett*, 7 Sc. 827; 7 Dowl. 653.

(*b*) *Spong* v. *Wright*, 2 Dowl., N. S. 545; 12 L. J., N. S., Ex. 144: *Hunt* v. *Cox*, 2 Ex. 606.

(*c*) *Tebbs* v. *Barron*, 5 Sc. N. R. 837: *Tomlinson* v. *Blacksmith*, 7 T. R. 132. The Court might now allow an amendment without granting a new trial, see post, p. 750.

(*d*) *Lane* v. *Crockett*, 7 Price, 566.

(*e*) *Marsh* v. *Bower*, 2 W. Bl. 851: *Macrow* v. *Hull*, 1 Burr. 11: *Burton* v. *Thompson*, 2 Id. 664: *Roberts* v. *Karr*, 1 Taunt. 495. And see *Vernon* v. *Hankey*, 2 T. R. 113: *Woods* v. *Pope*, 1 Bing. N. C. 467; 1 Sc. 536: *Haine* v. *Davey*, 2 H. & W. 30.

to induce the Court to interfere (*f*); unless the verdict involve some particular right (*g*), or some question of personal character, independent of the damages (*h*), and this whether the verdict be for plaintiff or defendant (*i*). This rule applies to actions of trover (*j*), to cases of surprise (*j*), and though other actions depend upon the result of the verdict (*k*). But, it seems, it does not apply if the verdict was obtained by the fraud of the party obtaining it (*l*), or where there has been a misdirection (*m*). It does not apply in replevin (*n*). Where the verdict was for a sum not exceeding 20*l.*, a new trial was granted, the Judge expressing himself dissatisfied with the verdict, and there being an uncontradicted affidavit, that, before the defendant's case had been heard, one of the jurymen had said, "The parson [meaning the defendant] will get served out" (*o*).

If the defendant succeed in a hard or vexatious action, the Court will, in general, refuse a new trial (*p*), unless, perhaps, where the verdict is contrary to the direction of the Judge (*q*).

Defence not on the merits.

On the other hand, if the jury find against the defendant, the Court will not, in general, grant a new trial, even on payment of costs (*r*), to let in a defence not on the merits (*s*).

In penal actions.

In Penal Actions.]—In penal actions, if there be a verdict for the plaintiff, the Court will grant a new trial in the like cases as in other actions; but if the jury have found a verdict for the defendant, a new trial is never granted (*t*), unless for a mistake of law (*u*), or misdirection of the Judge (*x*). But it is otherwise in

(*f*) *Joyce* v. *Metropolitan Board of Works*, 44 L. T. 811: *Sowell* v. *Champion*, 2 N. & P. 627; 6 Ad. & E. 407. See *Arthur* v. *Barton*, 6 M. & W. 144: *Hawkins* v. *Alder*, 18 C. B. 640.

(*g*) *Edgson* v. *Cardwell*, L. R., 8 C. P. 647.

(*h*) *Joyce* v. *Metropolitan Board of Works*, supra. See *Dyball* v. *Duffield*, Tidd, 9th ed. 910; 1 Chit. Rep. 265; 1 Y. & J. 402: *Bevan* v. *Jones*, 2 Y. & J. 264.

(*i*) *Young* v. *Harris*, 2 C. & J. 14; Tidd, 9th ed. 913: *Watts* v. *Judd*, 6 Sc. N. R. 630; 5 M. & G. 598; and per *Erskine*, J., "Where the verdict is found for the plaintiff, that of course ascertains the limit; when the verdict is for the defendant, the limit necessarily is the utmost the plaintiff could have recovered."

(*j*) *Banson* v. *Disbury*, 4 P. & D. 441; 12 A. & E. 631; 9 Dowl. 199: *Watts* v. *Sheriff of Herts*, 5 Jur., Q. B. 1009.

(*k*) *Leese* v. *Sylvester*, 12 L. J., N. S., C. P. 250.

(*l*) *Banson* v. *Disbury*, supra.

(*m*) *Haine* v. *Davey*, 4 A. & E. 892: *Anon.* v. *Phillips*, 1 C. & M. 26: *Twigg* v. *Potts*, 1 C. M. & R. 93: *Rendall* v. *Hayward*, 7 Sc. 407: *Adams* v. *Midland R. Co.*, 31 L. J., Ex. 35.

(*n*) *Edgson* v. *Cardwell*, L. R., 8 C. P. 647.

(*o*) *Allum* v. *Boulthee*, 23 L. J., Ex. 208, *Martin*, B., diss.

(*p*) *Macrow* v. *Hull*, 1 Burr. 11: *Penprase* v. *Johns*, 2 N. & M. 376: *Johnson* v. *Piper*, Id. 672.

(*q*) See *Farrant* v. *Olmius*, 3 B. & A. 692: *Edmondson* v. *Machell*, 2 T. R. 4: *Wilkinson* v. *Payn*, 4 T. R. 468: *Cox* v. *Kitchen*, 1 B. & P. 338.

(*r*) *Shaw* v. *Hislop*, 4 D. & R. 241.

(*s*) *Gist* v. *Mason*, 1 T. R. 84: *Tullidge* v. *Wade*, 3 Wils. 18.

(*t*) *Brook* v. *Middleton*, 10 East, 268: *Matthison* v. *Allanson*, 2 Str. 1238: *Jervois* v. *Hall*, 1 Wils. 17: *Fournereau* v. ——, 3 Wils. 59: *Rawston* v. *Etteridge*, 2 Chit. 273. See *Rex* v. *Sutton*, 5 B. & Ad. 52: *Hall* v. *Green*, 9 Ex. 247; 23 L. J., M. C. 15: *Gough* v. *Hardman*, 6 Jur., N. S. 402.

(*u*) *Gregory* v. *Tuffs*, 2 Dowl. 711; 1 C. M. & R. 310: *Att.-Gen.* v. *Rogers*, 11 M. & W. 670; 2 Dowl., N. S. 1037; 12 L. J., N. S., Ex. 395.

(*x*) *Wilson* v. *Rastall*, 4 T. R. 753: *Calcraft* v. *Gibbs*, 5 T. R. 19: *Att.-Gen.* v. *Rogers*, supra.

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penal actions by parties aggrieved (*y*), in which case the rule is the same as in other actions.

In criminal matter.

In Criminal Matters.]—A new trial will not be granted after an acquittal in a criminal or quasi-criminal proceeding, *e. g.* an indictment for obstructing a highway (*z*).

In ejectment.

In Ejectment.]—In ejectment, where the verdict is for the defendant, the Court will seldom grant a new trial, because the plaintiff may, if he will, bring a new action; but it is otherwise if the verdict be found for the plaintiff, and the circumstances of the case in other respects warrant them in granting it (*a*).

In replevin.

In Replevin.]—In replevin, where the verdict is for the plaintiff, the Court will be more cautious in granting a new trial than in other actions, and will not grant it unless upon very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs (*b*).

After inquiry before sheriff.

After Inquiry before the Sheriff.]—The execution of a writ of inquiry may be set aside, and a new writ awarded, for the same causes as a verdict. As to this, *see post, Vol.* 2, *Ch. CXV.*

After issue.

After Trial of Issue.]—As to this, *see post, Vol.* 2, *Ch. CXVIII.*

After a previous new trial.

After a previous New Trial.]—If the jury at the second trial find for the party against whom the former verdict was given, the Court, if the case be doubtful, or the second verdict do not accord with the justice of the case, may be induced, under circumstances, to grant a third trial (*c*). It is in the discretion of the Court, however, to do so or not; for the losing party in such a case is not entitled to it by any rule or practice of the Court (*d*); and they have accordingly refused it where the second verdict was satisfactory (*d*). It is also in the discretion of the Court to grant a third trial after two concurring verdicts (*e*). But this is seldom done (*f*), and the Court have refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict (*g*).

(*y*) *Lord Selsea* v. *Powell*, 6 Taunt. 297.

(*z*) *Reg.* v. *Duncan*, 7 Q. B. D. 198; 50 L. J., M. C. 95.

(*a*) *Goodtitle* d. *Alexander* v. *Clayton*, 4 Burr. 2224: *Wright* d. *Clymer* v. *Littler*, 2 Id. 1244; 1 W. Bl. 348. See *Smith* d. *Dormer* v. *Parkhurst*, 2 Str. 1105: *Cooling* v. *Appleby*, 4 P. & D. 538; 9 Dowl. 556: *Doe* d. *Cozens* v. *Cozens*, 1 Q. B. 426: *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102.

(*b*) *Parry* v. *Duncan*, 7 Bing. 243; 5 M. & P. 19: cp. *Edgson* v. *Cardwell*, L. R., 8 C. P. 647. See post, Vol. 2, Ch. CVII.

(*c*) *S. East. R. Co.* v. *Smitherman*, H. L., 47 J. P. 773.

(*d*) *Parker* v. *Ansell*, 2 W. Bl. 963.

(*e*) *Goodwin* v. *Gibbons*, 4 Burr. 2101: *Gibson* v. *Muskett*, 3 Sc. N. R. 427.

(*f*) See *Davies* v. *Roper*, 2 Jur., N. S. 167, Exch., where see a note by the editor as to the right of the Court to grant a third trial on the ground that the verdict is against evidence: *Foster* v. *Steele*, 3 Bing. N. C. 892: *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 232: *Lee* v. *Shore*, 2 D. & R. 198; 1 B. & C. 94.

(*g*) *Clerk* v. *Udall*, 2 Salk. 649: *Chambers* v. *Robinson*, 2 Str. 692.

2. *The Application, &c. for a New Trial.*

To what Court.

To what Court Application to be made.]—By *R. of S. C., Ord. XXXIX. r.* 1, "Every motion for a new trial or to set aside a verdict, finding, or judgment, shall be made (1) in every cause or matter by the Principal Act assigned to the Probate, Divorce and Admiralty Division, where there has been a trial thereof or of any issue therein with a jury, to a Divisional Court of that Division, one of the Judges of which shall (when practicable) sit on the hearing of such motion; (2) in every other cause or matter, where there has been a trial thereof or of any issue therein with a jury to a Divisional Court of the Queen's Bench Division; and (3) where there has been a trial without a jury, by appeal to the Court of Appeal."

Where the action is tried before a Judge without a jury, or where the jury is discharged and the decision left to the Judge (*h*), and the unsuccessful party is dissatisfied with the judgment, either on the ground that the Judge has misdirected himself as to the law, or that the findings as to the facts are against the weight of the evidence, the proper course is to appeal to the Court of Appeal, and not to move for a new trial (*i*).

Where, after a trial by Judge and jury, the Judge directs a finding (*k*) or a nonsuit (*l*), except, perhaps, when the nonsuit is directed on facts appearing on the Judge's notes (*m*), or refuses to direct a nonsuit, and the jury find for the plaintiff (*n*), or, indeed, in all cases where the finding is not admitted to be correct, the party dissatisfied must apply to the Divisional Court for a new trial and not to the Court of Appeal (*o*). Where, however, it is sought to review the judgment directed by the Judge on the findings, the application is to the Court of Appeal (*see post, Ch. LXXXV.*). Where an action attached to the Chancery Division is tried with a jury before a Judge of the Queen's Bench Division, the application for a new trial must be made to a Divisional Court (*p*).

Interpleader.

As to the application after the trial of an interpleader issue, *see post, Vol.* 2, *Chap. CXXI.*

(*h*) See the rule, supra. Cp. *Metropolitan Bank* v. *Heiron* (C. A.), W. N. 1880, 132.

(*i*) See the rule, supra. Cp. *Potter* v. *Cotton*, 5 Ex. D. 137; 49 L. J., Q. B. 178 (C. A.): *Pannell* v. *Nunn*, W. N. 1880, 148; 28 W. R. 940: *Dollman* v. *Jones*, 12 Ch. D. 553: *Jones* v. *Hough*, 5 Ex. D. 115; 42 L. T. 108: *Oastler* v. *Henderson*, 2 Q. B. D. 575; 46 L. J., Q. B. 607; 37 L. T. 22 (C. A.). Under the old rule when the Judge had wrongly rejected evidence (*Metropolitan Inner Circle R. Co.* v. *Metropolitan R. Co.*, W. N. 1880, 134: *The Sir Robert Peel*, 43 L. T. 364), or in case of surprise (*Jones* v. *Hough*, supra), the application was to the Court of Appeal for a new trial. Under the present rule the application is in all cases by way of appeal.

(*k*) *Yetts* v. *Foster*, 3 C. P. D. 437; 38 L. T. 742.

(*l*) *Etty* v. *Wilson*, 3 Ex. D. 359; 47 L. J., Ex. 664; 39 L. T. 83.

(*m*) Per *Thesiger*, L. J., 3 Ex. D. at p. 360.

(*n*) *Davies* v. *Felix*, 4 Ex. D. 32; 48 L. J., Ex. 3; 39 L. T. 322: *Clarke* v. *Midland R. Co.*, 44 L. T. 131 (C. A.).

(*o*) Id. *Hamilton* v. *Johnson*, 41 L. T. 461.

(*p*) See the rule, supra. Cp. *Jones* v. *Baxter*, 5 Ex. D. 275: *Hunt* v. *City of London Real Property Co.*, 3 Q. B. D. 19; 37 L. T. 344 (C. A.), reversing 2 Id. 605: *Krehl* v. *Burrell*, 10 Ch. D. 420; as to which see *Potter* v. *Cotton*, 5 Ex. D. 137, 138: *Dollman* v. *Jones*, 12 Ch. D. 553. See *Jenkins* v. *Morris*, 14 Ch. D. 674; 42 L. T. 817 (C. A.).

PART IX.

Form of—Notice of motion.

Form of Application—Notice of Motion.]—By *Ord. XXXIX. r.* 3, "Every application for a new trial shall be by notice of motion, and no rule nisi, order to show cause, or formal proceeding other than such notice of motion, shall be made or taken. The notice shall state the grounds of the application, and whether all or part only of the verdict or findings is complained of."

Under this rule the old practice of moving, in the first instance, for a rule nisi is abolished, and the application is, in all cases, made on notice of motion.

Length of notice—time for application.

Length of Notice—Time for Application.]—By *Ord. XXXIX. r.* 4, "The notice of motion shall be an eight days' notice, and shall be served within the times following, viz., if the trial has taken place in London or Middlesex, within eight days after the trial; if the trial has taken place elsewhere than in London or Middlesex, within seven days after the last day of sitting on the circuits for England and Wales during which the trial shall have taken place. The time of the vacations shall not be reckoned in the computation of the time for serving the notice of motion."

The time for moving in the case of a trial before a Judge or jury runs from the time when the jury have given their verdict or are discharged, and not from the time of any subsequent hearing or further consideration (*s*).

When the finding on one issue is for the plaintiff, and on the other for the defendant, and cross orders are sought for to set aside the verdicts on such findings, each party must move within the above time (*t*). The Court may allow the motion to be made after this time (*u*) or extend the time for moving (*x*), and they may, in their discretion, allow it to be made at any time before judgment has been actually signed. They may sometimes do so if the foundation for the motion be a fact not disclosed to the party till after that time (*y*). When it is desired to postpone the motion until after a decision of the Court of Appeal, the proper course is to serve the notice of motion within the time, and to apply to the Court to postpone the hearing (*x*).

After execution issued.

A new trial may be moved for, though execution has issued (*z*).

After inquiry before sheriff.

As to the time for applying to set aside the execution of a writ of inquiry, and for a fresh writ, *see post, Vol.* 2, *Ch. CXV.*

As to the time for moving for a new trial, where the action is removed to a County Court, *see post, Vol.* 2, *Ch. CXXXIII.*

By whom applied for (*a*).

By whom applied for.]—The motion should in general be made by the party who has been aggrieved by the first trial (*b*). Where,

(*s*) *Shaw* v. *Hope*, 25 W. R. 729.

(*t*) *Deacon* v. *Stodhart*, 2 M. & G. 317; 2 Sc. N. R. 557: *Ellaby* v. *Moore*, 22 L. J., C. P. 253: *Lanyon* v. *Kelby*, 8 L. J., Q. B. 40.

(*u*) Ord. LXIV. r. 7, post, Ch. CXXV.: *Birt* v. *Barlow*, 1 Doug. 171: *Thomas* v. *Edwards*, 2 Dowl. 664; 1 C. M. & R. 382: *Williams* v. *Andrews*, 9 Dowl. 122: *Bolton* v. *Prichard*, 4 D. & L. 117: *Rex* v. *Gough*, 2 Doug. 797. And see *Rex* v. *Holt*, 5 T. R. 436: *Price* v. *Duggan*, 2 M. & G. 641; 3 Sc. N. R. 47.

(*x*) *Peckett* v. *Short Brothers*, 32 W. R. 123.

(*y*) *Willis* v. *Bennett*, Barnes, 443.

(*z*) See 1 W. 4, c. 7, s. 4: *Baddley* v. *Oliver*, 1 Dowl. 198.

(*a*) See *Jenkins* v. *Tongue*, 29 L. J., Ex. 147, where a rule nisi for a new trial was moved for on the part of defendants without their authority.

(*b*) *Freeman* v. *Rosher*, 13 Q. B.

after a verdict for plaintiff in an action for a debt, the defendant became bankrupt and obtained his certificate, it was held, that he still had a sufficient interest to enable him to move for a new trial, on the ground that there was not any notice of trial (*c*). One or more of several defendants may move for a new trial. The motion in such a case should be to set aside the verdict, and for a new trial, and sometimes the other defendants should be made parties to the rule (*d*). In an action for negligence against two defendants, where, assuming there was negligence, if one defendant was not liable the other was, and a verdict was found in favour of one defendant and against the other; it was held that the latter defendant could not move for a new trial without serving notice of the application on the other (*e*).

The notice of motion—Form of, &c.

The Notice of Motion, Form of, &c.]—The notice of motion is in the usual form (*f*), but it must specify the grounds of the application, and whether all or part only of the verdict or findings is complained of (*g*). The various grounds on which a new trial will be granted are discussed, *ante*, p. 730 *et seq.* All the grounds intended to be relied on should be carefully specified (*h*). The same particularity was required in the case of the rule nisi, which was formerly granted in the first instance (*i*).

A rule nisi, which was drawn up on reading an affidavit and deposition, and which called on the defendant to show cause why a new trial shall not be had, "on the grounds set forth in the said affidavit and deposition," was held not sufficiently to state the grounds (*j*). But leave may be given to amend (*k*); and in one case the Court allowed the grounds to be stated *vivâ voce* (*l*). If the motion is made on behalf of one of several defendants, it is, as noticed *supra*, sometimes necessary to give notice of motion to the other defendants, as well as to the plaintiff. If the ground of the application be an irregularity in the proceedings, or on account of surprise, or the absence of counsel or solicitor, or some other mere practical point, the Court would formerly often direct that the rule nisi should not be placed in the new trial paper, but come on for discussion as a common rule.

Directing that rule shall not be put in new trial paper.

Service.

The notice of motion must be served on the opposite party or his

780; 18 L. J., Q. B. 340, where the motion was authorized by the executors of defendant who died after trial.

(*c*) *Shepherd* v. *Thompson*, 9 M. & W. 110.

(*d*) *Doe* d. *Dudgeon* v. *Martin*, 13 M. & W. 811: *Belcher* v. *Magnay*, 13 M. & W. 815, n.: *Wakley* v. *Healey*, 18 L. J., Ex. 426: *R.* v. *Gompertz*, 9 Q. B. 824: *R.* v. *Mawbey*, 6 T. R. 938: *Cooper* v. *Smith*, 4 Taunt. 802: *Parker* v. *Godin*, 2 Stra. 814: *Bond* v. *Sparke*, 12 Mod. 275: *Sir C. Berrington's case*, 3 Salk. 362: *Price* v. *Harris*, 4 M. & Sc. 474.

(*e*) *Purnell* v. *G. W. R. Co., and Harris*, 1 Q. B. D. 636; 45 L. J., Q. B. 687.

(*f*) See form, Chit. F., p. 368.

(*g*) See Ord. XXXIX. r. 3, ante, p. 746.

(*h*) See *Cowne* v. *Garment*, 3 Bing. N. S. 330: *Robertson* v. *Barker*, 2 Dowl. 39.

(*i*) See C. L. P. Act, 1854, s. 33.

(*j*) *Drayson* v. *Andrews*, 10 Ex. 472; 24 L. J., Ex. 22. See *Watson* v. *Lane*, 26 L. T., O. S. 260.

(*k*) See Ord. XXXIX. r. 5, post, p. 748.

(*l*) *Tuff* v. *Warman*, 2 C. B., N. S. 740; 26 L. J., C. P. 264.

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solicitor in the usual manner within the time limited by *Ord. XXXIX. r.* 4 (*ante*, p. 746).

Setting down for argument.

The notice must be taken to the proper office at the Royal Courts, and set down for argument in the list.

Judges' notes.

If the cause was tried before a Judge of the High Court, serve the clerk of such Judge with a written notice informing him that the notice of motion has been given, and requesting him to have in Court upon the notice coming on for argument the Judge's notes taken on the trial of the cause (*m*.) The fee on such application is five shillings, which is paid by means of a stamp impressed on the application (*n*). Deliver to your counsel the briefs in the original cause, together with such further instructions and observations as you may think fit.

Amendment of notice.

Amendment of Notice.]—By *Ord. XXXIX. r.* 5, "The notice may be amended at any time by leave of the Court or a Judge, on such terms as the Court or Judge may think just."

Amendment of rule.

Formerly the Court would not, in general, amend the rule nisi (*o*), nor would they allow another rule to be moved for upon another point, omitted in the first motion, to come on at the same time (*p*).

Affidavits on the motion (*q*).

Affidavits on.]—Where the new trial is moved for, for the improper rejection or reception of evidence, or for misdirection, or on account of the verdict being against the evidence, no affidavit is necessary; but where the ground of the motion cannot be collected from the Judge's notes an affidavit is necessary.

Formerly, it was necessary that the affidavit should be sworn within the time limited for moving for a new trial, though the case was put in the postponed list of motions (*r*), and that it should be made before obtaining the rule nisi, but this would not appear to be necessary now. As a general rule, the Court will not receive affidavits of witnesses examined at the trial to explain or add to their evidence given thereat (*s*). As to when the Court will not receive an affidavit made by a juror, *see ante*, p. 733. The Judge's notes are conclusive as to the evidence, &c.; and the Court will not allow them to be contradicted (*t*), even upon affidavit. Nor can affidavits be used to supply alleged omissions of evidence in the Judge's notes (*u*).

(*m*) See *Anon.*, 17 Jur. 466, Ex.: *Cockerell* v. *Aucompte*, 2 C. B., N. S. 445, n. The copy is usually delivered to the junior puisne Judge.

(*n*) See Orders in App., Vol. 2.

(*o*) *Lopez* v. *De Tastet*, 8 Taunt. 712.

(*p*) *Robertson* v. *Barker*, 2 Dowl. 39. And see *Cowne* v. *Garment*, 1 Bing., N. S. 320.

(*q*) As to verifying assessor's notes when motion made for a new trial of an action tried in the Liverpool Court of Passage, see *Welsh* v. *Mercer*, 42 L. J., Ex. 52.

(*r*) *Williams* v. *Mortimer*, 11 M. & W. 104; 2 Dowl., N. S. 509. See *Allum* v. *Boultbee*, 18 Jur. 336; 23 L. J., Ex. 208.

(*s*) *Phillips* v. *Hatfield*, 8 Dowl. 882; 10 L. J., N. S., Ex. 33: *Edger* v. *Knapp*, 7 Jur. 583, C. P.

(*t*) *R.* v. *Grant*, 3 N. & M. 106. And see *Gibbs* v. *Pike*, 1 Dowl., N. S. 409; 9 M. & W. 351.

(*u*) *Coles* v. *Bullman*, 17 L. J., C. P. 302.

The argument, &c.

The Argument.]—The motion will be called on for argument in the order in which it stands in the new trial paper. The argument may take place on the last day of the sittings (*x*).

By *Ord. XXXIX. r.* 2, "No Judge shall sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself."

It is no ground for taking a case out of the paper, and bringing it on as a motion, that several of the witnesses are infirm, and of an advanced age (*y*). When the case is called, and it is necessary to do so, the Junior Puisne Judge will read the Judge's notes; after which the counsel for the party moving will argue in support of the motion, and the counsel for the party opposing will show cause, and the counsel moving replies, and the Court then give judgment, and either grant the application or refuse it (*z*). Where one of several defendants is called on by the other to show cause why there should not be a new trial, he cannot be heard in support of the order, but he may show cause against its being made (*a*). The Court will look only to the Judge's notes for the evidence given at the trial, and the manner in which the Judge summed up the case (if that be stated in it), and will not attend to any contrary statement of them by counsel, or even by affidavit (*b*). The Court may look at the record in discussing a motion for a new trial (*c*). In some cases the Court will allow the costs of shorthand notes of the evidence at the trial (*d*). Where a defendant applied to the Judge for a nonsuit, on the ground that the contract declared on was not proved, and the Judge declined to nonsuit, but reserved the point, and the jury found for the defendant, it was competent to the defendant to set up the objection taken by him at the trial, in answer to an application for a new trial made by the plaintiff on the ground that the verdict was against evidence (*e*).

Cross-motions for judgment and new trial.

When there are cross-motions for judgment and for a new trial they should as a general rule be brought on together, and if necessary a direction for the purpose should be obtained (*f*).

Death of plaintiff.

Where, after a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff died, it was held, that no cause could be shown against the rule until there was a personal representative (*g*). Cause could not, in such a case, be shown on behalf of the solicitor who claimed a lien on the verdict for his costs (*h*).

By *Ord. XL. r.* 10, "Upon a motion for judgment, or upon an

(*x*) *Lambert* v. *Heath*, 15 L. J., Ex. 296.

(*y*) *Anon.*, 1 D. & L. 725; 13 L. J., Q. B. 80.

(*z*) See *Burnett* v. *Allen*, 4 Jur., N. S. 488.

(*a*) *Wakley* v. *Healey*, 18 L. J., Ex. 426.

(*b*) *Rex* v. *Grant*, 3 N. & M. 109, per *Denman*, C. J. See *Gibbs* v. *Pike*, 1 Dowl., N. S. 409; 9 M. & W. 351.

(*c*) *Angel* v. *Ihler*, 5 M. & W. 600; 7 Dowl. 846: *Sherry* v. *Oke*, 3 Dowl. 349; 1 H. & W. 119. And see *Platt* v. *Hall*, 2 M. & W. 391.

(*d*) *Watson* v. *Great Western R. Co.*, 6 Q. B. D. 163. A special direction for such allowance must be obtained. *Earl de La Warre* v. *Miles*, 19 Ch. D. 80.

(*e*) *Mummery* v. *Paul*, 1 C. B. 316.

(*f*) Per *Blackburn*, J., W. N. 1875, 216, Q. B. D.: *Scarf* v. *General Navigation Co.*, W. N. 1876, 83, Q. B. D.

(*g*) *Higgins* v. *Nichols*, 7 Dowl. 551: *Doe* d. *Wyatt* v. *Staff*, 5 Bing., N. S. 424. And see *Bate* v. *Kinsey*, 1 C. M. & R. 38.

(*h*) *Sloman* v. *Allen*, 1 M. & G. 96. See *Doe* d. *Cozens* v. *Cosens*, 1 Q. B.

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application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit" (*i*).

The judgment.

The Court, on a motion to set aside a verdict which has been found for the plaintiff, instead of ordering a new trial may give judgment for the defendant, where such Court is satisfied that there is really no evidence to support the verdict, and that it has before it all the materials necessary for finally determining the question in dispute (*j*). In one case where the ground of the application was that evidence was improperly rejected, the Court heard the evidence and gave judgment (*k*).

By *Ord. XXXIX. r.* 7, "A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question" (*l*).

Terms imposed.

If the Court make the order, they may do so upon terms, if necessary, unless where the new trial is a matter of right, as in the case of a material misdirection of the Judge (*m*). The terms may be that witnesses infirm or going beyond sea may be examined upon interrogatories, or that their evidence may be read from the Judge's notes of the first trial (*n*); that certain deeds, books, papers, &c., may be produced at the trial; that certain facts, not intended to be litigated, may be admitted (*o*), or that the party may make discovery of certain facts upon oath. Where an action was carried on by a bankrupt for the benefit of his creditors, the Court refused a new trial, unless the assignees would consent to be bound by the event of the action, and to be responsible for the costs (*p*). Where the plaintiff has died after verdict, the Court may grant a new trial on the application of the defendant on the same grounds on which a new trial may be granted in other cases (*q*). It may be added, that

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426: *Thomas* v. *Dunn*, 1 C. B. 139, where the rule nisi called on "the legal representatives of the defendant or their attornies." See *Freeman* v. *Rosher*, ante, p. 746, n. (*b*).

(*i*) See this rule fully discussed post, p. 760.

(*j*) *Daun* v. *Simmins* (C. P. D.), 48 L. J., C. P. 343. See fully, post, p. 760.

(*k*) *McCollin* v. *Gilpin* (C. A.), 44 L. T. 914.

(*l*) See *Marsh* v. *Isaacs*, 45 L. J., C. P. 505. See ante, p. 741. As to the power of the Court to grant a new trial as to one of two defendants without disturbing the verdict against the other, see *Purnell* v. *G. W. R. Co.*, 1 Q. B. D. 636; 45 L. J., Q. B. 557; 35 L. T. 605.

(*m*) See *Hawtayne* v. *Bourne*, 8 M. & W. 264, n.: *Earl Harborough* v. *Shardlow*, Id.: *Mahony* v. *Frasi*, 1 C. & M. 325; 1 Dowl. 70: *De Bernardy* v. *Harding*, 22 L. J., Ex. 340.

(*n*) *Anon.*, 2 Chit. 425: *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102: *Anon.*, 1 D. & L. 725; 13 L. J., Q. B. 80.

(*o*) See *Thwaites* v. *Sainsbury*, 7 Bing. 437: *Doe* d. *Cooling* v. *Appleby*, 4 P. & D. 538: *Doe* d. *Cozens* v. *Cozens*, 1 Q. B. 426.

(*p*) *Noble* v. *Adams*, 7 Taunt. 59.

(*q*) *Griffiths* v. *Williams*, 1 C. & J. 47: *Freeman* v. *Rosher*, 18 L. J., Q. B. 340. As to the effect of death of parties to an action, see Ch. LXXXVIII.

amendments may be made, on terms, after the trial, where the justice of the case requires it (*r*).

Appeal against decision of Court.

As to appealing against the decision of the Court granting or refusing a new trial, *see post, Vol.* 2, *Ch. LXXXV.*

Costs.

Costs.]—The Court may, in their discretion, make such order as to costs as they think fit. As a general rule, the costs of the first trial abide the event of the second (*s*). The Court will grant the new trial without imposing as a term the payment of costs, where the plaintiff submitted to an erroneous nonsuit (*t*), or where it is a matter of right by reason of a material misdirection or other mistake of the Judge, or the like (*u*). Where the new trial was granted for the misconduct of the jury, as where the verdict was perverse or the like, the costs are usually directed to abide the event of the second trial (*x*). If granted because the verdict was contrary to evidence, or because of excessive damages, it was usually granted upon payment of costs (*y*). If a party has obtained a verdict by trick, the Court will grant a new trial without costs, or perhaps, in a very gross case, will oblige him to pay the costs (*z*). Where it was granted because the plaintiff had a material witness for the defendant concealed in his house, and prevented the witness from being served with a subpœna, it was granted without costs (*a*). If granted on the ground of surprise not fraudulent, it will sometimes be on payment of costs (*b*), but this is not always so.

The Court upon granting a new trial on payment of costs, will not, in general, name a particular time for the payment of them. The form of the order in such a case is for the new trial on payment of the costs (*c*).

An appeal will lie against an order imposing the payment of costs as a condition to having a new trial (*d*).

In the case of a trial by Judge and jury if no special order is

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(*r*) See Ch. XLII. *Tomlinson* v. *Blacksmith*, 7 T. R. 132: *Wilder* v. *Handy*, 2 Str. 1151; *Marshall* v. *Riggs*, id. 1162: *Dennis* v. *Edwards*, Comb. 4: *Doe* d. *Bacon* v. *Brydges*, 1 D. & L. 954. When not, see *Price* v. *Severn*, 7 Bing. 402; 5 M. & P. 250; 1 Dowl. 215.

(*s*) See *Green* v. *Wright*, 2 C. P. D. 354; 46 L. J., C. P. 427: *Field* v. *Great Northern R. Co.*, 3 Ex. D. 261; 47 L. J., Ex. 662.

(*t*) *Porlaine* v. *Panley*, 1 W. Bla. 670: *Buscall* v. *Hogg*, 3 Wils. 146.

(*u*) *Vale* v. *Bayle*, Cowp. 297: *Harris* v. *Butterley*, 2 Id. 485: *Jackson* v. *Duchaire*, 3 T. R. 553: *Goodright* v. *Saul*, 4 Id. 359. See *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102: *Edwards* v. *Scott*, 2 Sc. N. R. 266: *Lord* v. *Wardle*, 3 Bing., N. S. 680: *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570.

(*x*) *Hale* v. *Cove*, 1 Str. 642: *Hodgson* v. *Barvis*, 2 Chit. 268: *Shillitoe* v. *Claridge*, Id. 425: *Brown* v. *Clarke*, 12 M. & W. 25; 13 L. J., Ex. 36. See *Green* v. *Wright*, post, p. 752, n. (*e*).

(*y*) *Doe* v. *Pike*, 1 N. & M. 385. See *Beverley* v. *Walker*, 4 Jur. 434, B. C.: *Anon.*, 12 Mod. 370. *Macrow* v. *Hull*, 1 Burr. 12: *Bright* v. *Eynon*, Id. 393: *Burton* v. *Thompson*, 2 Id. 566; Hullock, 387: *Furneaux* v. *Hutchins*, Cowp. 808: *Pochin* v. *Pawley*, 1 W. Bl. 670: *Jackson* v. *Duchaire*, 3 T. R. 551: *Farrant* v. *Olmius*, 3 B. & A. 692: *Harrison* v. *Fane*, 1 Sc. N. R. 287.

(*z*) *Anderson* v. *George*, 1 Burr. 352: *Trubody* v. *Brain*, 9 Price, 76. See Hullock, 391.

(*a*) Bull, N. P. 328. See *Turquand* v. *Dawson*, 1 C. M. & R. 709; ante, p. 739.

(*b*) See *Greatwood* v. *Sims*, 2 Chit. 269.

(*c*) *Bland* v. *Warren*, 6 Dowl. 21.

(*d*) *Metropolitan Asylum District* v. *Hill*, 5 App. Cas. 582; 49 L. J., Q. B. 745, H. L.

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Where costs not mentioned in the order.

made as to the costs they abide the event of the second trial—that being the event within *Ord. LXV.* (*e*); and the Judge at the second trial has power to deal with them as he thinks fit (*f*); and he may even order the party who succeeds at both trials to pay them (*f*).

In a case before the Judicature Acts, after a verdict for the plaintiff, a new trial was obtained by defendant, the rule was silent as to costs, and the plaintiff afterwards discontinued; it was held, the defendant was not entitled to the costs of the trial (*g*). So in another case before the Act, where, after a verdict for the plaintiff, a new trial was obtained, and the rule was silent as to costs, and after the plaintiff had applied for a special jury, the defendant withdrew his plea and suffered judgment by default, and damages were assessed thereon; it was held that the plaintiff was not entitled to the costs of the first trial (*h*). But this, it is submitted, would be otherwise in both cases now.

Where question of costs reserved till second trial.

Where the question of costs is reserved by the Court until after the second trial, it will then be entirely in their discretion, whether they will allow the costs of the first trial to the party who succeeds at the second or not (*i*).

Amount of costs, &c.

Where an order for a new trial has been obtained on payment of costs, there is a broad distinction between these costs and costs in the cause. The former costs do not include the costs of the pleadings, or of obtaining admission of documents, or of giving notice to produce, or of the briefs (*k*). In some cases, however, something may be allowed for amending the briefs (*k*). The costs incurred by a cause being made a remanet are costs in the cause and, therefore, not chargeable upon a defendant's obtaining a new trial on payment of costs (*l*). In an action upon a statute which gave double costs, if a new trial were granted on payment of the costs of a first trial generally, it would mean the double costs (*m*). Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master, in taxing costs, may allow fees on the second trial with reference to those

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(*e*) *Creen* v. *Wright*, 2 C. P. D. 354; 46 L. J., C. P. 427: *Field* v. *Great Northern R. Co.*, 3 Ex. D. 261; 47 L. J., Ex. 662. *Evans* v. *Robinson*, 24 L. J., Ex. 212: *Jones* v. *Williams*, L. R., 8 Q. B. 280; 42 L. J., Q. B. 48. As to the meaning of the event, see *Meule* v. *Goddard*, 5 B. & A. 766: *Gibbons* v. *Phillips*, 8 B. & C. 437. Where the second trial was granted on the application of the plaintiff on account of the smallness of the damages, and the costs were to abide the event, and the plaintiff at the second trial obtained only the same amount of damages; he was held entitled to the costs of the second trial only: *Hudson* v. *Majoribanks*, 8 Moore, 440; 1 Bing. 393.

(*f*) *Harris* v. *Petherick*, 4 Q. B. D. 611; 48 L. J., Q. B. 521 (C. A.).

(*g*) *Gray* v. *Cox*, 5 B. & C. 458; 8 D. & R. 220. And see *Earl Macclesfield* v. *Bradley*, 7 M. & W. 570. *Parke*, B., in *Jolliffe* v. *Mundy*, 4 M. & W. 502; 7 Dowl. 225: *Daniel* v. *Wilkin*, 16 Jur. 1092, Ex., where the plaintiff discontinued after verdict for defendant and new trial granted.

(*h*) *Peacock* v. *Harris*, 1 N. & P. 240; 5 A. & E. 449. See *Elvin* v. *Drummond*, 4 Bing. 415: *Bower* v. *Hill*, 2 Sc. 535, 540.

(*i*) See *Body* v. *Esdaile*, 3 Bing. 174: *Hunter* v. *Caldwell*, 10 Q. B. 83.

(*k*) *Lord* v. *Wardle*, 6 Dowl. 174.

(*l*) *Bentley* v. *Carver*, 2 C. B. 817; 15 L. J., C. P. 173; overruling *Robinson* v. *Day*, 5 B. & Ad. 814, contra.

(*m*) Semble *Loader* v. *Thomas*, 1 C. & J. 54. As to what costs are now allowed in lieu of double costs, see ante, p. 692.

given on the first (*o*). Where a party who succeeded on the second trial was not entitled to the costs of the first trial: it was held, that the Master was right in allowing the successful party the costs of all such proceedings on the first trial as were available for the second (*p*), and therefore, that he was right in allowing the costs of the briefs, subpœnas, and copies on the first trial, but not the fees on the briefs, or the consultation fees, or the costs of serving the subpœnas for the first trial.

Costs where application for a new trial discharged.

Costs of resisting an unsuccessful application for a new trial are costs in the cause (*q*), unless the application is made after judgment (*r*). As a general rule, the costs of the maintenance of a witness detained in this country, between the time when an application for a new trial is made and the time of its refusal, will not be allowed as costs in the cause. In one case, under very peculiar circumstances, such costs were so allowed (*s*). Where a rule nisi was obtained for a new trial, unless the plaintiff would consent to reduce the amount of the verdict, and the plaintiff did consent, and the rule by the agreement of the parties was discharged, it was so without costs (*t*).

Costs where application drops.

Where the Court is equally divided in opinion upon an application for a new trial, and it consequently fails, neither party is entitled to any costs of the application unless an order is made (*u*).

Proceedings on the order and mode of recovering costs.

Proceedings on Order for new Trial.]—*If the order be made, draw it up without delay at the proper office* (*x*), *and serve a copy of it on the opposite solicitor or agent. If made upon payment of costs, get an appointment from the Master, serve a copy of the order and appointment on the opposite solicitor, get the costs taxed and pay them without delay; otherwise the opposite party may move to rescind the order* (*y*). So, he may move to rescind it, if, after the costs are taxed and demanded, the party does not pay them in a reasonable time. The motion to rescind the order should be made on notice of motion (*z*).

Where a plaintiff after setting aside a nonsuit *upon payment of costs*, proceeded to a second trial without paying these costs, and obtained a verdict, the Court set it aside, and gave the defendant leave to sign his judgment in the original action, unless the costs were paid in ten days (*a*).

As to appealing to the Court of Appeal against the order, *see*

(*o*) *Wilkinson* v. *Malin*, 2 Dowl. 65: *Lord* v. *Wardle*, 6 Dowl. 174.

(*p*) *Lambert* v. *Lyddon*, 4 D. & L. 400.

(*q*) *Eyre* v. *Thorp*, 6 Dowl. 768: *Delisser* v. *Towne*, 1 Q. B. 333; 4 P. & D. 644.

(*r*) *Newton and Wife* v. *Boodle*, 4 C. B. 359, where the costs were ordered to be paid by both plaintiffs, husband and wife.

(*s*) *Dowdell* v. *The Royal Australian Steam Navigation Co.*, 23 L. J., Q. B. 369.

(*t*) *Thompson* v. *Bailey*, 7 D. & L. Ex. 234; 4 Ex. 86. The rule, however, by agreement or by order of the Court may give some other direction as to costs.

(*u*) *Dansey* v. *Richardson*, 23 L. J., Q. B. 361.

(*x*) See *Lopez* v. *De Tastet*, 8 Taunt. 712; 7 Moore, 120.

(*y*) See *Chase* v. *Goble*, 4 Sc. & R. 317; 3 M. & G. 635: *Farrer* v. *De Flynn*, 8 Jur. 779, B. C.: *Earl of Harborough* v. *Shardlow*, 8 M. & W. 265.

(*z*) Ord. LII. r. 1.

(*a*) *Nicholls* v. *Bozon*, 13 East, 185. See Hullock, 401: *Doe* d. *Davie* v. *Haddon*, Tidd, 9th ed. 915: *Farrer* v. *De Flynn*, 8 Jur. 779, B. C.

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post, Vol. 2, *Ch. LXXXV.* (*z*). An order for a new trial is an interlocutory order, an appeal from which must be brought within twenty-one days from the date thereof (*a*).

3. *The New Trial.*

In what time and how enforced by defendant.

If the order imposes some condition on the party at whose instance the new trial is granted, such as the payment of costs or the like, such condition should be performed (*b*). If the order for the new trial simply orders the costs to be paid by one party without making the payment a condition precedent to the new trial, proceedings on the new trial will not be stayed until they are paid (*c*).

Notice of trial.

Notice of trial is given, and the cause entered for trial, as in ordinary cases.

The second verdict alone appears upon the proceedings. No notice is taken upon the judgment of the first verdict, but the judgment proceeds as if the second verdict was the only one that had been given (*d*).

(*z*) See former enactment, C. L. P. Act, 1854, ss. 34, 42.

(*a*) *Highton* v. *Treherne*, 48 L. J., Ex. 167; 39 L. T. 411; 27 W. R. 245. See other cases, post, Vol. 2, Ch. LXXXV.

(*b*) See *Earl of Harborough* v. *Shardlow*, 8 M. & W. 265.

(*c*) *Morton* v. *Palmer*, 46 L. T. 285.

(*d*) Cp. 2 Saund. 253 *a*, n. (8).

CHAPTER LXIX.

MOTION OR APPLICATION FOR JUDGMENT, OR TO SET ASIDE JUDGMENT DIRECTED, AND ENTER OTHER JUDGMENT AND PROCEEDINGS THEREON.

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1. *In what Cases.*

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Generally when no express provision.

Generally.]—By *R. of S. C., Ord. XL. r.* 1, "Except where by the Acts or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment."

The cases in which it is necessary to move for judgment are those referred to in this chapter. In all or nearly all other cases a special mode is provided, which will be found treated of in its proper place. (*See post, Ch. LXX.*, "*Judgment*," and the *Index*.)

When no judgment directed at trial.

When no Judgment directed at Trial.]—By *R. of S. C., Ord. XL. r.* 2, "Where at the trial the Judge or referee abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment. If he does not set down such a motion and give notice thereof to the other parties *within ten days* after the trial, any defendant may set down a motion for judgment, and give notice thereof to the other parties."

Under this rule and *Ord. XXXVI. r.* 39 (*ante*, p. 653), the Judge at the trial may simply leave the party who considers himself entitled to judgment to move for it (*a*). But in order to bring the case within the rule, the Judge must be asked to give judgment, otherwise it has been held that he cannot be said to "abstain" from doing so (*b*).

(*a*) *Yetts* v. *Foster*, 3 C. P. D. 437, per Cur. at p. 438: *Benscher* v. *Coley*, 52 L. J., Q. B. 398; 48 L. T. 533.

(*b*) *Davenport* v. *Ward*, 47 L. T. 348.

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Where a verdict is taken subject to a reference, the arbitrator having power to direct a verdict to be entered, judgment may be signed on the award without any motion notwithstanding that nothing is said as to judgment in the order of reference (*c*).

—To set aside judgment directed and enter other.

When it is desired to set aside Judgment directed at the Trial and enter other Judgment.]—By *R. of S. C., Ord. XL. r.* 3, "Where, at or after a trial *with a jury*, the Judge has directed that any judgment be entered, any party may apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason that the finding of the jury upon the questions submitted to them has not been properly entered."

By *r.* 4, "Where, at or after a trial by a Judge, either *with or without a jury*, the Judge has directed that any judgment be entered, any party may apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong."

By *r.* 5, "An application under Rules 3 and 4 of this Order shall be to the Court of Appeal, unless, where there has been a trial with a jury, there is also a motion for a new trial, in which case it shall be to the Divisional Court by which such motion shall be heard."

An application under this rule is an application on appeal under *Ord. LVIII. rr.* 2 *and* 4 (*d*), and must be made on notice of motion and not *ex parte* (*e*).

After trial of issues.

After Trial of Issues or Questions of Fact.]—By *Ord. XL. r.* 7, "Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down a motion for judgment as soon as such issues or questions have been determined. If he does not set down such a motion, and give notice thereof to the other parties *within ten days* after his right so to do has arisen, then after the expiration of such ten days any defendant may set down a motion for judgment, and give notice thereof to the other parties."

By *r.* 8, "Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down a motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other issues of fact" (*f*).

After trial before referee.

After Trial before Referee.]—*See post, Vol.* 2, *Ch. CXXXV.*

(*c*) *Lloyd* v. *Lewis*, 2 Ex. D. 7. Where see per *Brett*, L. J.

(*d*) See post, Ch. LXXXV., "*Appeal to the Court of Appeal*": *Foster* v. *Roberts*, W. N. 1877.

(*e*) *Jones* v. *Davis*, W. N. 1877, 86; 36 L. T. 415.

(*f*) See, for instance, *Republic of Bolivia* v. *Bolivian Navigation Co.*, 24 W. R. 261.

In default of pleading—Default by defendant.

In Default of Pleading.]—Where the claim is for a debt or liquidated demand or for detention of goods or pecuniary damages, or recovery of land (*see post, Ch. CVI.*, "*Recovery of Land*"), or a combination of two or more of such claims, the plaintiff may sign judgment if the defendant makes default in delivery of defence (*g*). In other cases he must set down the action on motion for judgment under *Ord. XXVII. rr.* 11, 12, which are as follows:—

"11. In all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a Judge shall consider the plaintiff to be entitled to.

—Default by one of several defendants.

12. Where, in any such action as mentioned in the last preceding rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either (if the cause of action is severable) set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants."

No affidavit in support of the application is necessary (*h*).

If a defence is delivered out of time after the plaintiff has served notice of motion for judgment in default, it cannot be disregarded (*i*), but if it discloses no defence the Court will give judgment on the admissions (*k*).

Where several defendants, one of whom was an infant, made default in delivering defences in the Chancery Division, the Court ordered that the action should be set down on notice of trial against the infant, and on motion for judgment against the other defendants (*l*).

—By party other than plaintiff or defendant.

By *Ord. XXVII. r.* 14, "In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court or Judge may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties."

On admissions of fact.

On Admissions of Fact in Pleadings or otherwise.]—By *R. of S. C., Ord. XXXII. r.* 6, "Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, *or otherwise*, apply to the Court or a Judge for such *judgment or order* as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application

(*g*) See ante, pp. 326 *et seq.*
(*h*) *Perpetual Investment Building Society* v. *Gillespie*, W. N. 1882, 4.
(*i*) *Gill* v. *Woodfin*, 25 Ch. D. 707; 53 L. J., Ch. 617; 50 L. T. 490; 32 W. R. 393: *Gibbings* v. *Strong*, 26 Ch. D. 66; 50 L. T. 579; 32 W. R. 757.
(*k*) *Gill* v. *Woodfin*, supra.
(*l*) *National Provincial Bank* v. *Evans*, 51 L. J., Ch. 97. See *In re Fitzwater, Fitzwater* v. *Waterhouse*, 52 L. J., Ch. 83.

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make such order, or give such judgment, as the Court or Judge may think just."

This rule corresponds with the former *Ord. XL. r.* 11, the words "judgment" and "order" being substituted for "relief" (*m*). In accordance with it when either party is clearly entitled to an order or judgment by reason of admissions of fact (omissions to deny are sufficient (*n*)), he may apply for it at once (*o*), and so get rid of any part of the action as to which there is no controversy (*p*). But a plaintiff moving under this rule must have a clear case; a mere admission or mere non-denial of a right which has no existence in law will not suffice (*q*). The power to make an order under this rule is discretionary, and the Court of Appeal will not interfere where the Judge in his discretion has refused the application (*r*). The plaintiff may move for judgment under this rule notwithstanding that he has joined issue and given notice of trial (*s*); he does not, however, waive his right to insist on admissions in the pleadings by not moving under this rule (*t*). Where a defendant admits the claim, but sets up a counterclaim, the plaintiff could not, under the former rules, in ordinary cases, move for judgment under this rule (*u*). But it would appear that he can do so now under *Ord. XXVII. r.* 9, *ante*, p. 382.

Where the plaintiff fails to deliver a reply to a counterclaim, the defendant may move for judgment on his counterclaim (*x*). If, however, the reply is delivered before the notice of motion is given, though after the time limited, the Court will not order judgment (*y*).

In an action against husband and wife on a joint and several promissory note, where a defence delivered by both presented no defence as to the husband, upon motion under this rule the plaintiffs obtained an order for final judgment against the husband without waiting for the determination of the case against the wife (*z*). When some of the defendants do not appear or plead, and the others admit the plaintiff's right he may move against the

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(*m*) Cp. *Pascal* v. *Richards*, 50 L. J., Ch. 337; 44 L. T. 87; 29 W. R. 330.

(*n*) *Symonds* v. *Jenkins*, 34 L. T. 277: *Ruttec* v. *Tregent*, 12 Ch. D. 758, V.-C. B.: *Barnard* v. *Wieland*, W. N. 1882, 103; 30 W. R. 947, reference to deeds. As to what is a sufficient admission, see *London Syndicate* v. *Lord*, 8 Ch. D. 84: *Freeman* v. *Cox*, Id. 148.

(*o*) *Gilbert* v. *Smith* (C. A.), 2 Ch. D. 686; 35 L. T. 43: *Burnell* v. *Burnell*, 11 Ch. D. 213.

(*p*) Per *Jessel*, M. R., *Thorp* v. *Holdsworth*, 3 Ch. D. at p. 640.

(*q*) *Chilton* v. *Corporation of London*, 7 Ch. D. 735; 38 L. T. 498.

(*r*) *Mellor* v. *Sidebottom*, 5 Ch. D. 342.

(*s*) *Brown* v. *Pearson*, 21 Ch. D. 716; 46 L. T. 411.

(*t*) *Tildesley* v. *Harper*, 7 Ch. D. 403.

(*u*) *Mersey Steamship Co.* v. *Shuttleworth*, 11 Q. B. D. 531; 48 L. T. 625; 32 W. R. 245 (C. A.). See *Showell* v. *Bowron*, 48 L. T. 613; 52 L. J., Q. B. 284; 31 W. R. 550.

(*x*) *Street* v. *Crump*, 25 Ch. D. 68; 49 L. T. 397; 32 W. R. 89: *Lumsden* v. *Winter*, 8 Q. B. D. 650; 51 L. J., Q. B. 413: *Caroli* v. *Hirst*, 48 L. T. 759; 31 W. R. 839: cp. *Pascal* v. *Richards*, supra, n. (*m*): *Litton* v. *Litton*, 3 Ch. D. 793, contra, cannot be supported. See also as to reply joining issue generally on a counterclaim, *Rolfe* v. *McLaren*, 3 Ch. D. 106. See Ord. XXVII. r. 13, ante, p. 321.

(*y*) *Graves* v. *Terry*, 9 Q. B. D. 170; 30 W. R. 748: cp. *Gill* v. *Woodfin* and *Gibbings* v. *Strong*, cited ante, p. 757, n. (i).

(*z*) *Jenkins* v. *Davies*, 1 Ch. D. 696.

latter and against the others in default together (*a*). An order for sale in a partition action (*b*), for an account in a partnership action (*c*), or for a decree in an administration action (*d*), may be made under this rule. For form of order when the further hearing is adjourned, *see Bennett* v. *Moore*, 1 *Ch. D.* 692 (*e*).

Under the former rule which only applied to admissions on the pleadings and did not say "or otherwise" as the present rule does, it was held that the indorsement on the writ was not a pleading, so as to entitle the plaintiff to move under the rule (*f*). Under the present rule the motion could be made in this case.

The rule, it will be observed, applies to admissions made on the pleadings or *otherwise*. Admissions made in letters written and a deed executed before action have been held sufficient (*g*). But the rule does not empower the Court to order money to be brought into Court where the defendant in an action of tort merely admits in answer to interrogatories that something is due (*h*).

The application under this rule may be made by summons at Chambers (*i*).

2. *Practice on the Motion.*

Practice on motion.

Generally.]—In the Queen's Bench Division the party desiring to move for judgment must give notice of motion to the party against whom the judgment is desired (*k*). The notice is served in the usual manner (*l*), and a copy of it must be left with the officer having charge of the list of opposed motions, who will enter it in that list. The motion will then come on in its order in the list. The motion for judgment must be made to the Divisional Court except when the rules expressly require it to be made to the Court of Appeal. In the case of an application for judgment or admission in the pleadings under *Ord. XXXII. r.* 6 (*ante*, p. 757), the application may be made by summons at Chambers (*m*).

Two clear days' notice at least is necessary (*n*). The motion will be in the printed list on one of the days when opposed motions are taken, and will be called on in its order. It may be heard before a

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(*a*) See *Bridson* v. *Smith*, W. N. 1876, 103; 24 W. R. 392: *Parsons* v. *Harris*, 6 Ch. D. 694. Where one of the defendants is an infant, see *National Provincial Bank* v. *Evans*, 51 L. J., Ch. 97.

(*b*) *Burnell* v. *Burnell*, 11 Ch. D. 213.

(*c*) *Turquand* v. *Wilson*, 1 Ch. D. 85: *Brassington* v. *Cussons*, 24 W. R. 881, receiver appointed: *Rumsey* v. *Reade*, 1 Ch. D. 643, delivery of securities. See *Coddington* v. *Jacksonville, &c. R. Co.*, 39 L. T. 12, sale of bonds.

(*d*) *In re Barker's Estate, Hetherington* v. *Longrigg*, 10 Ch. D. 162.

(*e*) Adopted in *Brassington* v. *Cussons*, supra, and *Burnell* v. *Burnell*, supra.

(*f*) *Wallis* v. *Jackson*, 23 Ch. D. 204: cp. *Wilmott* v. *Young*, 44 L. T. 331.

(*g*) *Hampden* v. *Wallis*, 27 Ch. D. 251; 33 W. R. 357; 32 W. R. 977.

(*h*) *Phillips* v. *Homfray*, W. N. 1884, 171.

(*i*) *Padgett* v. *Binns*, W. N. 1884, 10, *Mathew*, J., at Chambers. See infra, n. (*m*): *Gough* v. *Heatley*, 49 L. T. 772; 32 W. R. 385.

(*k*) See forms, Chit. F., p. 371.

(*l*) See post.

(*m*) *Padgett* v. *Binns*, W. N. 1884, 10, *Mathew*, J., at Chambers: *Croft* v. *Collingwood*, W. N. 1884, 33. In the Chancery Division the application is made to the Court, *Cook* v. *Heynes*, W. N. 1884, 75: cp. *Gough* v. *Heatley*, W. N. 1884, 14.

(*n*) R. of S. C., Ord. LII. r. 5: *Roupell* v. *Parsons*, 34 L. T. 56.

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single Judge (*o*). When the same party moves for judgment, and also in the alternative for a new trial, or when there are cross motions for judgment and for a new trial in the same action, the motion for judgment should come on for argument together with the application for the new trial (*p*), and, if necessary, a direction that they should do so should be obtained.

A notice of motion for judgment may be served as against a defendant who has not appeared by being filed pursuant to *Ord. XIX. r.* 10 (*q*). The Court has, it appears, no power to order that the evidence be taken on affidavit (*r*).

Time within which motion must be set down.

Time within which Motion must be set down.]—By *R. of S. C., Ord. XL. r.* 9, "No motion for judgment shall, except by leave of the Court or a Judge, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do."

Further time limits are imposed by some of the rules relating to particular cases, which *see supra*, p. 755 *et seq.*

Powers of Court on motion for judgment.

Powers of Court on Motion for Judgment.]—By *Ord. XL. r.* 10, "Upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit."

This rule substantially reproduces *Ord. XL. r.* 10, of the Rules of 1875, but further gives the Court the power of drawing all inferences of fact not inconsistent with the findings of the jury. It is submitted that this addition is intended to increase and not to diminish the power of the Court to deal with the whole matter when it is once before them.

First. Where the case has been tried with a jury.

Under the former rule, the Courts on applications for new trials, when it appeared to them that they had before them all the materials for coming to a final decision in the case, instead of simply granting or refusing the application, frequently exercised this power of entering judgment according to their own view of the case; and this, notwithstanding that the proceeding involved setting aside a judgment, or even a verdict, obtained below (*s*). Thus, upon an application (*t*) to set aside a verdict for the plaintiff

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(*o*) R. of S. C., Ord. LIX.; Appellate Jurisdiction Act, 1876, s. 17. See ante, p. 16.

(*p*) *Scarf* v. *General Steam Navigation Co.*, W. N. 1876, 33.

(*q*) *Merton* v. *Miller*, 3 Ch. D. 516; 45 L. J., Ch. 613 (C. A.); *Dymond* v. *Croft*, 3 Ch. D. 512; 45 L. J., Ch. 612, M. R.

(*r*) *Ellis* v. *Robbins*, 50 L. J., Ch. 512.

(*s*) *Watkins* v. *Rymill*, 10 Q. B. D. 178, 191; 48 L. T. 426.

(*t*) *Dann* v. *Simmins*, 48 L. J., C. P. 343; 40 L. T. 556, affirmed in C. A.; 41 Id. 461.

and for a new trial, the Court, considering that there was no evidence to support the verdict, ordered judgment to be entered for the defendant. So in *Hamilton* v. *Johnson* (*u*), it was held that the Court might, if they thought fit, set aside the special findings of a jury and the judgment entered thereupon at the trial, and enter judgment in accordance with their own view of the case.

The Courts will not exercise this power while any question of fact remains undetermined, or unless all the necessary facts are completely before them (*x*). But where no additional facts remain to be proved, and it is clear that a jury must on the facts proved return a particular verdict, the Court will not put the parties to the expense of a new trial, but will enter judgment at once (*y*). In *Milissich* v. *Lloyd* (*z*), where on a verdict for the plaintiff the Common Pleas Division, though they granted a new trial, refused to enter judgment for the defendants under this rule, and the defendants appealed on this point, *Mellish*, L.J., said:—"Although the rules give very general powers, still it was not intended that the Court should take advantage of that to take any question from a jury which is proper to be decided by them; therefore, what we have to consider is, whether the appellants have made out that there is no question to go to a jury. . . . The Court should be very careful not to take upon itself any function which properly belongs to a jury, such as determining facts which depend on the credibility of witnesses; and even where the facts are admitted and the question turns on the proper inferences to be drawn from them, unless power is expressly given to the Court to draw inferences, the question is still one for a jury."

This power the Courts have under the new rule, so far as their inferences from the facts are not inconsistent with the findings of the jury.

The Court will not disturb the findings of fact by the jury (*a*); but where the jury has gone on to draw inferences from those facts, which the Court sees cannot be justified, it will either grant a new trial as in *Milissich* v. *Lloyd* (*b*), or under the present rule will take the facts as found by the jury and proceed to enter the proper judgment thereon (*c*).

Secondly. Where the case has been tried by a Judge without a jury.

"Where the Judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts which

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(*u*) 5 Q. B. D. 263; 41 L. T. 461. And see *Chapleo* v. *Brunswick Building Society*, 6 Id. 696, 714; 44 L. T. 449, 553: *Heath* v. *Pugh*, 6 Q. B. D. at p. 355.

(*x*) *Morton* v. *Palmer*, 51 L. J., Q. B. at pp. 9, 11; 45 L. T. at p. 427.

(*y*) *Yorkshire Banking Co.* v. *Beatson*, 5 C. P. D. 109, 127 (C. A.): *S. C.*, 4 Id. 204: *Bobbett* v. *South East. R. Co.*, 51 L. J., Q. B. 161: *Secar* v. *Cohen*, 45 L. T. 589, 591.

(*z*) 46 L. J., C. P. 404.

(*a*) Per *Bramwell*, L. J., in *Jones* v. *Hough*, 5 Ex. D. at p. 122: and see *Perkins* v. *Dangerfield*, W. N. 1879, p. 172.

(*b*) 46 L. J., C. P. 404: and see *Palmer* v. *Fitzwigram*, W. N. 1880, p. 26, where a new trial was granted; but the Court refused to enter judgment on the ground that at the second trial the facts might be found differently. In *Brewster* v. *Durrand*, Id. p. 27, the same course was taken, the Court holding there was some evidence to go to a jury and saying that Ord. XL. r. 10 was not intended to put the Court in the place of the jury.

(*c*) See supra, *Daun* v. *Simmins*, *Hamilton* v. *Johnson*, *Chapleo* v. *The Brunswick Building Society*.

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ever way they like" (*d*). Therefore, the Court of Appeal may in all such cases review the findings of fact, and give judgment accordingly upon an appeal without a motion for a new trial (*e*). See the principles on which the Court acts in these cases explained at length by *Cotton*, L. J., in *Jones* v. *Hough* (*f*). In the same case *Thesiger*, L. J., expressed an opinion, in which *Cotton*, L. J., concurred, that where the appellant alleges that he was taken by surprise at the trial, it would be proper that a motion for a new trial should be made, although upon that motion it would be open to the Court of Appeal not to send the case back to the Judge who tried it, but itself to take the additional evidence, and so try the whole case. The same learned Judge seemed to think that there should also be a motion for a new trial in cases where the Judge below had so dealt with specific questions of fact as that the findings on those specific questions might be separated from the judgment on the whole case. This question may be important with reference to the time for appealing from such a finding; for in *Krehl* v. *Burrell* (*g*), it was held that an appeal from the decision of a Judge, sitting without a jury on a question of fact, must be brought within twenty-one days. This was explained in *Lowe* v. *Lowe* (*h*) to mean a decision on a question of fact where definite issues of fact have been settled at the commencement of the trial. Other findings of fact may be appealed on like the judgment at any time within the year.

In *Davis* v. *Great Eastern Rail. Co.* (*i*), to an action in the Mayor's Court, the defendants pleaded judgment of nonsuit against the plaintiff in a former action. This plea was overruled, and a verdict passed for the plaintiff for the full amount of his claim. The defendants obtained a rule in the High Court to set aside this verdict, and to enter it for themselves. The Exchequer Division held that the plea was substantially good, and that the rule ought, therefore, to be made absolute; but considering that this plea, if pleaded, was fatal to the plaintiff's case, they availed themselves of the power given by this rule, and entered judgment for the defendants.

This rule applies to proceedings in interpleader (*k*), and *see Ch. CXXI.*

As to further considerations, *see* p. 647.

As to directing issues, accounts and inquiries, *see post, Vol.* 2, *Ch. CXVI.*

Power to order new trial or to set aside judgment.

Power of Court to order New Trial or to set aside Judgment directed at Trial.]—By *R. of S. C., Ord. LVIII. r. 5*, "If upon hearing of an appeal, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if

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(*d*) Per *Bramwell*, L. J., in *Jones* v. *Hough*, 5 Ex. D. at p. 122.

(*e*) *Jones* v. *Hough*, supra: *Potter* v. *Cotton*, 5 Ex. D. 137. Conversely, judgment on the whole case may be given in the Court of Appeal on a motion for a new trial. *Waddell* v. *Blockey*, 10 Ch. D. 416; 40 L. T. 286.

(*f*) 5 Ex. D. at p. 124.

(*g*) 10 Ch. D. 420 (C. A.).

(*h*) Id. 432 (C. A.).

(*i*) 39 L. T. 635. And see *Eastland* v. *Burchell*, 3 Q. B. D. at p. 437; 38 L. T. 563.

(*k*) *Williams* v. *Mercier*, 9 Q. B. D. 337; 51 L. J., Ch. 594.

it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had" (*l*). CHAP. LXIX.

3. *Judgment on Motion.*

Judgment on motion.

The judgment is signed in the usual way on production of the rule or order. A form of judgment is provided by the *R. of S. C., App. F. No.* 10, the use of which is sanctioned by *Ord. XLI. r.* 1. In ordinary cases this form is not used, but the ordinary form of judgment on an order of Court is adopted (*m*).

(*l*) This was acted on in *Perkins v. Dangerfield*, W. N. 1879, 172.

(*m*) See Chit. F., pp. 273—4.

CHAPTER LXX.

JUDGMENT (*a*).

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[As to judgment on motion for judgment, *see ante*, pp. 756 *et seq.*; in default of appearance, *see ante*, pp. 259 *et seq*; in default of pleading, *see ante*, pp. 326 *et seq.*; for costs on discontinuance, *see ante*, p. 340. *See also*, as to the practice on signing judgment in various other particular cases, the *Index*, *sub-tit.* "*Judgment.*"]

When to be signed or entered.

When to be Signed or Entered (*b*).]—As to the Judge at the trial directing judgment to be entered, *see ante*, p. 653; and as to moving for judgment, *see ante*, p. 755.

Final judgment must be signed before execution can be sued out upon it (*c*).

Signing judgment contrary to an order of Nisi Prius is an irregularity (*d*).

Postponing the signing of judgment.

The party entitled to sign judgment may in general postpone doing so as long as he pleases, unless the opposite party take steps to compel the signing of the judgment (*e*). It is not, it seems, necessary to give a calendar month's notice previous to signing judgment where one year or more has elapsed since the trial (*f*).

Entering judgment nunc pro tunc.

In some cases the Court will permit a judgment to be entered *nunc pro tunc* where the signing of it has been delayed by the act of the Court (*g*).

(*a*) As to the difference between a judgment and an order, see *Ex p. Schmitz*, 12 Q. B. D. 509, 511; 50 L. T. 747; 32 W. R. 812: *Ex p. Chinery*, 12 Q. B. D. 342; 53 L. J., Ch. 663. As to what is a "final judgment" within sub-s. (g) of sect. 4 of the Bank. Act, 1883, see *Ex p. Whinney*, 13 Q. B. D. 476.

(*b*) The new rules talk of judgment being "entered" not "signed," but the old phraseology has been retained here.

(*c*) See *Finch* v. *Brook*, 5 Dowl. 59.

(*d*) *Bikker* v. *Beeston*, 29 L. J., Ex. 121.

(*e*) See *Baker* v. *Saunders*, 7 C. B., N. S. 858; 29 L. J., C. P. 158.

(*f*) *May* v. *Wooding*, 3 M. & Sel. 500.

(*g*) See Ord. XLI. r. 3, supra:

Entry of judgment.

Entry of Judgment—Generally.]—By *R. of S. C., Ord. XLI. r.* 1, "Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the cause, other than any petition or summons; such copy shall be in print, except such parts (if any) thereof as are by these rules permitted to be written: provided that no copy need be delivered of any document a copy of which has been delivered on entering any previous judgment in such cause. The forms in Appendix F. shall be used, with such variations as circumstances may require" (*g*).

Place of entry.

By *r.* 2, "All judgments in the Queen's Bench Division, shall, if entered in London, be entered in the Central Office" (*h*).

Date of entry.

By *r.* 3, "Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or Judge shall otherwise order, and the judgment shall take effect from that date: Provided that by special leave of the Court or a Judge a judgment may be ante-dated or post-dated" (*i*).

By *r.* 4, "In all cases not within the last preceding rule, the entry of judgment shall be dated as of the day on which the requisite documents (*k*) are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date."

Authority to officer to enter judgment.

By *r.* 6, "Where under the Acts or these rules, or otherwise, it is provided that any judgment may be entered upon the filing of any affidavit or production of any document (*k*), the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required, he shall enter judgment accordingly."

By *r.* 7, "Where by the Acts or these rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly."

Turner v. *London & South West. R. Co.*, L. R., 17 Eq. 561; 43 L. J., Ch. 630: *Hemming* v. *Batchelor*, L. R., 10 Ex. 54; 44 L. J., Ex. 54.

(*g*) See form, Chit. F., Index, sub tit. "*Judgment.*"

(*h*) As to entering judgment in District Registries, see post, Ch. CXXIV.

(*i*) Judgment is now entered before the costs are taxed, and the amount of the costs when taxed is added as a memorandum afterwards. Before the Jud. Acts, until the costs were taxed and inserted in the judgment it was for some purposes considered only in an inchoate state. *Butler* v. *Bulkeley*, 8 Moore, 104; 1 Bing. 233: *Doe* d. *Ellis* v. *Owens*, 9 M. & W. 455, per *Parke*, B.: *Salter* v. *Slade*, 1 Ad. & E. 608; 3 N. & M. 734: *Pierce* v. *Derry*, 3 G. & D. 477; 4 Q. B. 635; 12 L. J., Q. B. 277: *Wright* v. *Lewis*, 4 Jur. 1112, B. C.: *Fisher* v. *Dudding*, 9 Dowl. 872; 3 Sc. N. R. 516; 10 L. J., C. P. 328. For other purposes it was considered complete before taxation of costs. *Walker* v. *De Richemont*, 6 Q. B. 544; 2 D. & L. 507; 14 L. J., Q. B. 22: *Frewen* v. *Lethbridge*, 4 H. & N. 418; 28 L. J., Ex. 234: *Newton* v. *Grand Junction R. Co.*, 16 M. & W. 139; 16 L. J., Ex. 276. The final judgment was complete at the time of entering it in the Master's book, without carrying in the roll. *Colbron* v. *Hall*, 5 Dowl. 534: and see *Fisher* v. *Dudding*, 9 Dowl. 872; 3 Sc. N. R. 516; 10 L. J., C. P. 328: *Phillips* v. *Birch*, 4 M. & G. 403.

(*k*) As to the certificate of the associate being a sufficient authority to enter judgment, see Ord. XXXVI. r. 42, ante, p. 653.

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Waiving costs.

If the plaintiff when he is entitled to them, will waive the recovery of costs from defendant, he may sign entitled to sign judgment, do so, without giving any notice of taxation, and issue execution; and this, when the debt is large, and the delay arising from the taxation might occasion the loss of it, is sometimes expedient (*l*). *See also Ord. XLII. r.* 18, *post*, p. 793.

Practical directions as to signing judgment after trial.

Practical Directions as to signing after Trial.]—We have noticed, *ante*, p. 653, that the Judge who tries the cause may at or after the trial direct judgment to be entered or leave any party to move for judgment. The practice as to moving for judgment is noticed *ante*, p. 759. Where the Judge directs a judgment to be entered, the certificate of the associate is a sufficient authority to the proper officer to enter judgment accordingly (*ante*, p. 653).

Three days after judgment has been pronounced attend at the Associates' Office, taking with you a 1*l. adhesive stamp, which will be affixed to the associates' certificate of the judgment, cancelled, and the certificate, together with the stamped copy of the pleadings left on entering the action for trial, delivered to you. Fill up two forms of judgment in accordance with the certificate. The forms, which must be of the proper size, may be either written or printed, and where a judgment is special it is better that the whole should be in writing. The letter and number must be on the forms; and when the writ was issued in a District Registry, and the cause has been removed to London, the London letter and number must be inserted* (*m*). *The judgment must bear the same date as the certificate, but should also state the date when the judgment is entered. Sign one of the forms, which must be impressed with a* 1*l. stamp, and affix adhesive stamps to the other according to the number of folios in the judgment. Take the associates' certificate, the forms, and copy of the pleadings to the proper officer, who will sign the judgment and will return that copy of the judgment to which the adhesive stamps have been affixed, marked as an office copy of the judgment. The copy of the pleadings, the associates' certificate, and the other form of the judgment are filed. The fees on signing judgment are regulated by the Orders in Appendix* (post, Vol. 2).

When judgment is entered for "costs to be taxed," the form of judgment contains a note that "the above costs have been taxed and allowed at ——l. as appears by a taxing officer's certificate dated this —— day of ——, 18—," and if judgment be signed before the costs are taxed this note is left in blank at the time of signing judgment. After the judgment is signed the costs are taxed (the usual notice of taxation being first given), and the Master signs the certificate of the amount in the usual way. The Master's certificate and the office copy judgment, with the note as to the costs filled in in accordance with the Master's certificate are then taken to the officer who signed the judgment, when he will enter on the original judgment the particulars of the Master's certificate, and will initial and complete the office copy judgment. Execution for the costs can then issue.

Memorandum to be indorsed

Memorandum to be Indorsed on Judgment requiring Act to be done.]—By *R. of S. C., Ord. XLI. r.* 5, "Every judgment or order made

(*l*) *Somerville* v. *White*, 5 East, 145: *Doe* d. *Messiter* v. *Dynely*, 4 Taunt. 219: *Booth* v. *Parker*, 3 M. & W. 54: *Colbron* v. *Hall*, 5 Dowl. 537.

(*m*) As to signing judgment when action proceeds in district registry, see Vol. 2, Ch. CXXIV.

on judgment requiring act to be done.

in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz. :—

'If you, the within-named *A. B.*, neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order].'"

This memorandum must be indorsed on every judgment or order requiring any person to do any act (*n*), even though the order is one that need not be personally served (*o*). It applies, therefore, to an order for discovery of documents, in which service on the solicitor on the record is sufficient (*o*).

Relation, &c. of judgments.

Relation of Judgments.]—By the common law, the judgment had relation to the first day of the term whereof it was entered, unless from the record itself it appeared that it could not have had that relation (*p*). As to the date from which a judgment now takes effect, *see ante*, p. 765.

As to chattels, the judgment does not, at law, affect them; they are bound, under certain circumstances, by the writ of execution as hereafter mentioned (*q*). As to the relation of judgments in the case of a charge upon public stock or shares in a company, *see Ch. XCII.*

As to judgments entered up after 29th July, 1864, not affecting lands until delivered in execution, *see* 27 *&* 28 *V. c.* 112; *Ch. LXXI.*

As to how judgments entered up before such date affected lands, *see* 12th edition of this work, p. 537.

Effect of judgment in detinue.

Effect of Judgment in Detinue.]—Where the plaintiff in an action of detinue for goods or trover recovers judgment, the property in the goods remains in the plaintiff until the judgment is satisfied (*r*).

Interest on judgment.

Interest on Judgment.]—The 1 *&* 2 *V. c.* 110, *s.* 17, enacts, "That every judgment debt shall carry interest at the rate of 4*l.* per centum per annum, from the time of entering up (*s*) the judgment [or from the time of the commencement of this Act (1st October, 1838), in cases of judgment then entered up and not carrying interest (*t*)] until the same shall be satisfied (*u*); and such interest may be levied under a writ of execution on such judgment." This

(*n*) *Treherne* v. *Dale*, (C. A.) 27 Ch. D. 66, which see as to what is a sufficient notice.

(*o*) *Hampden* v. *Wallis* (C. A.), 26 Ch. D. 746; 50 L. T. 515; 32 W. R. 808.

(*p*) See *Swan* v. *Broome*, 3 Burr. 1596: *Littleton* v. *Cross*, 3 B. & C. 317; 5 D. & R. 175: *Whittaker* v. *Whittaker*, 8 B. & C. 768: *Greenway* v. *Fisher*, 7 B. & C. 436: *Haswell* v. *Thorogood*, Id. 705.

(*q*) Ch. LXXIV.

(*r*) *Brinsmead* v. *Harrison*, L. R., 6 C. P. 584; affirmed 7 Id. 547: *Ex p. Drake, In re Ware*, 5 Ch. D. 866; 46 L. J., B. 105.

(*s*) *Fisher* v. *Dudding*, 3 Sc. N. R. 516; 3 M. & G. 38; 9 Dowl. 872: *Newton* v. *Grand Junction R. Co.*, 16 M. & W. 139: *Haigh* v. *Jones*, 6 Sc. N. R. 696. As to the entry of the judgment, see ante, p. 765.

(*t*) The part within the brackets is repealed by 42 & 43 V. c. 59.

(*u*) Where money is paid into Court the plaintiff cannot claim interest after such time, as he might have obtained the money out of Court. *Sinclair* v. *Great Eastern R. Co.*, L. R., 5 C. P. 391; 39 L. J., C. P. 224.

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enactment applies as well to judgments for costs, as for the subject-matter of the action (*u*); and, in the absence of any special order, interest on the costs runs from the date of the judgment, and not merely from the date of the Master's certificate of taxation (*x*). In an action on a covenant to pay principal and interest at 5*l.* per centum per annum, the covenant becomes merged in the judgment, and interest on the judgment debt is at 4*l.* per centum only (*y*).

Amendment of judgment.

Amendment of Judgment.]—A judgment was amendable at common law, in substance or in form, at any time during the term of which it was signed, and after that time, even after error brought and *in nullo est erratum* pleaded (*z*).

By *R. of S. C., Ord. XXVIII. r.* 11, "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal." Under this rule any accidental omission or error in a judgment may be amended on an application for that purpose to the Judge or Court by whom the judgment was directed to be entered (*a*). An omission to make any order as to costs arising from their not being mentioned at the trial, may be supplied on such an application (*a*).

On an appeal, the Court of Appeal has power to amend the record by correcting the entry of the findings of the jury (*b*).

By *r.* 12, "The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

Where judgment roll lost.

In a case before the Judicature Acts, where the judgment roll was lost, the Court allowed it to be supplied by a new entry (*c*).

Setting aside judgment.

Setting aside Judgment.]—As to setting aside a judgment signed in default of appearance or pleading, *see ante*, pp. 264 *and* 333.

As to setting aside judgment directed at the trial, *see ante*, p. 756.

As to whether a judgment can be impeached on the ground of fraud, *see Flower* v. *Lloyd*, 6 Ch. D. 297; 37 L. T. 419, C. A.; *S. C.*, 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496, C. A. Where a solicitor put in a fraudulent defence for his client, making admissions on which judgment was obtained, the Court set the judgment aside, and gave leave to deliver a fresh defence (*d*).

As to the application by a stranger to an action to set aside a judgment, *see Jacques* v. *Harrison*, 12 Q. B. D. 165; 53 L. J., Q. B. 137; 50 L. T. 246; 32 W. R. 470, cited *ante*, p. 266.

(*u*) *Pitcher* v. *Roberts*, 2 Dowl., N. S. 394; *Newton* v. *Lord Conyngham*, 17 L. J., C. P. 288.

(*x*) *Landowners' West of England, &c. Co.* v. *Ashford*, 33 W. R. 41: *Pyman* v. *Burt*, W. N. 1884, 100, *Field*, J., at Chambers: cp. *Schroeder* v. *Clough*, 46 L. J., C. P. 365; 35 L. T. 850.

(*y*) *Ex p. Fewings, In re Sneyd* (C. A.), 25 Ch. D. 338; 52 L. J., Ch. 545; 50 L. T. 109.

(*z*) *Usher* v. *Dansey*, 4 M. & S. 94: *Foster* v. *Blackwell*, Barnes, 7: *Davids* v. *Wilson*, Id. 18: *Simmonds* v. *King*, 9 Jur. 250, Q. B. It seems an amendment could not have been made after judgment in error. *Jackson* v. *Galloway*, 1 C. B. 293.

(*a*) *Fritz* v. *Hobson*, 14 Ch. D. 542, 558, 561; 42 L. T. 677.

(*b*) *Clack* v. *Wood*, 9 Q. B. D. 276; 47 L. T. 144.

(*c*) *Douglas* v. *Yallop*, 2 Burr. 722: *Evans* v. *Thomas*, 2 Str. 833.

(*d*) *Williams* v. *Preston*, 20 Ch. D. 672; 47 L. T. 265.

CHAPTER LXXI.

REGISTRATION OF JUDGMENTS, LIS PENDENS, ETC.

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To affect lands as regards purchasers, &c.

Registration of Judgments to affect Lands as against Purchasers, &c., generally.]—There are several statutes (*a*) under which judgments may be registered, but since the statute 27 & 28 *V. c.* 112, passed on the 29th of July, 1864, it does not appear that any practical object is to be gained by registering a judgment. By sect. 1 of that statute, which will be found *post, Ch. LXXVI.*, no judgment is to affect any land until such land is actually delivered in execution; and by sect. 3, a mode of registering the writ of execution is provided, and that section provides that no other or prior registration of the judgment shall be or be deemed to be necessary for any purpose.

The statutes as to registration will be found set out in the *Thirteenth Edition* of this work at pp. 463 *et seq.*

Registering judgments as against heirs, executors, &c.

Registering Judgments (*b*) *as against Heirs, Executors, &c.*]—By 23 & 24 *V. c.* 38, *s.* 3, after reciting that by an Act of 4 & 5 *W. & M.* intituled "An Act for the better discovery of judgments in the Courts of King's Bench, Common Pleas, and Exchequer in Westminster," it was enacted, that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in their administration of their ancestor's, testator's, or intestate's estates: And that by several later Acts judgments are required to be registered with more particulars than were required by the said recited Act, and it is thereby enacted that judgments not so registered shall not affect

(*a*) The statutes on the subject are 1 & 2 V. c. 110, ss. 11, 13, 19; 2 & 3 V. c. 11; 3 & 4 V. c. 82, s. 2; 18 & 19 V. c. 15, s. 4; 23 & 24 V. c. 38; and 27 & 28 V. c. 112. There are also the statutes of 5 Ann. c. 18, s. 4; 6 Ann. c. 35, s. 19; 7 Ann. c. 20, s. 18; and 8 Geo. 2, c. 6, ss. 1—18, requiring a memorial of every judgment to be filed at the registry office in Middlesex and Yorkshire respectively, before it shall bind or affect real estate in these counties. The docketing of judgments under the 4 & 5 W. & M. c. 20, s. 3, is abolished by the 2 & 3 V. c. 11, s. 1. As to the entry of satisfaction on the register, see post, p. 779.

(*b*) As to judgments entered up after 29th July, 1864, not affecting lands until delivered in execution, see Ch. LXXVI.

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any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until the same shall be registered in manner thereby required, and, in obedience to a direction in one of the same Acts contained, the dockets existing under the said first recited Act have been finally closed: And that the said several later Acts do not expressly enact that judgments not docketed, as thereby required, shall not have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first-recited Act, and it is expedient that the same should be restored: Declares and enacts "That no judgment which has not already been or which shall not hereafter be entered or docketed under the several Acts now in force, and which passed subsequently to the said Act of the 4 & 5 *W. & M.*, so as to bind lands, tenements or hereditaments, as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates" (*c*).

This section is not restricted in its operation to the protection of heirs, executors, and administrators against claims by unregistered judgment creditors, but absolutely deprives unregistered judgment debts of all priority in the administration of assets; and the Act applies equally to judgments of County Courts as to other judgments (*d*). This section does not apply to judgments obtained against a personal representative (*e*). [illegible] 32 & 33 *V.* c. 46, s. 1, noticed *Ch. XCVII.*, which applies where deceased person died after 1st January, 1870.

By sect. 4, "No judgments which since the passing of the 1 & 2 *V.* c. 110, have been registered under the provisions therein contained, or contained in the later Act, 2 & 3 *V.* c. 11, as explained and amended by the Act 18 & 19 *V.* c. 15, or which shall hereafter be so registered, shall have any preference against heirs, executors, or administrators in their administration of their executor's, testator's or intestate's estates, unless at the death of the testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorized to be made in manner directed by the said Act 2 & 3 *V.* c. 11, as explained and amended by the Act 18 & 19 *V.* c. 15, but it shall be deemed sufficient to secure such preference as aforesaid if such a memorandum as was required in the first instance is again left with the senior Master of the Common Pleas within five years before the death of the testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration be[illegible] last-mentioned memorandum or minute was left; and so [illegible] upon every re-registry" (*f*).

By sect. 5, the term judgment shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment.

(*c*) *Kemp* v. *Waddingham*, 35 L. J., Q. B. 114.

(*d*) *Re Turner*, *Walter* v. *Turner*, 33 L. J., Ch. 232.

(*e*) *Re Rigby*, 33 L. J., Ch. 149.

(*f*) This section does not operate retrospectively: *Evans* v. *Williams*, 34 L. J., Ch. 661.

As to the Master entering a satisfaction or discharge of a judgment, *see* 23 & 24 *V. c.* 115, *s.* 2.

An unregistered judgment ranks only as a simple contract debt bearing interest (*g*).

Registration of judgments for purposes of execution in Scotland or Ireland.

Registration of Judgments for purposes of Execution in Scotland or Ireland.]—The Judgments Extension Act, 1868 (31 & 32 *V. c.* 54), provides that when a judgment has been obtained in one of the superior Courts at Westminster, a certificate of it, registered in Ireland, and *vice versâ*, shall have the same effect as a judgment of the Court in which it is registered (sect. 1); and that such a certificate, if registered in Scotland, shall have the same effect as a decreet of the Court of Session (sect. 2); and that a certificate of an extract of a Scotch decreet which is registered in England or Ireland shall have the same effect as a judgment obtained there (sect. 3) (*h*).

Where judgment has been obtained in the Courts at Westminster, a certificate thereof registered in Ireland, and vice versâ, shall have the effect of a judgment of the Court in which it is so registered.

By sect. 1. Where judgment shall hereafter be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas or Exchequer at Westminster or Dublin respectively for any debt, damages or costs, on production to the Master of the Court of Common Pleas at Dublin where such judgment shall have been obtained or entered up in any of the said Courts in England, or to the senior Master of the Court of Common Pleas at Westminster where such judgment shall have been obtained or entered up in any of the said Courts in Ireland, of a certificate of such judgment in one of the forms contained in the schedule hereto annexed (*i*), as the case may be, purporting to be signed by the proper officer of the Court where such judgment has been obtained or entered up, such certificate shall be registered by such Master in a register to be kept in the Court of Common Pleas at Dublin and at Westminster respectively for that purpose, and to be called in the Court of Common Pleas at Dublin, "The Register for English Judgments," and to be called in the Court of Common Pleas at Westminster, "The Register for Irish Judgments," and shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered, and all the reasonable costs and charges attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment: Provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to and leave obtained from the Court or a Judge of the Court in which it is sought so to register such certificate.

Where judgment has been

2. Where judgment shall hereafter be obtained or entered up in

(*g*) *Van Gheluive* v. *Neringckx*, 21 Ch. D. 189; 51 L. J., Ch. 929.

(*h*) By the Inferior Courts Judgments Extension Act, 1882 (45 & 46 V. c. 31), similar enactments are made as to the judgments of inferior courts of the three kingdoms.

(*i*) See form, Chit. F., p. 385. The certificate is conclusive as to the fact of the judgment being entered: *Bailey* v. *Whelpy*, 4 Ir. R., C. L. 243.

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obtained in the Courts at Westminster, or at Dublin, a certificate thereof registered in Scotland shall have the effect of a decree of the Court of Session.

any of the Courts of Queen's Bench, Common Pleas or Exchequer, at Westminster or Dublin respectively for any debt, damages or costs, on production at the office kept in Edinburgh, for the registration of deeds, bonds, protests and other writs registered in the books of council and session of a certificate of such judgment in one of the forms contained in the schedule hereto annexed (*k*), as the case may be, purporting to be signed by the proper officer of the Court where such judgment has been obtained or entered up, such certificate shall be registered in a book to be kept for that purpose, and to be called, "The Register for English and Irish Judgments," in like manner as a bond executed according to the law of Scotland with a clause of registration for execution therein contained; and every certificate so registered shall, from the date of such registration, be of the same force and effect as a decree of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate as if the judgment of which it is a certificate had been a decree originally pronounced in the Court of Session on the date of such registration as aforesaid, and all the reasonable costs, charges and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment: Provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have been first made to and leave obtained from the Lord Ordinary on the bills.

Where decree has been obtained in the Court of Session, a certificate of an extract thereof registered in England or Ireland shall have the effect of a judgment of the Court in which it so registered.

3. On production to the senior Master of the Court of Common Pleas at Westminster, or to the Master of the Court of Common Pleas at Dublin, of the certificate in one of the forms contained in the schedule hereto annexed (*k*), as the case may be, of any extracted decreet of the Court of Session in Scotland which shall hereafter be obtained for the payment of any debt, damages or expenses purporting to be signed by the extractor of the Court of Session, or other officer duly authorized to make and subscribe extracts, or on production of the certificate of an extracted decreet of registration in the books of council and session purporting to be signed by the keeper of the register of deeds, bonds, protests and other writs registered for execution in the books of council and session which shall hereafter be obtained for the payment of any debt, damages or expenses, such certificate shall be registered by such Master in a register to be kept in the Court of Common Pleas at Westminster and Dublin respectively for that purpose, and to be called, "The Register for Scotch Judgments," and such certificate, when so registered, shall, from the date of such registration, be of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered, and all the reasonable costs, charges and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the decreet of which it is a certificate:

(*k*) Ante, p. 771, n. (*i*).

Provided always, that no certificate shall be registered as aforesaid more than twelve months after the date of such decreet, unless application shall have been first made to and leave obtained from the Court or a Judge of the Court in which it is sought so to register such certificate; provided that where a note of suspension of any such decreet shall have been passed or a sist of execution shall have been granted thereon by the said Court of Session or any Judge thereof, on the production of a certificate under the hand of the clerk to the bill chamber of the Court of Session of the passing of such note or the granting of such sist to a Judge of the Court in which such certificate of such decreet has been registered, execution on such registered certificate shall be stayed until a certificate be produced under the hand of the said clerk that such sist has been recalled or has expired, or, where the note of suspension has been passed, until there be produced an extract, under the hand of the extractor of the Court of Session or other officer duly authorized to make and subscribe extracts, of a decreet of the said Court repelling the reasons of suspension.

Courts to have control over registered judgments or decreets in so far as relates to execution.

4. The Courts of Common Pleas at Westminster and at Dublin and the Court of Session in Scotland shall have and exercise the same control and jurisdiction over any judgment or decreet, and over any certificate of such judgment or decreet, registered under this Act in such Courts respectively as they now have and exercise over any judgment or decreet in their own Courts, but in so far only as relates to execution under this Act.

No security for costs where plaintiff resides in a different part of the kingdom.

5. It shall not be necessary for any plaintiff in any of the aforesaid Courts in England resident in Ireland or Scotland, or any plaintiff in any of the aforesaid Courts in Ireland resident in England or Scotland, in any proceeding had and taken on such certificate, to find security for costs in respect of such residence, unless, on special grounds, a Judge or the Court shall otherwise order; nor shall it be necessary for any party to such proceeding in Scotland, resident in England or Ireland, to sist a mandatory, or otherwise to find security for expenses in respect of such residence, unless, on special grounds, the Court shall otherwise order.

Costs not to be allowed in actions on judgments unless by order of Court.

6. In any action brought in any Court in England, Scotland or Ireland, on any judgment or decreet which might be registered under this Act in the country in which such action is brought, the party bringing such action shall not recover or be entitled to any costs or expenses of suit, unless the Court in which such action shall be brought, or some Judge of the same Court, shall otherwise order.

Judges to make rules for execution of this act (*l*).

7. It shall be lawful for the Judges of the Court of Queen's Bench, Common Pleas and Exchequer at Westminster and Dublin respectively, or any eight or more of them respectively, of whom

(*l*) The following rules and scale of fees were made by the Judges at Westminster in Michaelmas Term, 1868:—

1. The register for Irish judgments to be kept by the senior Master, under section 1 of the said Act, shall be arranged in alphabetical order in the surname of the defendant, where a judgment shall be registered under form 1 in the schedule of the Act, or in the surname of the plaintiff where registered under form 2 in the said schedule: and the said Master shall enter on the said register all the further par-

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the chiefs of the said Courts respectively shall be three, and they are hereby required, from time to time, to make all such general rules and orders to regulate the practice to be observed in the execution of this Act, or in any matter relating thereto, including the scale of fees to be charged, in the Courts of common law in England and Ireland respectively, as they may deem to be necessary and proper; and it shall be lawful for the Court of Session in Scotland, and the said Court is hereby required, from time to time

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ticulars relating to the judgment contained in the certificate presented for registration.

2. The register for Scotch decrees, to be kept by the said Master under section 3 of the said Act, shall, as to defender or pursuer, be arranged in like manner, and contain the like particulars as provided by the preceding rule relating to the register for Irish judgments.

3. When an attorney, law agent, or creditor shall present for registration to the said Master a certificate of an Irish judgment or Scotch decreet, a copy thereof shall also be produced, certified by the attorney, law agent, or creditor to be a true copy of the original certificate, and the said Master shall thereupon stamp such certified copy with his office stamp.

4. Upon the production of such copy certificate of an Irish judgment or Scotch decreet, an original of which shall have been filed with the said Master, the proper officer shall issue execution or other process as though such judgment or decreet had been duly obtained and entered up as an English judgment in the Court of Common Pleas at Westminster, the form of the writ of execution being varied accordingly:—

> The writ of execution may be thus varied:—instead of "which the said lately in our Court of Queen's Bench at Westminster recovered, &c." *insert* "which the said lately in our Court of [Queen's Bench at Dublin] recovered, &c., and which judgment has been duly registered in our Court of Common Pleas at Westminster pursuant to 'The Judgment Extension Act, 1868.'"

5. An affidavit of the attorney applying for a certificate of a judgment in the English Courts, of his information and belief as to the title, trade or profession, and the last known or usual place of abode of the plaintiff or defendant, as the case may be, shall be sufficient to justify the officer in inserting the particulars so sworn to in his certificate.

6. The fees to be taken for issuing execution or other process on an Irish judgment or Scotch decreet that shall have been registered under this Act, shall be the same as in the case of an English judgment.

7. The fees hereinafter mentioned shall be collected, not in money, but by means of stamps denoting the amount of such fees.

SCALE OF FEES.

(See Order as to Fees in App., Vol. 2.)

	£	s.	d.
For a certificate of a judgment for registration in Ireland or Scotland, including affidavit [This fee is paid by means of a stamp impressed or affixed on certificate, see Order in App., Vol. 2.]	0	2	0
On filing for registration a certificate issued out of the Courts of Dublin, and Court of Session in Scotland, although more than one name may have to be registered [This fee is paid by means of a stamp impressed or affixed on the certificate, see Order in App., Vol. 2.]	0	7	0
On filing every acknowledgment of satisfaction of an Irish judgment, or Scotch decreet, for entry on the register	0	2	6
For every certificate of the entry of a satisfaction [This fee is paid as above.]	0	1	0
For every search made in the registers of Irish and Scotch judgments in one or both registers, for each name [This fee is paid by means of an impressed stamp on præcipe, see Order in App., Vol. 2.]	0	1	0

to make such acts of sederunt to regulate the practice to be observed in the execution of this Act, or in any matter relating thereto, including the scale of fees to be charged in Scotland, as such Court may deem to be necessary and proper: Provided always, that such rules, orders and acts of sederunt respectively shall be laid before both Houses of Parliament within one month from the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one month from the commencement of the then next session of Parliament.

Act not to apply to certain decrees.

8. This Act shall not apply to any decree pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland.

Registering lis pendens.

Registering Lis Pendens.]—By 2 & 3 *V. c.* 11, *s.* 7, it is enacted, "That no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and the Court of Equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior Master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of *lis pendens* which shall be registered under the provisions of this Act."

Before 2 & 3 *V. c.* 11, *s.* 7, a purchaser of property was affected by any action which was pending at the time of sale relating to and calling in question the title of the legal owner, on the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding not only on the litigant parties, but on those who derive title from them *pendente lite*, whether with notice of the suit or not (*m*). No doubt the language of the Courts on several occasions implies that the *lis pendens* is implied notice to all the world (*m*); but this view is clearly held to be erroneous (*m*).

Under 13 & 14 *V. c.* 35, *s.* 17, a special case is, under certain circumstances, to be considered as a *lis pendens*.

It seems that no *lis pendens* should be registered unless some specific property is directly affected by the suit; it is for the Master appointed for the purpose to determine whether a *lis pendens* should be registered or not, and it seems that he may refuse to register any writ which does not affect specific property. If a devisee files a bill to establish a will against the heir in possession, the devised estates would be affected by the *lis pendens*; but if there be a general bill for an account of personal estate, or of real and personal estate, or a decree for general administration,

(*m*) *Bellamy* v. *Sabine*, 1 De G. & J. 578; 26 L. J., Ch. 797.

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the registering of such a suit would have no effect (*o*). No case has gone so far; and it would be very inconvenient if, where money is secured upon an estate, and there is a question depending in the Court upon the right to or about that money, but no question relating to the estate upon which it is secured, which is wholly a collateral security, that a purchaser of the estate pending that suit should be affected by such an implication arises in law from the pendency of a suit (*p*). There cannot be any registration of a mere partnership suit as a *lis pendens*, so as to affect the real estate of one of the partners [*secus* as to real estate of partnership]; nor again, in an administration action, can the original action be registered against a debtor to the estate as a *lis pendens*, but a fresh action must be commenced against the debtor and registered (*q*). There is no doubt that an action against or for land may be registered as a *lis pendens*; and it also seems clear that registration may be effectual where leasehold estates are affected (*r*). A question arises when it is attempted to register a *lis pendens* so as to bind a purchaser of a chattel (*s*). According to a dictum of Lord Chancellor *Hardwicke*, in *Walker* v. *Flamstead* (*t*), real and personal estate are governed by the same rules, but it appears clear that an action affecting personal estate other than chattels real cannot be registered (*u*). Where a plaintiff was entitled to four tenth shares in a colliery, and of the profits which might arise from the sale of a lease thereof, it was held that the omission to register such an action was a breach of a solicitor's duty (*v*).

Registration of an action as a *lis pendens* is effected as directed by the statute, *supra*, p. 775.

The fee for registering a *lis pendens* is 2*s.* 6*d.*, which is paid by means of a stamp impressed on the memorandum of registry; the memorandum, duly stamped, can be purchased at the Judgment Office. The fee for re-registering is 1*s.* (*Orders, post, Vol.* 2, *in App.*)

It will be noticed that the title of the Court is to be inserted in the memorandum; and although the statute says Court of Equity, yet there is no doubt that the doctrine relates also to a Court of law (*x*). This distinction is now done away entirely by the Judicature Act, and the High Court of Justice is equivalent to the Court of Equity. It seems that the formal necessaries for registering the action as a *lis pendens* should be strictly adhered to, and if a slip has been made the Court will not go out of its way to make any amendment (*y*). So a Judge at Chambers has vacated the registration of a *lis pendens* on the ground that the words

(*o*) 2 White & Tudor, L. C.

(*p*) *Worsley* v. *Scarborough*, 3 Atk. 392.

(*q*) *In re Barned's Banking Co., Ex p. Thornton*, L. R., 2 Ch. 177; 36 L. J., Ch. 190, per *Turner*, L. J.

(*r*) *Sorrell* v. *Carpenter*, 2 P. Wms. 482, as explained in *Bellamy* v. *Sabine*, 26 L. J., Ch. 801.

(*s*) *Berry* v. *Gibbons*, L. R., 8 Ch. 749, arguendo.

(*t*) 2 Ld. Kenyon, pt. 2, p. 59.

(*u*) *Bellamy* v. *Sabine*, supra. See the statute, supra, p. 775.

(*v*) *Plant* v. *Pearman*, 41 L. J., Q. B. 169; 26 L. T. 313.

(*x*) *Bellamy* v. *Sabine*, 26 L. J., Ch. p. 803, per *Turner*, L. J.

(*y*) *Sorrell* v. *Carpenter*, 2 P. Wms. 483: *Pulbrook* v. *Pearse*, 20 Jan. 1882, per *Stephen*, J., *ex rel. amici.*

Chancery Division, which had been inserted by mistake instead of Queen's Bench Division, were material. When it is required to register an action as a *lis pendens*, a *præcipe* should be obtained and the blanks filled up; it should then be handed to the proper officer, who will give a copy of such register to the applicant. It seems to be the practice to require the production of the writ of summons in the action if it be in the Queen's Bench Division—*secus* if it be in the Chancery Division.

The pendency of a suit cannot be treated as notice of the equitable rights of one defendant against another, unless it is clear that an adjudication will take place between them (*z*). The plaintiff in like manner cannot alienate property the subject of an action, if it be duly registered as a *lis pendens* (*a*).

The effect of registration of an action as a *lis pendens* is to bind the property by the judgment which is finally pronounced in the action. It does not create a charge or a lien on the property, nor does it excuse a purchaser from completing his contract, but it merely puts him upon inquiry into the validity of the plaintiff's claim (*b*). It seems uncertain from when the registration dates; before the Judicature Act it related back to the service of the subpœna (*c*) which would now probably be held equivalent to the writ of summons.

Vacating same.

As to vacating or expunging the registry of an action as a *lis pendens*, by 30 & 31 *V. c.* 47, *s.* 2, "Whereas a registered *lis pendens* cannot be vacated without the consent of the person by whom it was registered, and such consent is sometimes withheld, although the suit or proceeding is at an end, or is not being *bonâ fide* prosecuted: For remedy whereof be it enacted, that the Court before whom the property sought to be bound is in litigation, may, upon the determination of the *lis pendens*, or during the pendency thereof where the Court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it, and may, in the discretion of the Court, direct the party on whose behalf the registration was made to pay all the costs and expenses occasioned by the registration or the vacating thereof. The application to the Court pending the litigation may be in a summary way by petition or motion in Court, or by summons at Chambers; and if an order shall be made for vacating any such registration, the senior Master of the Common Pleas at Westminster shall, upon the filing with him of an office copy of such order, enter a discharge of such *lis pendens* on the register, and shall be entitled for every such entry of discharge to the sum of two shillings and sixpence, and no more, and may issue certificates of such entry, and may charge for every such certificate the sum of one shilling, which said sums shall be collected by stamps, &c."

It will be here noticed that only two grounds of objection are mentioned, but it seems that the Courts have an inherent jurisdiction to set aside an irregular proceeding; therefore, where the action was registered as in the Chancery Division, whereas it was

(*z*) *Bellamy* v. *Sabine*, 1 De G. & J. 578: *Tyler* v. *Thomas*, 25 Beav. 47.

(*a*) *Bellamy* v. *Sabine*, supra: *Garth* v. *Ward*, 2 Atk. 174.

(*b*) *Bull* v. *Hutchens*, 32 Beav. 615; 9 Jur., N. S. 954.

(*c*) *Anon.*, 1 Vern. 318.

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in fact in the Queen's Bench Division, the Court held that it had jurisdiction to set it aside; it also seems that where the registration of a *lis pendens* is bad as not being in respect of property specifically mentioned, or where the claim does not sufficiently appear on the record, the Court has power to set it aside without any reference to the Act (*d*). If any proceedings are taken, the summons should be entitled in the matter of the statute and in the action (*e*).

If a purchaser have express notice that the property is affected by a *lis pendens*, he would be bound by the doctrine of notice quite apart from any question as to the registration of a *lis pendens* (*f*).

Practice.

Practice on Registration.]—The registration is effected by delivering at the office of the registrar of judgments at the Royal Courts a memorandum in the proper form filled up with the particulars of the judgment or action.

Not to be registered after 2 p.m.

By *R. of S. C., Ord. LXI. r.* 22, "The Registrar of Judgments shall not receive any memorandum of a judgment, execution, *lis pendens*, order, rule, annuity, Crown debt, or other incumbrance, or any memorandum of satisfaction relating to the same, for registration, after the hour of two in the afternoon."

Searches.

Searches.]—By *Ord. LXI. r.* 23, "The Clerk of Enrolments and each of the following Registrars, namely—

The Registrar of Bills of Sale,

The Registrar of Certificates of Acknowledgments of Deeds by Married Women, and

The Registrar of Judgments,

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search."

(*d*) *Pulbrook* v. *Pearse*, 17 Feb. 882, cor. *Mathew* and *Cave*, JJ., *ex rel. amici*.

(*e*) *Clutton* v. *Lee*, 7 Ch. D. 541, n. (*i*); 45 L. J., Ch. 184; 24 W. R. 607.

(*f*) *Bellamy* v. *Sabine*, 1 De G. & J. 578; 26 L. J., Ch. 797.

CHAPTER LXXII.

ENTRY OF SATISFACTION.

When defendant entitled to enter satisfaction.

As soon as the judgment is satisfied by payment, levy or otherwise, the debtor is entitled to have satisfaction entered (*a*). There are no rules in the Rules of 1883 as to entry of satisfaction. The former rules on the subject are repealed by the Rules of 1883 (*App. O.*). But as they practically regulate the practice, they are set out in this Chapter. They are as follows:—

Mode of doing so.

By *R.* 80, *H. T.* 1853, "In order to acknowledge satisfaction of a judgment, it shall be requisite only (*b*) to produce a satisfaction piece, in form as hereinafter mentioned (*c*); and such satisfaction piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the Courts at Westminster expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece before the same is signed, and which attorney shall declare himself, in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney; provided that a Judge at Chambers may make an order dispensing with such signature, under special circumstances, if he thinks fit; and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the master may direct."

As to the form of the attestation to a warrant of attorney, *see Vol.* 2, *Ch. CXIV.*

By *R. E. T.* 1857, "Upon a satisfaction piece, duly signed and attested in accordance with the 80th rule of Hilary Term, 1853, being presented to the clerk of the judgments of the Masters in the Court in which the judgment has been signed, he shall file the same, and enter satisfaction in the judgment book against the entry of the said judgment, and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment."

In order to enter satisfaction upon the roll, proceed as follows:—*Purchase at a stationer's a form of satisfaction piece, and fill up the blanks in same. Let it be signed and attested as directed by the above*

(*a*) See *Lambert* v. *Parnell*, 15 L. J., Q. B. 55, where defendant had been arrested on a *ca. sa.*, and discharged from custody with the consent of the plaintiff. And see *Ward* v. *Broomhead*, 7 Ex. 726: 21 L. J., Ex. 216: *Cattlin* v. *Kernot*, 7 L. J., C. P. 186. As to when arresting the defendant on a *ca. sa.* operates as a discharge of the judgment, see post, Ch. LXXVII. See *Combe* v. *Sandon*, 1 D. & R. 281, a case of trover for title deeds.

(*b*) R. E. T. 7 V. was the former rule on this subject. As to the practice before this rule, see *Wood* v. *Hart*, 2 B. N. C. 45; 3 Sc. 368.

(*c*) See the form, Chit. F. 386.

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rule, unless such signing be dispensed with; take it to the clerk at the Judgment Office, who will file (*d*) *the satisfaction piece and enter satisfaction.* Where the satisfaction piece is signed by the personal representative of a deceased, his representative character, as we have seen by the above rule, must be proved in such manner as the Master may direct.

When signature to satisfaction piece dispensed with.

By the above rule of *H. T.* 1853, as we have seen, a Judge at Chambers has power to make an order dispensing with the above signature. A Judge will not dispense with it unless it be clearly proved that the judgment is satisfied (*e*). Where the plaintiff was dead, and administration had not been taken out, the Court, before the above rule, refused to allow satisfaction to be entered, though the defendant's solicitor swore that the plaintiff had received a sum from the defendant in full satisfaction (*f*). And the Common Pleas, before the above rule, refused to order satisfaction on the roll in a case where four out of five plaintiffs had given their consent, although the fifth plaintiff was resident in America and could not be found, and the solicitor for the plaintiffs consented (*g*).

Lis pendens, &c.

Satisfaction of registered judgment.

As to the Master entering a satisfaction or discharge as to any registered judgment, &c., *see* 23 & 24 *V. c.* 115, *s.* 2, &c. (*h*).

(*d*) The fee on filing is 2*s.*, which is paid by a stamp, impressed or adhesive, on the document filed. Orders 28 October, 1875; 22 April, 1876, Appendix.

(*e*) *De Bastos* v. *Willmott*, 1 Hodges, 15. And see *Speach* v. *Slade*, 8 Moore, 461; Tidd, 9th ed. 1041.

(*f*) *Speach* v. *Slade*, supra.

(*g*) *Davis* v. *Jones*, 5 Dowl. 503.

(*h*) See Dan. Ch. Pr. 328: *Pooley* v. *Bosanquet*, 7 Ch. D. 541: *Clutton* v. *Lee*, 7 Ch. D. 541, n.

CHAPTER LXXIII.

SETTING OFF JUDGMENTS AND COSTS.

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Judgments of superior Courts.

Setting off Judgments one against the other.]—Where there are cross judgments in the same or different actions, in the same or different divisions (*a*), between parties substantially the same, whether they are for debt or damages and costs, or for costs alone, the one may be set off against the other. This may be effected by applying to a Master (*b*) on a summons for an order that satisfaction be entered, on the applicant acknowledging satisfaction for the same amount on his judgment (or *vice versâ*, if the applicant's judgment be less (*c*)). Formerly this was only done on the terms of the other party's solicitor being first satisfied his lien upon the judgment for costs in that particular suit (*d*). But probably, since *Ord. LXV. r.* 14 (*post*, p. 783), this term would not now be imposed. This, it seems, will not be allowed if the applicant has taken the other party in custody in execution on a *ca. sa.* on his own judgment (*e*). It has been allowed, although the opposite party was dead, and her administrator had issued an *elegit* and commenced ejectment thereon, to enforce the judgment (*f*).

(*a*) See *Brydges* v. *Smith*, 8 Bing. 29: *Murphy* v. *Cunningham*, 1 Anst. 271: *Bristowe* v. *Needham*, 8 Sc. N. R. 366.

(*b*) The application might be made to the Court; but, except under very special circumstances, it should be made to a master.

(*c*) See *Barker* v. *Braham*, 2 W. Bl. 869; 3 Wils. 396.

(*d*) See R. 63, H. T. 1853, post: *Middleton* v. *Hill*, 1 M. & Sel. 240; Tidd, 339. The right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of the Court with reference to all the circumstances of the case: *Simpson* v. *Lamb*, 26 L. J., Q. B. 121: *Alliance Bank* v. *Holford*, 16 C. B., N. S. 460, where one of the parties had become bankrupt.

(*e*) *Beard* v. *M'Carthy*, 9 Dowl. 136. The plaintiff, having obtained judgment in an action, took the defendant in execution under a *ca. sa.* The latter applied to a judge at Chambers for his discharge on the ground of irregularity in the proceedings, and the plaintiff made a cross-application to amend. The two applications were heard together, and the judge made an order "that the plaintiff should be at liberty to amend and should pay the defendant the costs of both applications."—Held, that these were interlocutory costs, the payment of which was not by the order made a condition precedent to the amendment; and (hæsitante *Williams*, J.), that as they had been incurred in the same suit in which judgment had been obtained, the Court might, in the exercise of its equitable jurisdiction to prevent its process being abused, allow them to be set off against the judgment: *Thompson* v. *Parish*, 28 L. J., C. P. 153. See *O'Hare* v. *Reeves*, 13 Q. B. 659, where defendant was discharged under 48 G. 3, c. 123, s. 1 (now repealed), after twelve months' imprisonment.

(*f*) *Brydges* v. *Smith*, 8 Bing. 29.

PART IX.

Costs of one of several defendants.

In a case where an action of trespass was brought against three, and two of them allowed judgment to go by default, and the third went to trial and obtained a verdict, the Court, upon application of the third defendant, and upon affidavit that the other two had acted under his authority, compelled the plaintiff to set off the damages and costs he had recovered against the two defendants against the costs he was liable to pay to the third (*g*). It seems unnecessary to apply to the Court or a Judge to have this set-off allowed in these cases, and the Master may allow it (*h*).

The judgments must be between the same parties.

The judgments to be set off must be between parties substantially the same, though it is not necessary that they should be exactly the same parties, provided the funds to be ultimately resorted to in both actions be substantially the same (*i*). Where B. brought an action against A., and recovered, and A. brought an action against B. and C., and recovered, the Court, upon the application of A., allowed him to set off the damages and costs recovered by him in his action against B. and C., against the damages and costs recovered by B. in his action against him, subject to the lien of B.'s solicitor (*j*). So, where A. brought an action against B., which was defended at the joint expense of C. and D. (they being the parties really interested), and A. was nonsuited, and C. brought an action against A., and was nonsuited; the Court, upon the application of C., allowed him to set off the costs of the first nonsuit against the costs of the second (*k*). So, where on two policies of insurance, underwritten by the same persons for A., two sets of actions were brought, and each set was consolidated; and A., the plaintiff, was entitled to costs in one, and had to pay costs in the other; the Court allowed the costs in the latter action to be set off against the costs in the former, as in substance, under the consolidation rule, the same persons were the defendants in both, although in form one action appeared to be against B., and the other against C. (*l*). On the other hand, the Court have refused to allow the damages and costs in an action by A. against B. and C. to be set off against damages and costs recovered by the assignees of B. against A. (*m*). So, the costs of a judgment against the plaintiff, after he has become bankrupt, cannot be set off against the costs of an action by the bankrupt's assignees against the defendant (*n*). And where the plaintiff sued out a *fi. fa.*, and the sheriff, under an indemnity from trustees to whom the defendant had previously assigned all his effects, returned *nulla bona*, and the plaintiff sued the sheriff for a false return, and the sheriff obtained a verdict; the Court refused to allow the plaintiff's judgment to be set off against the sheriff's (*o*).

(*g*) *Schoole* v. *Noble*, 1 H. Bl. 23. And see *Starling* v. *Cozens*, 3 Dowl. 782: *George* v. *Elston*, 1 Sc. 518; 3 Dowl. 419. As to the costs of several defendants in general, see ante, p. 677.

(*h*) *Rawlins* v. *Sewell*, 7 Sc. 230: *Paxton* v. *Wyllie*, 10 L. J., N. S., C. P. 292.

(*i*) See per *Tindal*, C. J., 1 Dowl. 250: *Standeven* v. *Murgatroyd*, 27 L. J., Ex. 425.

(*j*) *Mitchell* v. *Oldfield*, 4 T. R. 123. And see *Glaister* v. *Hewer*, 8 T. R. 69.

(*k*) *O'Connor* v. *Murphy*, 1 H. Bl. 657.

(*l*) *Nunez* v. *Modiziani*, 1 H. Bl. 217.

(*m*) *Doe* v. *Darnton*, 3 East, 149. See *Bristowe* v. *Needham*, 8 Sc. N. R. 366.

(*n*) *West* v. *Pryce*, 10 Moore, 154; 2 Bing. 455.

(*o*) *Hewitt* v. *Pigott*, 1 Dowl. 250; 1 M. & Sc. 122; 8 Bing. 61.

The judgment offered to be set off must in general be actually in existence at the time of making the application, for the Court will not allow costs to which a party may probably be entitled in an action to be set off against costs to which he is absolutely liable in another. Therefore, the amount of a verdict on which a rule for a new trial is pending cannot be set off against the amount of a judgment (*p*). And the Common Pleas refused to set off a sum payable *in futuro* against costs payable *in præsenti* under the same award (*q*); and the Exchequer refused to stay proceedings for the purpose of allowing such costs to be set off when they should become due (*r*). Perhaps, however, under special circumstances, such as the insolvency of the opposite party, the Court might suspend execution by him until the right of the applicant to costs in the other action should be decided (*s*).

The judgment set off must be in esse.

Where a plaintiff, suing as a pauper, recovered damages and costs, it was held that the defendant might set off costs recovered against the plaintiff in another cause in which he was defendant (*t*).

Pauper cause.

By *R. of S. C., Ord. LXV. r.* 14, "A set off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set off is sought" (*u*).

Solicitor's lien.

Setting off Costs, &c. accrued in the same Action.]—*See Ord. LXV. r.* 27, *sub-r.* 21, ante, p. 706. Where costs accrue to both parties in the same action upon *interlocutory* proceedings, or to one upon some *interlocutory* proceeding and to the other upon verdict, the Court will allow the costs in the one case to be set off against the costs in the other; and without satisfying the solicitor's lien, for he has a lien only on the balance which is ultimately to be paid to his client in that particular suit (*x*). And, in general, *interlocutory* costs may be set off against *final* costs, where the payment of them at the time they were adjudged is not, strictly speaking, a condition precedent to other proceedings (*y*). A defendant was allowed to set off costs for not proceeding to trial, when taxed, against damages ultimately recovered in the action by the plaintiff (*z*). So, where a plaintiff, after giving notice of trial, withdrew

Setting off interlocutory costs and moneys in the superior Courts.

(*p*) *Masterman* v. *Malin*, 5 M. & P. 324; 7 Bing. 435; 1 Dowl. 222: *Garrick* v. *Jones*, 2 Dowl. 157. And see *Philipson* v. *Caldwell*, 6 Taunt. 176: *Cooke* v. *Crofts*, 1 D. & L. 360: *Beard* v. *M'Carthy*, 9 Dowl. 136.

(*q*) *Young* v. *Gye*, 10 Moore, 198.

(*r*) *Johnson* v. *Lakeman*, 2 Dowl. 646. See *Doe* d. *Martin* v. *Pucker*, 2 C. & M. 457; 4 Tyr. 144.

(*s*) 7 Bing. 435, marginal note. See *Taylor* v. *Cooke*, 1 Younge, 201.

(*t*) *O'Hare* v. *Reeves*, 13 Q. B. 659.

(*u*) Cp. the former rule 63, H. T. 1853. See *Melville* v. *Leeson*, 27 L. J., Q. B. 318, where costs were ordered to be paid after judgment: *Scott* v. *De Richebourg*, 11 C. B. 447; 20 L. J., C. P. 263: *O'Hare* v. *Reeves*, 13 Q. B. 659: *Dunn* v. *West*, 10 C. B. 420; 1 L. M. & P. 608; 20 L. J., C. P. 1. See this rule noticed ante, p. 166.

(*x*) See R. 63, H. T. 1853: *Stevens* v. *Weston*, 3 B. & C. 535; 5 D. & R. 399: *Vansandau* v. *Burt*, 1 D. & R. 168: *Howell* v. *Harding*, 8 East, 362: *Lang* v. *Webber*, 1 Price, 375.

(*y*) *Halliday* v. *Lawes*, 3 Bing. N. C. 774: *Doe* v. *Carter*, 1 M. & Sc. 516; 8 Bing. 330; 1 Dowl. 259. See *Abernethy* v. *Paton*, 5 Bing. N. C. 276: and *Doe* v. *Davies*, 12 A. & E. 21: *Thompson* v. *Parish*, 28 L. J., C. P. 153, noticed ante, p. 781, n. (*e*), where the defendant had been taken in execution.

(*z*) *Lang* v. *Webber*, 1 Price, 375.

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the record, and the defendant obtained a rule for the payment of the costs of the day which were taxed, and at the next assizes the plaintiff obtained a verdict, and a new trial was afterwards granted on payment of costs: the Court held, that the defendant might set off the costs due to him against those payable on the rule for the new trial (*a*). When, by an order of Nisi Prius, a verdict is entered in favour of the plaintiff for nominal damages and the costs of the action, and the plaintiff is to pay the defendant a certain sum, that sum may be set off against the costs in the action (*b*). But where a defendant was, by a Judge's order, allowed to proceed to trial upon payment to the plaintiff of a certain sum of money, with costs up to the date of the order, and the plaintiff consented to the trial proceeding, on those terms, before the costs had been paid; the Court held that the defendant, having obtained a verdict, was bound to pay those costs, and could not set off against them the costs afterwards taxed for him on the postea (*c*). Where, before the *Com. Law Proc. Act*, 1852, the lessor of the plaintiff obtained a verdict in ejectment in 1834, and taxed his costs, and sued out a writ of possession, which was set aside in 1837 for irregularity, with costs: it was held, that, not having revived the judgment by *sci. fa.*, he could not set off his costs on the judgment against the defendant's costs of setting aside the writ of possession (*d*).

Setting off costs in other cases.

Setting off Costs in other Cases.]—The power to set off costs given by *Ord. LXV. r.* 27, *sub-r.* 21 (*ante*, p. 706), is confined to costs due in respect of the same action (*e*). It cannot be enforced in respect of costs of separate proceedings between the same parties (*f*). Formerly where a bill in equity was dismissed with costs, and the plaintiff brought an action in the Court of Queen's Bench for the same cause and recovered, the Court, upon application of the defendant, ordered that the costs in equity should be set off against the damages and costs in law, the lien of the plaintiff's solicitor being first satisfied (*g*). The Court of Exchequer, however, refused to allow costs in Chancery to be set off against costs of a *rule* in that Court (*h*).

(*a*) *Doe* d. *Dangerfield* v. *Allsop*, 9 B. & C. 760.

(*b*) *Newton* v. *Newton*, 1 M. & Sc. 366; 8 Bing. 202; 1 Dowl. 254. See *Doe* d. *Swinton* v. *Sinclair*, 5 Dowl. 26, per Cur.

(*c*) *Aspinall* v. *Stamp*, 3 B. & C. 108; 4 D. & R. 716. The distinction between this case and that in 9 B. & C. 760, seems to be, that there the defendant's costs sought to be set off had been incurred at the time when the order was made. See *Pitt* v. *Coombs*, 1 H. & W. 13.

(*d*) *Doe* d. *Stevens* v. *Lord*, 1 P. & D. 388; 7 A. & E. 610.

(*e*) *Barker* v. *Hemming*, 5 Q. B. D. 609; 43 L. T. 678 (C. A.).

(*f*) Id.: *Wilde* v. *Walford*, 52 L. J., Ch. 436; 48 L. T. 352; 31 W. R. 518.

(*g*) *Harrison* v. *Bainbridge*, 4 D. & R. 363; 2 B. & C. 800. And see *Hall* v. *Ody*, 2 B. & P. 28: *Emdin* v. *Darley*, 1 N. R. 22: *Webber* v. *Nicholas*, 12 Moore, 87; 4 Bing. 16. But in a case in the C. P., it was held that an application to set off a portion of a debt secured by a judgment in that Court against the costs incurred by the dismissal of petitions presented by the plaintiff against the defendant in the Court of Bankruptcy must be made to the latter Court: *Woodroffe* v. *Wootton*, 6 L. J., C. P. 176. See as to lien on the costs in equity, *Smith* v. *Brocklesby*, 1 Anst. 61.

(*h*) *Wenham* v. *Fowle*, 2 Dowl. 444.

A set-off will be allowed, where the rights of the parties arise from separate awards (*i*), or where the right of one arises from an action, and the other from an award (*k*).

Even where the costs on one side were costs incurred in the Mayor's Court, London (*l*), or the costs of an indictment (*m*), the Court of Common Pleas allowed them to be set off.

(*i*) MS. E. 1814.

(*k*) *Doe* d. *Swinton* v. *Sinclair*, 5 Dowl. 26: *Caddell* v. *Smart*, 4 Dowl. 760.

(*l*) *Emerson* v. *Lashley*, 2 H. Bl. 253.

(*m*) *Emdin* v. *Darley*, 1 N. R. 22.

PART X.

EXECUTION AND ENFORCEMENT OF JUDGMENTS AND ORDERS.

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[As to execution in actions for recovery of land, *see post*, *Vol.* 2, *Ch. CVI.*]

CHAPTER LXXIV.

EXECUTION GENERALLY.

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CH. LXXIV.

1. By what writs, &c., judgments, &c. enforceable.

1. *By what Writs, &c., and by and against whom Judgments or Orders are enforceable.*]—The judgment or order of the Court is generally enforced by a writ of execution. The writs at present in use are that of *fieri facias* against the goods of the judgment debtor, that of *elegit* against his lands, and those of *capias ad satisfaciendum* and attachment against his person; and the writ of sequestration against his property generally, or against the property of corporations (*a*). There is also the writ of possession for recovery of land and the writ of delivery for recovery of specific goods. Judgments and orders may also be enforced by the processes of attachment of debt, charging of stock and shares, and by the appointment of a receiver.

"Writ of execution."

By *R. of S. C., Ord. XLII. r.* 8, "In these rules the term 'writ of execution' shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term 'issuing execution against any party' shall mean the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case."

"Issuing execution against any party."

Levari facias.

The writ of *levari facias* is abolished in civil proceedings by the *Bankruptcy Act*, 1883 (46 & 47 *V. c.* 52), *s.* 146, *sub-s.* (2), which enacts that "No writ of *levari facias* shall hereafter be issued in any civil proceeding."

Outlawry.

Outlawry in civil proceedings having been long practically obsolete has been finally abolished by the *Civil Procedure Acts Repeal Act*, 1879, which provides (*s.* 3), that "after the passing of this Act no person shall be outlawed or waived in or in consequence of any civil proceeding, and no proceedings to outlawry or waiver in consequence of any civil proceedings shall be taken at the instance of the Crown or otherwise."

Order for committal under the Debtors Act.

Judgment summonses.

By an order of the Lord Chancellor, dated the 1st January, 1884, and made under the power given by the 103rd section of the *Bankruptcy Act*, 1883, the powers given by sect. 5 of the *Debtors Act*, 1869, are assigned to the Judge to whom bankruptcy business is assigned, and, save as to the power of committal, is delegated to

(*a*) See Ord. XLII. r. 31, post, Ch. XCII.

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and exercised by the bankruptcy registrars of the High Court. The judgment summons and order for committal to compel a judgment creditor who has the means of paying the debt, but will not do so, to pay it or be committed to prison in default, therefore no longer fall within the province of the present work.

Writs of execution are *judicial* writs issuing out of the Court where the record or other proceeding is upon which they are grounded (*b*).

Where judgment for payment of money.

By *R. of S. C., Ord. XLII. r.* 3, "A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the Principal Act might have been enforced at the time of the passing thereof."

Such a judgment is usually enforced by a writ of *fieri facias*, noticed *post*, p. 836, or by writ of *elegit*, noticed *post, Vol.* 2, p. 873.

Where for payment of money into Court.

By *Ord. XLII. r.* 4, "A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment." The writ of sequestration is noticed *post, Vol.* 2, p. 907; the writ of attachment is noticed *post, Vol.* 2, p. 941.

For the recovery of land.

By *Ord. XLII. r.* 5, "A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession." As to this writ, *see Vol.* 2, *Ch. CVI.*

For recovery of property other than land or money.

By *Ord. XLII. r.* 6, "A judgment for the recovery of any property other than land or money may be enforced:

(*a.*) By writ for delivery of the property [*see post*, p. 904]:

(*b.*) By writ of attachment [*see post* p. 941]:

(*c.*) By writ of sequestration [*see post*, p. 907]."

Judgment to do or abstain from an act.

By *Ord. XLII. r.* 7, "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal." As to the writ of attachment, *see post*, p. 941.

Order of Court or a Judge.

By *Ord. XLII. r.* 24, "Every order of the Court or a Judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." *See post, Vol.* 2, *Ch. CXXII.*

If a party obtained an order to amend or the like upon payment of costs, execution cannot be issued to enforce payment of same unless there be an express direction in the order that the same should be paid (*c*).

By or against person not a party to the action.

By *Ord. XLII. r.* 26, "Any person not being a party to a cause or matter, who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter; and any person not being a party to a cause or matter against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to such cause or matter."

(*b*) 2 Wms. Saund. 27, 38 (2). And see Tidd, Pract. 9th ed. 400, 401, 994, 995. See further as to the execution of judgments on the removal of causes from inferior Courts, post, Vol. 2, Ch. CXXXIV.

(*c*) *Turner* v. *Gill*, 3 Dowl. 30: *Hendy* v. *Collett*, 7 Dowl. 599: *Field* v. *Sawyer*, 6 C. B. 71: *Harrison* v. *Ward*, 3 Dowl. 541: *Ryalls* v. *Emerson*, 2 Dowl. 357. And see *Price* v. *Philcox*, 7 Dowl. 559.

By *r.* 28, "Nothing in this order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever." Cf. *Anglo-Italian Bank* v. *Davies*, 9 *Ch. D.* at p. 275. Former rights preserved.

As to execution against partners, *see post*, *Vol.* 2, *Ch. XCIII.* As to execution in actions for recovery of land, *see post*, *Vol.* 2, *Ch. CVI.* In special cases.

2. *When to be issued.*]—By *Ord. XLII. r.* 17, "Every person to whom any sum of money or any costs shall be payable under a judgment or order, shall, *so soon as the money or costs shall be payable*, be entitled to *sue out one or more writ or writs of fieri facias* or one or more writ or writs of *elegit* to enforce payment thereof, subject, nevertheless, as follows: 2. When to be issued.

(*a.*) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period:

(*b.*) The Court or a Judge may at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit."

By *Ord. XLII. r.* 19, "A party who has obtained judgment, or an order not being a judgment, for payment of money or costs, or for the recovery of land, may *issue execution in fourteen days*, unless the Court or a Judge shall order execution to issue at an earlier or later date, with or without terms" (*d*). After fourteen days.

By *R. of S. C., Ord. XLII. r.* 1, "Where any person is by any judgment or order directed to pay any money, or to deliver up or transfer any property, real or personal, to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand." No demand necessary.

No demand of performance is necessary, but the judgment or order must be served on the person against whom execution is to issue. In cases of judgments or orders, requiring any person to do any acts, the judgment or order must be indorsed and served as required by *Ord. XLII. r.* 5 (*ante*, p. 766).

By *Ord. XLII. r.* 22, "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order" (*e*). Within six years.

As to the mode of proceeding to issue execution after the six years, or where there has been a change by death, &c. in the parties to the judgment, *see post*, *Vol.* 2, *Ch. LXXXVIII.*

Execution should, of course, not be issued where it is stayed by order of the Court or a Judge (*f*), or by agreement (*g*). As to when an appeal operates as a stay of execution, *see post*, *Vol.* 2, *Ch. LXXXV.* Where execution stayed.

(*d*) As to the former power to issue execution *immediately* after signing judgment, see *Smith* v. *Smith*, L. R., 9 Ex. 121; 30 L. T. 429: *Cruickshank* v. *Moss*, 8 L. T. 439, *Willes*, J.

(*e*) See C. L. P. Act, 1852, s. 128: *Franklin* v. *Hodgkinson*, 3 D. & L. 554: *Greenshields* v. *Harris*, 2 Dowl., N. S. 272; 9 M. & W. 775; Co. Lit. 290 b; 2 Saund. 68 d.

(*f*) See C. L. P. Act, 1852, s. 226: *Winter* v. *Lightbound*, 1 Str. 301: *Francis* v. *Nash*, Cas. t. Hard. 53.

(*g*) *Veal* v. *Warner*, 1 Mod. 20: *Cash* v. *Wells*, 1 B. & Ad. 375: *Bikker* v. *Weston*, 29 L. J., Ex. 121.

PART X.

Where defence arises too late to be pleaded.

By *Ord. XLII. r.* 27, "No proceeding by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just."

This writ of *auditâ querelâ* (*h*) was given in order to afford a remedy to the defendant (*i*), where matter of defence (such as a release, &c.), had arisen since the judgment. It was a proceeding of common right, and *ex debito justitiæ* (*k*). But the indulgence shown by the Courts in granting a summary relief upon motion (*l*) rendered the proceeding by *auditâ querelâ* almost obsolete, even before the Judicature Acts (*m*).

Where a judgment has been obtained, and an arrangement is subsequently entered into which would render it inequitable to carry that judgment into effect, execution will be stayed by a Master at Chambers (*n*).

Pending action upon judgment.

Where the plaintiff, after he had obtained judgment, brought an action upon it, and without discontinuing such action, took the defendant's goods in execution upon a *fi. fa.*, the Court held the writ irregular, and ordered it to be set aside, and the goods to be restored with costs (*o*). But the plaintiff in such a case may sue out execution after discontinuing his action on the judgment (*o*).

Until a second action for same cause decided.

In an action by the owners of goods which were on board a vessel, and were lost by a collision with defendants' vessel, the jury having found a verdict for defendants, the plaintiff in another action against the same defendants for the same injury, which stood next in the paper for trial, withdrew the record: the Court refused, on the application of the plaintiffs in the first action, to stay the judgment and execution until after the trial of the second, although it was stated on affidavit, that material evidence in favour of the plaintiffs, which could not be produced on the former trial, would be adduced on the other, the Judge being satisfied with the verdict (*p*).

Where indictment for perjury.

The Courts have refused to stay execution against a defendant until after the trial of an indictment against the plaintiff's witnesses for perjury (*q*).

As to issuing execution against a bankrupt, *see Vol.* 2, *Ch. CII.*

Judgment, &c. subject to condition—waiver of.

By *R. of S. C., Ord. XLII. r.* 2, "Where any person who has obtained any judgment or order upon condition does not perform

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(*h*) See, as to this writ in general, Chit. Arch. 12th ed. p. 548: *Newton* v. *Rowe*, 7 M. & G. 334, note; 2 Saund. 137 e.

(*i*) See per *Parke*, B., 2 M. & W. 413.

(*k*) *Nathan* v. *Giles*, 5 Taunt. 558; 1 Marsh. 226.

(*l*) See Chit. Arch. 12th ed. 548: *Wicket* v. *Cremer*, 1 Ld. Raym. 439: *Sharp* v. *D'Almaine*, 8 Dowl. 668: *Turner* v. *Pulman*, 2 Ex. 513: *Ouchterlony* v. *Gibson*, 6 Sc. N. R. 586.

(*m*) See C. L. P. Act, 1854, s. 84; R. 79, H. T. 1853.

(*n*) Per *Quain*, J., at Chambers, *Anon.*; Bitt. No. lxxxv. See post, p. 792.

(*o*) *Burdus* v. *Satchwell*, Barnes, 208. See a case, where, after judgment in the Exch., the plaintiff proceeded in the Mayor's Court in London by foreign attachment. *Chamberlayne* v. *Green*, 9 M. & W. 790; 1 Dowl., N. S. 649.

(*p*) *Yates* v. *Dublin Steam Packet Co.*, 6 M. & W. 77.

(*q*) *Warwick* v. *Bruce*, 4 M. & S. 140; Lofft, 436: *R.* v. *Tremaine*, 5 B. & C. 761; 8 D. & R. 590.

or comply with such condition, he shall be considered to have waived or abandoned such judgment or order so far as the same is beneficial to himself, and any other person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the judgment or order may in such case warrant, or such proceedings as might have been taken if no such judgment or order had been made, unless the Court or a Judge shall otherwise direct."

—Leave to issue execution on.

As to obtaining leave to issue execution on a judgment or order subject to a condition or contingency, on the condition being performed or contingency happening, *see post, Vol.* 2, *Ch. LXXXIV.*

3. Discovery in aid of execution, examination of the debtor.

3. *Discovery in Aid of Execution—Examination of the Debtor.*]— By *R. of S. C., Ord. XLII. r.* 32, "When a judgment *or order* is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a Judge for an order that the debtor liable under such judgment or order, or *in the case of a corporation that any officer thereof*, be orally examined, as to whether any and what debts are owing to the debtor, and *whether the debtor has any and what other property or means of satisfying the judgment or order*, before a Judge or an officer of the Court as the Court or a Judge shall appoint; and the Court or Judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."

This rule corresponds with the 60th section of the *Com. Law Proc. Act*, 1854, and *Ord. XLV. r.* 1 of the former rules. It is, however, more extensive than either, inasmuch as it provides for the case of a corporation, which the former act did not (*r*), and is not confined to the discovery of debts due to the debtor, but extends to all property or means of satisfying the debt.

The application should be made to a Master at Chambers on a summons, and an order will be granted or refused according as the Master does or does not think it a fit case for the examination. The order should direct before whom the examination is to take place. The Master may, if he thinks proper, direct the production of books and documents. *Draw up the order, if made, in the usual way; get an appointment to proceed from the Master or other person before whom the examination is ordered to take place, and serve a copy of the order and appointment upon the debtor. Attend before the Master or other person at the time and place appointed.*

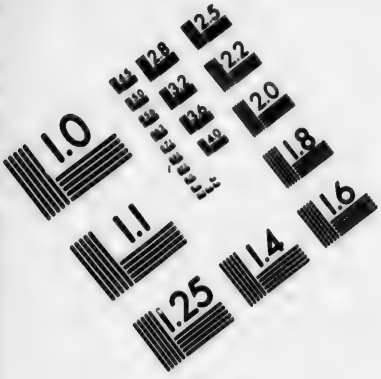
Under the *Com. Law Proc. Act*, it was held that service of the order on the wife of the judgment debtor, without showing that it came to his knowledge, was insufficient (*s*); and, indeed, under the former rule, it was held at Chambers that personal service must be proved (*t*). On the examination the judgment creditor is not confined to asking simply whether any and what debts are due: he is entitled to put, and the debtor is bound to answer, all questions relevant to the subject, and the examination may be made a cross-examination of the strictest kind (*u*). If the debtor do not attend,

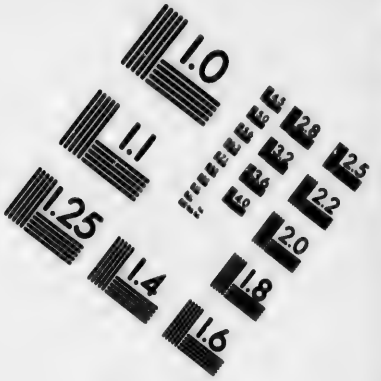
(*r*) *Dickson* v. *Neath, &c. R. Co.*, L. R., 4 Ex. 87.

(*s*) *Mason* v. *Muggeridge*, 18 C. B. 642.

(*t*) Per *Lindley*, J., at Chambers, May 10, 1878, *ex rel. amici.*

(*u*) *Republic of Costa Rica* v. *Strousberg* (C. A.), 16 Ch. D. 8; 50 L. J., Ch. 7; 43 L. T. 399.





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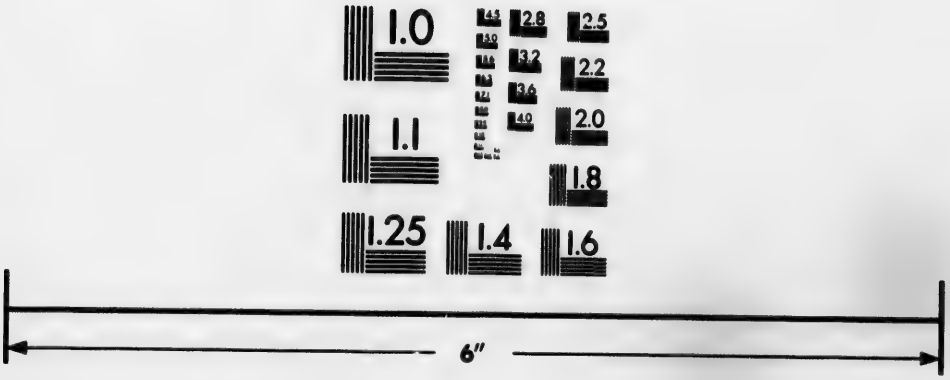

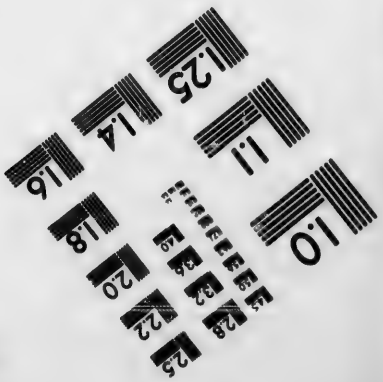

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PART X.

an application may be made for his attachment, but the party applying for such attachment must show by affidavit that conduct money has been tendered to the debtor, or that he has the means of coming up, and also some reason must be given for not examining the debtor at his place of residence, and it must be shown that there were no other means of ascertaining what debts were due to him (*s*).

Where the judgment creditor had issued a judgment summons before applying for the examination, the Court refused to attach the debtor for his non-attendance on the ground that the creditor's proceedings were vexatious (*t*).

Application by party interested.

By *r.* 33, "In case of any judgment or order other than for the recovery or payment of money, if any difficulty shall arise in or about the execution or enforcement thereof, any party interested may apply to the Court or a Judge, and the Court or Judge may make such order thereon for the attendance and examination of any party or otherwise as may be just."

Costs.

By *r.* 34, "The costs of any application under the last two preceding rules, or either of them, and of any proceedings arising from or incidental thereto, shall be in the discretion of the Court or a Judge, or in the discretion of such officer as in Rule 32 mentioned, if the Court or a Judge shall so direct."

4. Staying execution.

4. *Staying Execution.*]—By *R. of S. C., Ord. XLII. r.* 27, "No proceeding by *auditâ querelâ* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just." *See also Ord. XLII. r.* 17, *ante*, p. 789.

Under this rule, where, after judgment is obtained, any arrangement is entered into that would make it inequitable to carry the judgment into effect, execution will be stayed by a Master at Chambers (*u*). The application should be made by summons and supported by an affidavit stating clearly the facts upon which it is made and showing the right of the applicant to the stay or relief.

As to the proceeding by *auditâ querelâ*, which had long been rendered almost obsolete by the indulgence shown by the Courts in granting summary relief upon motion, *see* 1 *Pr.* 12*th ed.* 548.

5. Execution for defendant.

5. *Execution for Defendant.*]—If judgment be given for the defendant, he may have the same writs of execution for the amount of the damages and costs awarded him as the plaintiff might have had for his damages and costs if he had had judgment (*x*); and this even though the plaintiff sue as executor (*y*). He is also entitled to levy interest on the damages and costs

(*s*) *Protector Endowment Co.* v. *Whitlam*, 36 L. T. 467, Q. B. D.

(*t*) *Hayter* v. *Beale*, W. N. 1881, 12; 41 L. T. 131.

(*u*) See per *Quain*, J., *Anon.*, Bitt. No. LXXXV.

(*x*) Ord. XLII. r. 1, and other rules noticed ante, pp. 787, 788; 23 H. 8, c. 15, s. 1; 4 J. 1, c. 3, s. 2.

(*y*) Vol. 2, Ch. XCVII.; 3 & 4 W. 4, c. 42.

awarded (*z*). He may also now, as noticed *post*, p. 824, levy on the plaintiff the poundage, officer's fees, and other expenses of the execution. CH. LXXIV.

6. *Execution by and against Persons not Parties to the Action.*]—By *R. of S. C., Ord. XLII. r.* 26, "Any person not being a party to a cause or matter, who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter; and any person not being a party to a cause or matter against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to such cause or matter." 6. Execution by and against persons not parties to the action.

7. *By what Solicitor.*]—Execution may be sued out by a solicitor different from the one employed to conduct the action without any notice of change (*a*). 7. By what solicitor.

8. *Several Writs—Succession of Writs, &c.*]—By *Ord. XLII.* r. 29, "Nothing in this Order shall affect the order in which writs of execution may be issued." 8. Several writs,—succession of, &c.

By *Ord. XLII. r.* 18, "Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs and shall be issued not less than eight days after the first writ." Under this rule the execution creditor may issue execution for the debt, without affecting his right to proceed afterwards to tax his costs and issue execution for them (*b*). Separate writs for debt and for costs.

The party for whom judgment for a sum of money or costs is given may have a writ of *fieri facias*, or *elegit*, or *ca. sa.* when it will lie, at his option; and, after suing out one, he may abandon it before it is executed, and sue out another; or he may even have several writs running at the same time, either of the same or different species, and into different counties (*c*), or of a different species, into the same or different counties (*d*). Care, however, must be taken as far as possible that not more than one of these writs is executed (*e*). In the absence of malice, however, no action will lie against an execution creditor for neglecting to countermand a writ when the debt is paid after it is placed in the sheriff's hands (*f*), nor for not withdrawing the sheriff after he has become bound by a composition (*g*).

(*z*) 1 & 2 V. c. 110, s. 17, ante, p. 767.

(*a*) Ante, p. 109.

(*b*) *Harris* v. *Jewell*, W. N. 1884, 216.

(*c*) Tidd, 9th ed. 995; *Dunn* v. *Harding*, 2 Dowl. 803.

(*d*) *Primrose* v. *Gibson*, 2 D. & R. 193. See *Miller* v. *Parnell*, 6 Taunt. 370; 2 Marsh. 78: *Smith* v. *Johnson*, 4 Dowl. 208; 2 C., M. & R. 360.

(*e*) See *Lewis* v. *Morris*, 2 C. & M. 712; *Smith* v. *Eggington*, 7 A. & E. 167.

(*f*) *Scheibel* v. *Fairbain*, 1 B. & P. 388: *Page* v. *Whiple*, 3 East, 314. See *Crozer* v. *Pilling*, 4 B. & C. 26, where malice was alleged and proved. Cp. *Huffer* v. *Allen*, L. R., 2 Exch. 15.

(*g*) *Phillips* v. *General Omnibus Co.*, 50 L. J., Q. B. 112.

PART X.

New writ, where first part executed.

If part only of the amount indorsed to be levied is levied on a *fieri facias*, a new writ of execution may be issued for the recovery of the remainder. It must be remembered, however, that a *fi. fa.* returnable, as such writs now are, "immediately after the execution thereof," is in force until it has been completely executed; and that when a portion only of the amount for which the writ was issued is realised by a levy, a second levy may be made under the *same* writ for the balance (*h*). If any part, however trifling, has been levied (*i*), or anything has been done which renders the existence of the writ necessary for the justification of the sheriff (*k*), the plaintiff cannot sue out any *other* writ of execution until *after the return* of the first writ (*l*), and this though the sheriff may have withdrawn the execution (*m*). Therefore, where a defendant was taken under a *ca. sa.* before the return of a *fi. fa.*, under which plaintiff had seized, the whole amount of the levy being swallowed up by the landlord's claim for rent, except 17*s.* 6*d.*, which went towards the expenses of the execution, the Court set aside the *ca. sa.*, and discharged the defendant out of custody (*n*). And even where the sheriff withdrew the execution upon defendant entering into an agreement with plaintiff, that upon payment to him of 500*l.*, portion of the debt, the officer should withdraw, that the judgment should stand as a security for the payment of the residue of the debt by instalments, and that, in default in payment of any such instalments, the plaintiff should be at liberty immediately to re-enter into possession: no return having been made to the writ, and default being made in payment of the instalments, a second writ of *testatum fi. fa.* having been issued indorsed to levy the amount then due to the plaintiff, under which the sheriff re-entered and took possession of the goods: it was held, that there was an actual levy under the first writ to the extent of 500*l.*, and therefore that the second writ was irregular, since it ought not to have issued until the first had been returned, and ought to have recited the first writ and the amount levied under it (*o*). It seems, also, that such further writ must recite the first writ, stating the amount levied under it (*p*); and that the second writ must also be tested after the return of the first (*q*). If, however, the sheriff seize goods under a *fi. fa.*, but

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(*h*) *Jordan* v. *Binckes*, 13 Q. B. 757; 7 D. & L. 30; 18 L. J., Q. B. 277.

(*i*) One test of whether there has been a levy is to consider whether the sheriff was entitled to poundage: *Chapman* v. *Bowlby*, per *Parke*, B., infra, n. (*o*).

(*k*) Per *Pollock*, C. B., *Andrews* v. *Saunderson*, 1 H. & N. at p. 728.

(*l*) *Coppendale* v. *Debonaire*, Barnes, 213: *Foster* v *Jackson*, Hob. 58: *Wilson* v. *Kingston*, 2 Chit. Rep. 203: *Lawes* v. *Codrington*, 1 Dowl. 30: *Reg.* v. *Sheriff of Essex*, 8 Sc. 363; 8 Dowl. 5.

(*m*) *Miller* v. *Parnell*, 6 Taunt. 373; 2 Marsh. 78: *Andrews* v. *Saunderson*, 1 H. & N. 725; 26 L. J., Ex. 208, where the goods of one defendant were seized and a *ca. sa.* was issued against another.

(*n*) *Hodgkinson* v. *Whalley*, 2 C. & J. 86; 2 Tyrw. 174; 1 Dowl. 298. And see *Wintle* v. *Freeman*, 11 A. & E. 539: *Wilson* v. *Kingston*, 2 Chit. Rep. 203. Where part of a debt has been levied, and defendant is detained on a *habeas corpus ad satisfaciendum* for the residue, it is not necessary to refer on the latter writ to the amount of the levy: *Green* v. *Foster*, 2 Dowl. 191.

(*o*) *Chapman* v. *Bowlby*, 8 M. & W. 249; 1 Dowl., N. S. 83.

(*p*) *Chapman* v. *Bowlby*, supra: *Webber* v. *Hutchins*, 8 M. & W. 319.

(*q*) See *Reg.* v. *Sheriff of Essex*, 8 Sc. 363; 8 Dowl. 5.

the seizure is ineffectual, and there is no levy, as when the whole of the goods seized, are already seized under a distress by the landlord for rent (*r*), or are already *in custodiâ legis*, or assigned under a bill of sale (*s*), and he afterwards withdraw the execution, another writ may be issued and executed before the return of the first. Where the sheriff had withdrawn from possession under a *fi. fa.*, in consequence of the defendant having informed him "that he had sold the goods to cheat the plaintiff," it was held, that he might take the defendant under a *ca. sa.* for the same debt, without first obtaining the return of the *fi. fa.* (*t*). Though part of the amount of the judgment be levied under a *fi. fa.*, the plaintiff may bring an *action* on the judgment for the residue, before the return of such *fi. fa.* (*u*).

If the party be taken under a *ca. sa.* on a judgment, no other writ can in general be executed against him or his effects in respect of the same judgment, unless he die in execution, or escape, or be rescued (*x*). So, if lands be extended on an *elegit*, and delivered to the plaintiff, a *fi. fa.* or *ca. sa.* cannot afterwards be executed against defendant in respect of the judgment upon which the *elegit* issued (*y*). These points, however, will be found more fully noticed hereafter when treating of the particular writs themselves.

No writ can be executed after *ca. sa.* executed, or after lands extended on *elegit*.

9. *Issuing Execution—Production of Judgment and Præcipe.*]—By *Ord. XLII. r.* 11, "No writ of execution shall be issued without the production to the officer by whom the same should be issued, of the judgment or order upon which the writ of execution is to issue, or an office copy thereof showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the creditor to execution."

9. Issuing execution. Production of judgment and præcipe.

By *r.* 12, "No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose. The præcipe shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firm against whose goods, the execution is to be issued; and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix G. shall be used, with such variations as circumstances may require" (*z*).

The writ is issued by taking to the office at the Royal Courts the judgment or order, or an office copy of it, together with a præcipe duly filled up and signed as required by the above Rule 12, and stamped with a *5s.* impressed stamp, and a copy of the writ it is proposed to issue duly filled up.

The copy writ is sealed and returned to the party issuing it out. It is not now the practice to file a copy.

(*r*) *Edmond* v. *Ross*, 9 Price, 5.

(*s*) *Dicas* v. *Warne*, 10 Bing. 341; 2 Dowl. 762; 3 M. & Sc. 814.

(*t*) *Knight* v. *Coleby*, 5 M. & W. 274.

(*u*) *Green* v. *Elgie*, 1 Dowl. 344; 3 B. & Ad. 437: *Holmes* v. *Newlands*, 8 Jur. 614, Q. B.

(*x*) Post, Ch. LXXVII. But an imprisonment under the Debtors Act, 1869, s. 5, does not prevent the creditor taking out execution against the debtor's lands, goods and chattels.

(*y*) *Crawley* v. *Lidgeat*, Cro. Jac. 338: *Beacon* v. *Peck*, 1 Str. 226: *Lancaster* v. *Fielder*, 2 Ld. Raym. 1451.

(*z*) See the forms, Chit. F., p. 389, et seq.

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10. Form of the writ.

10. *Form of the Writ.*]—Forms of writs of execution are given in Appendix H. to the *R. of S. C.* 1883. Their use is prescribed by *Ord. XLII. r.* 14 (which *see post*, p. 799).

Should pursue the judgment.

The writ should strictly pursue the judgment (*a*), and be warranted by it; otherwise it will be irregular, and might be set aside, unless allowed to be amended, which indeed, in most cases, it would be, unless, perhaps, where the rights of third parties have intervened.

As to the parties (*b*).

It must pursue the judgment as to the parties, or show the reason why it does not. Thus, upon a judgment against two, the writ cannot be against one (*c*) without showing upon the face of it a valid reason for its being so (*d*). So, where a married woman is sued as sole, and obtains a verdict on a plea of coverture, the *husband* cannot have execution in his name or in their joint names, without an order for that purpose under *R. of S. C., Ord. XLII. r.* 23 (*e*), *post, Ch. LXXXIV.* If one of several defendants dies and the plaintiff wishes to have execution against the lands of the deceased defendant, he must proceed as pointed out *post, Ch. LXXXIV.*

In actions by or against nominal parties.

An exception to the above general rule exists in cases where an action is brought by or against a body of persons in the name of an individual, by permission of an Act of Parliament. In such cases execution cannot be issued against the individual though he be the party on the record, unless expressly made liable by the Act, but only against the persons or property pointed out by the Act (*f*).

As to the names of parties.

The writ should also correspond with the judgment in the name of the defendant, although he be therein described by a wrong one (*g*); and the sheriff is bound, notwithstanding, to execute the writ (*h*). It seems, that if a party changes his name or title after judgment, execution may issue against him in the name in which he is described in the judgment.

As to the amount.

It should agree *in the mandatory part of it* with the judgment, where the judgment is for the recovery of a sum of money, in its amount, or show upon the face of it why it does not (*i*). Thus, if the judgment be for 88*l.* damages, and the writ of execution state it to be for 100*l.*, it would be bad (*k*). So, if the writ in the mandatory part of it require the sheriff to levy a smaller sum than that for which judgment was given, the writ will be bad, unless it show

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(*a*) *Phillips* v. *Birch*, 4 M. & G. 403; 5 Sc. N. R. 178.

(*b*) As to execution against partners, see ante, Ch. XCIII.

(*c*) 15 H. 7; Roll. Abr. 888: *Clarke* v. *Clement*, 6 T. R. 525.

(*d*) *Raynes* v. *Jones*, 9 M. & W. 104; 1 Dowl., N. S. 373, where one of several defendants was discharged from the judgment by the Insolvent Debtors Act. See *Newton and Wife* v. *Rowe*, 8 Sc. N. R. 26.

(*e*) See *Wortley* v. *Rayner*, 2 Doug. 237.

(*f*) *Wormwell* v. *Hailstone*, 6 Bing. 668; 4 M. & P. 502. See remarks on this case in *Cobbett* v. *Wheeler*, 3 El. & El. 359; 30 L. J., Q. B. 644; 3 W. R. 140. See Vol. 2, Ch. XCII.

(*g*) *Reeves* v. *Slater*, 7 B. & C. 486.

(*h*) See *Fisher* v. *Magnay*, 6 Sc. N. R. 588; 1 D. & L. 40: *Davies* v. *Watkins*, 2 Dowl., N. S. 930: *Jarmain* v. *Hooper*, 7 Sc. N. R. 663; 1 D. & L. 769; 6 M. & Gr. 827.

(*i*) *Webber* v. *Hutchins*, 8 M. & W. 319; 1 Dowl., N. S. 95; 10 L. J., Ex. 354: *Chapman* v. *Bowlby*, 1 Dowl., N. S. 83; 10 L. J., Ex. 299; 8 M. & W. 249: *Cobbold* v. *Chilver*, 4 Sc. N. R. 678; 4 M. & G. 62; 1 Dowl., N. S. 726.

(*k*) *Arnell* v. *Weatherby*, 1 C. M. & R. 831; 3 Dowl. 464.

upon the face of it why the sheriff is required to levy only the less sum (*l*); and for this reason, if there has been a levy under a writ, such levy must be recited in any future one (*m*). If before the Judicature Acts the Judge at the trial certified for speedy execution under 1 *W.* 4, *c.* 7, *s.* 2, for part only of the damages recovered, the plaintiff should have sued out a special writ, reciting the certificate, and directing a levy for the amount of such damages only (*n*). The writ should only be indorsed to levy the sum actually due (*o*).

The writ must also pursue the judgment in the subject-matter (*p*). A special execution is not warranted by a general judgment; therefore, a general judgment against an insolvent debtor was held not to warrant a special execution against his future effects, and was deemed irregular (*q*).

In the subject-matter.

The writ may be endorsed to levy interest on the debt and costs at 4*l.* per cent. per annum from the date of the judgment or order. Interest on the costs runs from the date of the judgment or order, and not merely from the date of the certificate (*r*).

Interest.

It was not absolutely necessary that a *ca. sa.* should contain the clause relating to interest (*s*).

11. *Direction of Writ.*]—In ordinary cases writs of execution, such as writs of *fi. fa.*, *elegit*, and *ca. sa.*, are directed to the sheriff of the county where they are to be executed, except in cases where he is interested (*t*). If the writ is to be executed within a liberty or franchise, it must be directed to the sheriff of the county in which such liberty or franchise is situate (*u*); and, therefore, a writ to be executed in the borough of Southwark must be directed to the sheriff of Surrey (*x*); and so a writ to be executed in the Isle of Ely must be directed to the sheriff of Cambridgeshire (*y*).

11. Direction of writ.

When directed to sheriff.

If the sheriff be a party, the writ should be directed to the other sheriff, if there be two (*z*); or, if there be but one, then to the

To coroners or elisors.

(*l*) *Webber* v. *Hutchins*, 8 M. & W. 319; 1 Dowl., N. S. 95: *Cobbold* v. *Chilver*, supra: *King* v. *Birch*, 3 Q. B. 425; 2 G. & D. 513: *Phillips* v. *Birch*, 5 Sc. N. R. 178; 2 Dowl., N. S. 97.

(*m*) *Chapman* v. *Bowlby*, 8 M. & W. 249.

(*n*) *Smith* v. *Dickenson*, 1 D. & L. 155. As to the present practice respecting the shortening and extending the time for issuing execution, see ante, p. 789.

(*o*) See post, p. 801.

(*p*) See *Bicknell* v. *Wetherell*, 1 Q. B. 914; 1 G. & D. 460.

(*q*) *Buxton* v. *Mardin*, 1 T. R. 82.

(*r*) *Landowners' West of England Co.* v. *Ashford*, 33 W. R. 41: *Pyman* v. *Burt*, W. N. 1884, 100. But see *Schroder* v. *Clough*, 35 L. T. 850; 46 L. J., C. P. 365.

(*s*) *Stopford* v. *Fitzgerald*, 16 L. J., Q. B. 310.

(*t*) *Price* v. *Jackson*, 1 M. & Sel. 442. See *Kelly* v. *Shaw*, 6 T. R. 74: *Edwards* v. *Robertson*, 5 M. & W. 520; 7 Dowl. 857.

(*u*) If the writ contains a *non omittas* clause, the sheriff may execute it in such liberty or franchise; otherwise it should be executed by the bailiff of the liberty, to whom the sheriff directs his mandate for that purpose. In the Exchequer, the writ, being considered in the nature of a prerogative one, was always issued in the first instance with this *non omittas* clause. But this was not the practice in the other Courts. And the writs now in use do not contain the clause.

(*x*) *Bowring* v. *Pritchard*, 14 East, 289. And see 1 Chit. Rep. 374 b.

(*y*) *Grant* v. *Bagge*, 3 East, 128. See R. T. 13 G. 2.

(*z*) *Letsom* v. *Bickley*, 5 M. & Sel. 144: *Andrews* v. *Sharp*, 2 W. Bl. Rep. 911.

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coroner; and if the coroner also be party, then to persons appointed by the Court, or nominated by one of the Masters, called elisors (*b*).

In districts surrounded by another county.

The statute 2 *W.* 4, *c.* 39, *s.* 20, reciting that, "There are in divers parts of England certain districts and places, parcel of some one county, but wholly situated within and surrounded by some other county, which is productive of inconvenience and delay in the service and execution of the process of the said Courts;" and which enacted, "that every such district and place shall and may, for the purpose of the service and execution of every writ and process, whether mesne or judicial, issued out of either of the said Courts, be deemed and taken to be part as well of the county wherein such district or place is so situate as aforesaid, as of the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties," is repealed by stat. 42 & 43 *V. c.* 59, *sched.*, and no provision is substituted in its place. By 7 & 8 *V. c.* 61, *s.* 1, from and after the 20th of October, 1844, every part of any county in England or Wales, which is detached from the main body of such county, shall be considered for all purposes as forming part of that county of which it is considered a part for the purpose of the election of members to serve in Parliament as knights of the shire, under the provision of 2 & 3 *W.* 4, *c.* 64. By 7 & 8 *V. c.* 61, *s.* 4, no judicial proceedings or deed, or other instrument in writing, shall be invalidated by reason of any error in stating the name of the county to which such detached portion originally belonged, instead of the county to which it will belong under this Act, or the converse (*see Stat. Law Rev. Act*, 1874, *No.* 2).

In counties of cities and boroughs.

Formerly, the cities of Bristol, Coventry (*c*), Gloucester, Lincoln, Norwich and York, and the town of Nottingham, had two sheriffs each; the cities of Canterbury, Exeter and Worcester, the city of Lichfield, and county of the same city, the town and county of Kingston-upon-Hull, the town and county of Newcastle-upon-Tyne, the town and county of Poole, the town and county of Southampton, had but one each.

By the Municipal Corporation Act, 1882 (45 & 46 *V. c.* 50), sect. 170—(1) "The council of every borough being a county of itself, and of the city of Oxford, shall on the ninth of November in every year appoint a fit person to execute the office of sheriff.

(2) The appointment shall be made at the quarterly meeting of the council immediately after the election of the mayor.

(3) The sheriff shall hold office until the appointment of his successor.

(4) He shall have the same duties and powers as the sheriff, or

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(*b*) See *Mayor of Norwich* v. *Gill*, 1 Dowl. 246; 1 M. & Sc. 91; 8 Bing. 27: *R.* v. *Sheriff of Glamorganshire*, 1 Dowl., N. S. 308: *Bastard* v. *Trutch*, 5 N. & M. 109; 4 Dowl. 6. A suggestion of the reason for directing the writ to the coroner, &c., must be entered on the roll when it is made up, but need not be inserted in the writ. *S. C.* If the writ be directed to the coroner, the officer executing it is his officer, and not the sheriff's. *Sarjeant* v. *Cowan*, 1 C. & M. 491.

(*c*) By 5 & 6 V. c. 110, the county of the City of Coventry is re-annexed to Warwickshire, and there is to be no sheriff in the city of Coventry (sect. 10). See *Warner* v. *Powell*, 2 Dowl., N. S. 531.

the person filling the office of sheriff in the respective borough or city, would have had if this Act had not been passed."

The sheriff of the city of Oxford, appointed in pursuance of the above section of the Municipal Corporation Act, has not the execution in Oxford of writs from the superior Courts, but they are still to be executed by the sheriff of the county (*d*). And the same in all other cities and boroughs, which had not sheriffs on whom the duty rested before the passing of the Municipal Corporation Act.

In Berwick-upon-Tweed the process is directed, "To the mayor and bailiffs of Berwick-upon-Tweed" (*e*). In Berwick.

In the Cinque Ports, writs are now directed and executed as in other places (*f*). In Cinque Ports.

If the writ should be directed to the sheriff, and is directed to any other person, it is void; and any seizure or arrest, &c., made under it will be considered in the same light as if no writ whatever had been issued. But if the writ be directed to the sheriff when it should have been directed to some other person, the execution of the writ will, it seems, be valid; although it might be set aside for the irregularity (*g*). Effect of writ being directed to wrong person.

Care should be taken that the direction be correct in substance. A writ directed to the "Sheriff," instead of "Sheriffs" of London was held bad (*h*). So was a writ directed to the "Sheriffs," instead of "Sheriff" of Middlesex (*i*). A writ directed to the sheriff of "Middlesex," instead of "Middlesex," was in one case held to be bad (*k*); but in a more recent case this was overruled (*l*). And mistakes such as these would probably now be allowed to be amended, and this whether the writ be executed or not (*see post*, p. 833). A writ directed in the alternative to "A. or B." would be bad (*m*). Erroneous direction.

Some writs, as writs of *mandamus* and injunction, are directed to the defendant himself. As to how a writ of sequestration is directed, *see post, Ch. LXXIX.* Direction of other writs.

12. *Teste of Writ.*]—By *Ord. XLII. r.* 14, "Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix H. shall be used with such variations as circumstances may require" (*n*). 12. Teste of writ.

By *R. of S. C., Ord. II. r.* 8, "Every writ of summons and also (unless by any statute or by these rules it is otherwise provided) every other writ shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or, if the office of Lord Chancellor shall be vacant, in the name of

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(*d*) *Granger* v. *Taunton*, 3 Bing. N. C. 64; 5 Dowl. 190.

(*e*) See *Mayor of Berwick* v. *Shanks*, 3 Bing. 461; 11 Moore, 372.

(*f*) 18 & 19 V. c. 48, s. 2.

(*g*) *Weston* v. *Coulson*, 1 W. Bl. 506. See *Mayor of Kingston* v. *Bubb*, 1 Dowl. 151.

(*h*) See *Nicol* v. *Boyne*, 2 Dowl. 761; 3 M. & Sc. 812; 10 Bing. 339: *Barker* v. *Weedon*, 2 Dowl. 707: *Irving* v. *Heaton*, 4 Dowl. 638: *Clutterbuck* v. *Wiseman*, 2 C. & J. 213.

(*i*) *Jackson* v. *Jackson*, 3 Dowl. 182; 1 C. M. & R. 438: *Moore* v. *Magan*, 16 M. & W. 95; 4 D. & L. 267.

(*k*) *Hodgkinson* v. *Hodgkinson*, 2 Dowl. 535.

(*l*) *Colston* v. *Berens*, 3 Dowl. 253; 1 C. M. & R. 833.

(*m*) See *R.* v. *Fowler*, 1 Ld. Raym. 586.

(*n*) Cp. 3 & 4 W. 4, c. 67, s. 1, repealed by 42 & 43 V. c. 59, sched. Part I.

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the Lord Chief Justice of England." A mistake in the teste is an irregularity only, and it would be in general allowed to be amended.

13. Return day of writ.

13. *Return Day of Writ.*]—Writs of execution to be executed by the sheriff are usually made returnable immediately after the execution thereof. (Cp. 3 & 4 *W.* 4, *c.* 67, *s.* 1, repealed, 42 & 43 *V. c.* 59, *sched. pt.* 1.) Before 3 & 4 *W.* 4, *c.* 67, *s.* 2, writs of execution must have been made returnable on a day certain in term (*p*). By that Act, "all writs of execution may be made returnable immediately after the execution thereof." This is repealed by the stat. 42 & 43 *V. c.* 59 (*sched. pt.* 1), and no provision is substituted for it, but the forms of writs in the Appendix to the *R. of S. C.* are made returnable "immediately after the execution thereof." Under *r.* 72, *H. T.* 1853, every writ of execution might be made returnable on a day certain in term (*q*). A writ returnable on a Sunday, or other *dies non*, would, it seems, be a nullity (*r*).

At common law, in actions by original, it was necessary that there should be fifteen days between the teste and return of all writs of execution; but this was rendered unnecessary in the writs of *fieri facias* and *ca. sa.* by stat. 13 *C.* 2, *st.* 2, *c.* 2, *s.* 6, unless the *ca. sa.* were sued out for the purpose of fixing bail, or proceeding to outlawry (*s*). In other cases it seems that no particular number of days were required between the teste and the return. Before the Judicature Acts it was not necessary in any case that a writ of execution should be made returnable in the term next after that in which it was tested (*t*). A writ of *fi. fa.*, returnable "immediately after the execution thereof," is not executed until the whole amount indorsed is levied under it, and may, if in the hands of the sheriff, be put in force after the levy of a part (*u*). A writ of *ca. sa.* so returnable is not returnable until executed: therefore, where a party arrested under a *ca. sa.* is discharged on the ground of privilege, he may be retaken under it when his privilege expires (*x*).

See *post*, p. 803, as to writs of execution not remaining in force more than one year, unless renewed.

14. Indorsements in general.

14. *Indorsements on.*]—The manner in which the different writs of execution must be indorsed will be hereafter noticed whilst treating of them respectively.

Name and abode of solicitor, &c.

By *R. of S. C., Ord. XLII. r.* 13, "Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same, and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor

(*p*) *Furtado* v. *Miller*, Barnes, 213: *Adams* v. *Sparry*, 1 Wils. 155: *Walker* v. *Haryes*, Barnes, 413.

(*q*) See *Drake* v. *Gough*, 1 Dowl., N. S. 573.

(*r*) *Morrison* v. *Manley*, 1 Dowl., N. S. 773: *Kenworthy* v. *Peppiatt*, 4 B. & Ald. 288.

(*s*) See *Sandford* v. *Wyatt*, 2 Dowl., N. S. 2.

(*t*) *Shirley* v. *Wright*, 2 Salk. 700; 2 Ld. Raym. 775: *Simpson* v. *Heath*, 5 M. & W. 631, per *Parke*, B.: *Thomas* v. *Harris*, 1 Dowl., N. S. 798, per *Coleridge*, J.

(*u*) *Jordan* v. *Binckes*, 13 Q. B. 757; 18 L. J., Q. B. 277.

(*x*) *Reynolds* v. *Newton*, 1 G. & D. 153; 1 Q. B. 525. See *Towers* v. *Newton*, 1 Q. B. 319: *Phillips* v. *Price*, 1 D. & L. 110.

shall also be indorsed upon the writ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town or parish, and also the name of the hamlet, street and number of the house of such plaintiff's or defendant's residence, if any such there be" (*y*).

The rule imperatively requires the indorsement therein mentioned to be made, otherwise the writ will be irregular, and might be set aside, unless allowed to be amended, which in general it would be. The language of the rule is nearly the same as that which requires a similar indorsement to be made on a writ of summons. *See ante*, p. 226.

Of party against whom writ has issued.

It is usual and proper to indorse on the writ the place of abode and addition of the party against whom the writ has issued, or to give such other description of him as can be given, though there is no rule of Court requiring this (*z*). This indorsement, when in the ordinary form, that "the defendant is a ——— and resides at ———," amounts to no more than a mere statement for the information of the sheriff, leaving him to act on his own discretion (*a*), and, unless made fraudulently, will not render the execution creditor, or his solicitor, liable to the sheriff or the person whose goods are seized if it be incorrect (*a*). As to the liability of the party or his solicitor for a trespass by the sheriff, *see post*, p. 814.

Of amount to be levied.

By *R. of S. C., Ord. XLII. r.* 16, "Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest (*b*) thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum from the time when the judgment or order was entered or made, provided that in cases where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment or order, then the indorsement may be accordingly to levy the amount of interest so agreed."

Though the writ in the body of it must be for the whole amount of the judgment, or show upon the face of it why it is not, it should not be indorsed to levy a larger sum than is actually due upon the

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(*y*) This is similar to r. 73, H. T. 1853.

(*z*) See per *Cockburn*, C. J., in *Childers* v. *Wooler*, cited infra. See the former Rules of Court, as to indorsing the abode and addition of party against whom the execution issued, in the 8th ed. of this work, p. 543.

(*a*) *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129; 2 L. T. 49. See *Jarmain* v. *Hooper*, 7 Sc. N. R. 663; 1 D. & L. 769; 6 M. & Gr. 827, where in the case of a specific indorsement the execution creditor was held liable in trespass. The solicitor of an execution creditor has no implied authority to direct the sheriff to levy on particular goods. *Smith* v. *Keal* (C. A.), 9 Q. B. D. 340; 51 L. J., Q. B. 487; 47 L. T. 142. He is himself liable if he expressly directs the sheriff to levy on particular goods. *Power* v. *Fleming*, 4 Ir. R., C. L. 404.

(*b*) See the enactment as to interest, ante, p. 767.

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judgment (*d*). Therefore, where money has been paid on account of a judgment, the writ, though it should in the body of it direct the levy of the whole amount, should be indorsed to levy only the balance (*e*). So, in debt on a bond for performance of covenants, &c., where breaches are suggested, &c., under 8 & 9 *W.* 3, c. 11, *s.* 8 (*f*), although the writ of execution must be for the entire penalty, &c., yet it should be indorsed to levy only the damages assessed upon the breaches, and the costs which the plaintiff has recovered, and the costs of execution (*g*). So in debt on a bond conditioned to pay a sum in gross, although execution must have been sued out for the entire penalty, in order to make it conformable with the judgment, yet it should have been endorsed to levy only the principal, interest, nominal damages and costs; and if it were executed for more, or if the defendant were charged in execution for more, the Court or a Judge might order it to be reduced (*h*). In the case of several actions brought against different parties for the same debt, as on a bill of exchange, &c., each party is liable to pay the whole debt until it be paid, but he is liable to the costs recovered in the action against himself only; and the levy must be made accordingly. So, where the plaintiff issued execution against a surety, including costs in an action against the principal, which the defendant had expressly promised to pay, the Court reduced the execution (*i*).

Interest. The writ may be indorsed to levy interest at 4*l.* per cent. per annum on the debt and costs from the date of the judgment or order (*k*).

Costs of execution. As to what poundage, sheriff's fees and costs of execution may be indorsed, *see post*, p. 824. The expenses of a previous *fi. fa.* and levy under it which was ultimately unproductive could not be included in a *ca. sa.* (*l*).

Where too little or too much indorsed. Where a plaintiff from mistake has indorsed a *fi. fa.* for less than the sum for which he has obtained judgment, and which he has a right to levy under it, the Court or a Judge may, on conditions, allow him to take out a *fi. fa.* for the residue (*m*). But the Court refused to allow a *ca. sa.* to issue after defendant had been already taken under one for a less amount than he should have been (*n*). If the writ be indorsed by mistake to levy too large a sum, the indorsement will in general be allowed to be amended, even after a summons is taken out to set aside the execution on such ground (*o*). Where

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(*d*) See ante, p. 797: *Tilby* v. *Best*, 16 East, 163: *M'Cormack* v. *Melton*, 1 A. & E. 331; 3 N. & M. 881. It may be noted that an agreement to take less than the whole amount of the judgment debt is not binding unless there is some consideration for it beyond a promise to pay the amount. *Foakes* v. *Beer*, 9 App. Cas. 605.

(*e*) See *Plevin* v. *Henshall*, 2 Dowl. 743.

(*f*) Vol. 2, Ch. CX.

(*g*) 1 Saund. 58 b.

(*h*) See *Emery* v. *Smalridge*, 2 W. Bl. 760: *M'Cormack* v. *Melton*, 1 A. & E. 331; 3 N. & M. 881.

(*i*) *Evans* v. *Pugh*, 2 Dowl. 360.

(*k*) *Pyman* v. *Burt*, W. N. 1884, 100. And see ante, p. 728.

(*l*) *Earp* v. *Satchell*, 4 Q. B. 121: *Marquis of Salisbury* v. *Ray*, 20 L. J., C. P. 225; 8 C. B., N. S. 193.

(*m*) *Hunt* v. *Passmore*, 2 Dowl. 414.

(*n*) *Smith* v. *Dickenson*, 5 Q. B. 602; 13 L. J., Q. B. 151.

(*o*) *Laroche* v. *Wasbrough*, 2 T. R. 737: *M'Cormack* v. *Melton*, 1 A. & E. 331: *Mouys* v. *Leake*, 8 T. R. 416, n.: *Evans* v. *Manero*, 7 M. & W. 463; 9 Dowl. 256.

an application is made by one of several execution creditors to amend the indorsement on a writ by increasing the amount of the sum to be levied, the other creditors and the officer to whom it is directed should be made parties to the summons (*p*). When judgment has been signed for a certain amount, although that amount be more than is actually due at the time, no action will, so long as the judgment stands, lie for issuing execution for that amount, even though it is alleged that the judgment was signed and the execution issued maliciously and without probable cause (*q*). It seems, moreover, that in no case will an action lie for indorsing a writ of execution for too much, unless there has been an agreement as to the amount, or unless there was malice and want of probable cause for such indorsement, and the execution debtor has thereby sustained damage (*r*). But if the levy has been made for too large a sum, and the amount of it has been paid to the execution creditor, the Court, though they will not in general set aside the execution on that account, if the judgment itself warrant it (*s*), will compel the execution creditor to refund the overplus (*t*); but not so, it seems, upon the motion of the sheriff or of a creditor (*u*).

In the absence of malice no action will lie against the execution creditor for not withdrawing the sheriff after he has become bound by composition proceedings (*x*).

15. *How long Writ in force—Renewal of same.*]—By *Ord. XLII. r.* 20 (*y*), "A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal of the Court; and a writ of

15. How long in force—renewal of same.

(*p*) *Hammond* v. *Navin*, 1 Dowl., N. S. 351; 9 M. & W. 221.

(*q*) *Huffer* v. *Allen*, L. R., 2 Exch. 15; 36 L. J., Ex. 17, where *Churchill* v. *Siggers*, infra, was not cited.

(*r*) See *Wentworth* v. *Bullen*, 9 B. & C. 840, per *Parke*, B.: *De Medina* v. *Grove*, 10 Q. B. 152; 17 L. J., Q. B. 321: *Churchill* v. *Siggers*, 3 E. & B. 929; 23 L. J., Q. B. 308. See *Gilding* v. *Eyre*, 10 C. B., N. S. 604; 31 L. J., C. P. 174, where it was held that an action would lie for maliciously, &c. indorsing a *ca. sa.* for too much, though no judge's order or rule of Court had been obtained for discharging plaintiff from custody. *Mellin* v. *Pedley*, 68 L. T., Jour. 134.

(*s*) Per *Willes*, J., *Gerard* v. *Lewis*, L. R., 2 C. P. at p. 310: *Laroche* v. *Wasbrough*, 3 T. R. 737: *M'Cormack* v. *Melton*, 1 A. & E. 331: *Mouys* v. *Leake*, 8 T. R. 416, n.: *Browne* v. *Burton*, 5 D. & L. 289.

(*t*) See *Barehead* v. *Hall*, 8 Dowl. 796, n.: *De Medina* v. *Grove*, supra, where it was held money had and received would not lie.

(*u*) *Bowser* v. *Lloyd*, 9 Dowl. 1029.

(*x*) *Phillips* v. *The General Omnibus Co.*, 50 L. J., Q. B. 112.

(*y*) The C. L. P. Act, 1852, s. 124, is the previous enactment on this subject. Previous to this enactment, a writ of execution, if it was returnable "immediately after the execution" of it, might be executed at any time after its teste, however remote the period might be.

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execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof."

By *Ord. XLII. r.* 21 (*z*), "The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed."

Subject to the above *r.* 20, a *fi. fa.*, returnable immediately after the execution thereof, remains in force until it is *completely* executed (*a*).

16. From what time it binds the debtor's property.

16. *From what Time it binds the Debtor's Property.*]—At common law the judgment, and not the writ of execution, bound the *lands* of the party (*b*): but as to his *goods and chattels*, they were *bound* by the writ of execution from the time of its teste (*c*).

By stat. 29 *C.* 2, *c.* 3, *s.* 16, however, "no writ of *fi. fa.* or other writ of execution shall bind the property in the goods of the debtor against whom such writ of execution is sued forth, but from the time that such writ shall be *delivered to the sheriff, under-sheriff, or coroners, to be executed:* and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ (without fee for doing the same) indorse upon the back thereof the day of the month or year whereon he or they received the same." Under this section, which is still law, the goods are bound by the delivery of the writ to the sheriff, except against persons protected by the stat. 19 & 20 *V. c.* 97, *s.* 1 (*post*, p. 805) (*d*). A delivery of the writ to the sheriff's deputy in London is the same thing as a delivery to the sheriff himself (*e*). If the party at whose suit the writ issued, after the delivery of it to the sheriff, give him notice not to execute it till further order, this is tantamount to a withdrawal of the writ, which cannot be considered in the hands of the sheriff *to be executed*, within the meaning of the above section, until an order to proceed (*f*). The Statute of Charles was intended only to protect *purchasers* from an injury which might arise to them from the relation which writs of execution had to their teste at common law: and, therefore, as far as relates to the party himself, and to all others but purchasers for a valuable consideration, writs of execution bind the party's goods from the time of their teste (*g*). The meaning of the words "that the goods shall be bound by the delivery of the writ to the sheriff" is that after the writ is so delivered, if the de-

(*z*) The C. L. P. Act, 1852, s. 125, is the previous enactment on this subject.

(*a*) *Jordan* v. *Binckes*, cited ante, p. 794, n. (*h*).

(*b*) See 23 & 24 V. c. 38, noticed post, p. 806; 27 & 28 V. c. 112, noticed ante, p. 769, and post, Vol. 2, p. 879.

(*c*) *Anon.*, Cro. Eliz. 174: *Boucher* v. *Wiseman*, Id. 440; 1 Saund. 219 *g*.

(*d*) *Ehlers* v. *Kauffman*, 49 L. T. 800.

(*e*) *Harris* v. *Loyd*, 5 M. & W. 432, 436: *Woodland* v. *Fuller*, 11 Ad. & E. 859; 3 P. & D. 570; ante, p. 32. See *Williams* v. *Waring*, 4 Dowl. 200; 2 C. M. & R. 354. As to the priority of writs of execution issuing out of superior Courts and County Courts, see 19 & 20 V. c. 108, s. 47.

(*f*) *Hunt* v. *Hooper*, 12 M. & W. 664; 1 D. & L. 626.

(*g*) 1 Saund. 219 *f*: *Anon.*, 2 Vent. 218: *Horton* v. *Ruesby*, Comb. 33: *Houghton* v. *Rugby*, 2 Show. 485; Skin. 257: *Ranken* v. *Harwood*, 10 Jur. 794.

fendant make an assignment of the goods, even for a valuable consideration, unless in market overt (*h*), the sheriff may take them in execution (*i*). The *binding*, both in the case of the Crown and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt (*k*). But the *property* in the goods is not *altered* by the writ until execution and sale by the sheriff (*l*). The law also admits of inquiry into the fraction of a day (*m*), whether the writ of execution was delivered to the sheriff or not before the completion of the conveyance or purchase (*n*). As to when the goods of a party who has become bankrupt can be taken in execution, *see Vol.* 2, *Ch. CII.*

By the Mercantile Law Amendment Act, 1856 (19 & 20 *V. c.* 97), *s.* 1, "No writ of *fieri facias*, or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to goods acquired by any person *bonâ fide* and for a valuable consideration before the actual (*o*) seizure or attachment thereof by virtue of such writ; provided such person (*p*) had not, at the time when he acquired such title, notice (*q*) that such writ, or any other writ (*r*) by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the (*r*) sheriff, under-sheriff,

Goods assigned bonâ fide and for value.

(*h*) See 2 Eq. Ca. Abr. 381: *Samuel* v. *Duke*, 6 Dowl. 536; 3 M. & W. 622: *Woodland* v. *Fuller*, 11 Ad. & E. 859; 3 P. & D. 570.

(*i*) Per Lord *Hardwicke*, in *Lowthal* v. *Tomkins*, B. N. P. 90. And see *R.* v. *Wells*, 16 East, 278, n.: *Payne* v. *Drewe*, 4 East, 523, per Lord *Ellenborough*: *Harding* v. *Hall*, 10 M. & W. 47, per *Parke*, B. See 19 & 20 V. c. 97, s. 1, as to when goods assigned for a valuable consideration cannot be taken in execution.

(*k*) Per *Patteson*, J., *Giles* v. *Grover*, 1 Cl. & F. 74.

(*l*) *Lucas* v. *Nockells*, 10 Bing. 182: *Samuel* v. *Duke*, 6 Dowl. 536: *Payne* v. *Drewe*, 4 East, 523; 1 Smith, 170. See per *Littledale*, J., in *Giles* v. *Grover*, 1 Cl. & F. 177: *Burnell* v. *Hunt*, 5 Jur., Q. B. 650: *Harris* v. *Loyd*, 5 M. & W. 432: *Woodland* v. *Fuller*, infra, where per *Littledale*, J., "The seizure confers only a right to sell, and not a property: for the party whose goods are taken in execution may sell them subject to the right of the execution creditor: and where the goods are worth more than the sum for which execution issues, such sale passes the right to the residue." Post, p. 838.

(*m*) See *Woodland* v. *Fuller*, 11 Ad. & E. 859: *Godson* v. *Sanctuary*, 4 B. & Ad. 255: *Edwards* v. *The Queen*, 9 Ex. 628; 23 L. J., Ex. 165: *Wright* v. *Mills*, 4 H. & N. 488; 28 L. J., Ex. 223.

(*n*) *Bowen* v. *Bramidge*, 6 Car. & P. 140.

(*o*) Where premises, consisting of a mansion house, offices, gardens, farm and farm house, are in the same county, and in one and the same occupation as an entirety, a seizure by a sheriff, at the mansion house, of part of the effects liable to the execution in the name of the whole, is an "actual seizure" within the statute of everything on the premises liable to the execution, whatever the extent of the premises, and however dispersed the effects may be. *Gladstone* v. *Padwick*, L. R., 6 Ex. 203; 40 L. J., Ex. 154.

(*p*) See *Hobson* v. *Thellusson*, L. R., 2 Q. B. 642; 36 L. J., Q. B. 302, where the defendant executed a conveyance to trustees for the benefit of his creditors, and it was held that his knowledge of a writ being out was notice to the trustees, and from which it appears that notice to the debtor is always sufficient. *Ehlers* v. *Kauffmann*, 49 L. T. 806.

(*q*) See *Gladstone* v. *Padwick*, supra.

(*r*) *Quære* whether notice of a writ issued in *another* county is within this proviso. *Gladstone* v. *Padwick*, supra.

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or coroner." This section has no retrospective operation (*s*). It does not protect a person taking an assignment from the debtor with notice that a writ of execution is in the hands of the sheriff (*t*).

Registration of writs to bind lands necessary in certain cases (*u*).

By 23 & 24 *V. c.* 38, *s.* 1, after reciting that it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates, in respect of judgments, statutes, and recognizances, as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold or customary, or leasehold, to ascertain when execution has issued, on any judgment, statute, or recognizance, and to protect them against delay in the execution of the writ: *Enacts*, "that no judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (*x*) (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment, statute, or recognizance), unless a writ or other due process of execution of such judgment, statute, or recognizance shall have been *issued and registered* as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: *Provided always*, that no judgment, statute or recognizance to be entered up after the passing of the Act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered."

How such registration to be made.

By sect. 2, "The registry hereinbefore required of any writ of execution or other due process on any judgment, statute or recognizance, in order to bind a purchaser or mortgagee shall be made by a memorandum or minute referring to the judgment, statute or recognizance already registered so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the Senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute or recognizance upon which the writ of execution or other process issued was registered (*y*), and also the year and the day of the month when every such memorandum or minute is left with him, and such officer shall be entitled for any such registry to the sum of five shillings, and all persons shall be at liberty to search the same book in addition to all the other books in

Search for.

(*s*) *Williams* v. *Smith*, 26 L. J., Ex. 371; 2 H. & N. 443; 28 L. J., Ex. 286; 4 H. & N. 559.

(*t*) *Ehlers* v. *Kauffman*, 49 L. T. 806.

(*u*) The Act for registering writs of execution against land issued on judgments entered up after the 29th July, 1864, is 27 & 28 V. c. 112, s. 3; post, Vol. 2, p. 880. See *Thomas* v. *Cross*, 34 L. J., Ch. 580.

(*x*) As to this section applying where the judgment debtor has only an equitable interest, see *Wallis* v. *Morris*, 10 Jur., N. S. 741; 10 L. T., N. S. 709.

(*y*) In the name of the *debtor*, now, 27 & 28 V. c. 112, s. 3; post, Vol. 2, p. 880.

the same office on payment of the sum of one shilling only: and all the provisions of this Act in regard to writs of execution or other process, and the registry thereof or otherwise relating thereto, shall extend, *mutatis mutandis*, to writs of execution or other due process issuing on judgments of the several Courts of Commons Pleas of the county palatine of Lancaster, and of Pleas of the county palatine of Durham. But none of these provisions are to extend to Ireland."

Acts to extend to judgments in Palatine Courts.

By sect. 5, "In the construction of the previous provisions the term judgment shall be taken to include registered decrees, orders of Courts of equity and bankruptcy, and other orders having the operation of a judgment."

Meaning of "judgment."

By 27 & 28 *V. c.* 112, judgments, &c. entered up after 29th July, 1864, do not affect lands until actually delivered in execution. *See this statute, post, Vol.* 2, p. 879.

When judgments affect lands.

17. *Registration of Writs.*]—As to when it is necessary to register writs of execution against land, *see* 23 & 24 *V. c.* 38, *ante*, p. 806; and 27 & 28 *V. c.* 112, *post, Vol.* 2, p. 880.

17. Registration of writs.

18. *Delivery of Writ to be executed.*]—When a writ is directed to the sheriff it should, after it has been issued, be taken to the sheriff or deputy-sheriff's office (*z*), with instructions to give a warrant for its execution to the officer, if any, whom you wish to execute it (*a*). In a county palatine, writs are delivered to the sheriff in the same way as in other counties (*b*).

18. Delivery of writ to be executed.

19. *By whom executed, when directed to the Sheriff—Warrant and Bailiff appointed by.*]—The sheriff or other party to whom a writ of *fi. fa.*, or other writ directed as this writ is directed, should execute it. But where a writ is to be executed in a liberty or franchise within a county, the writ is directed to the sheriff of the county, but should, unless it contain a *non omittas* clause (*c*), be executed by the bailiff of the liberty to whom the sheriff directs his mandate for that purpose (*d*). But the sheriff, and not the bailiff, must execute the writ if there be a clause of *non omittas* in it (*e*); or if even, without a clause of *non omittas*, the sheriff execute the writ within the liberty, the execution will be good, although the sheriff may thereby render himself liable to an action at the suit of the lord

19. By whom executed, &c. when directed to the sheriff, &c.

(*z*) See ante, p. 31.

(*a*) See *Humphrey* v. *Pratt*, 5 Bligh, N. S. 154, and cases cited ante, p. 32, and post, p. 814, n. (*k*), as to the solicitor being liable to the sheriff for giving wrong directions, whereby goods of a third party are seized. It is no part of the duty of a sheriff's officer to receive writs for execution from the parties, and a clerk of the sheriff's officer has no authority to receive a writ. *Trimingher* v. *Keene*, W. N. 1882, 106.

(*b*) Cf. C. L. P. Act, 1852, s. 122 (repealed).

(*c*) The non omittas clause is not inserted in the form of writ given in the Appendix to the Rules of the S. C.

(*d*) See 5 G. 2, c. 27, s. 3. See *Hamon* v. *Lord Jermyn*, 1 Ld. Raym. 198. If the sheriff, instead of directing his mandate to a bailiff of a liberty, send his warrant to him making him his officer or bailiff, the bailiff may waive his franchise, and act upon the warrant as an ordinary sheriff's officer: *Jackson* v. *Hill*, 10 A. & E. 493, per *Patteson*, J.

(*e*) *Carrett* v. *Smallpage*, 9 East, 330. See *Atkyns* v. *Clare*, 1 Vent. 413; *Semayne's case*, 5 Co. 92; Gilb. C. B. 29, ante, p. 797.

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of the franchise (*e*). The same sheriff who begins the execution must end it, although he goes out of office before the sale (*f*).

The warrant.

The sheriff himself, when the writ is directed to him, may personally execute it; and so may his under-sheriff, without warrant (*g*); but to enable any other party to do so, there must be a warrant directed to him from the sheriff for that purpose. The warrant is an order from the sheriff to his officer to execute the writ, so that the sheriff may obey the order of the Court as contained in it (*h*). It would seem that the warrant should be in writing (*i*). The person to whom this warrant is directed is in general a bound bailiff, that is, a bailiff usually bound with sureties in an obligation for the due execution of his office (*k*). But it may be directed to a special bailiff nominated by the execution creditor or his solicitor (*l*). As to what amounts to the nomination of such a bailiff, and as to the sheriff not being liable for his acts, *see ante*, p. 33 (*m*). An infant cannot, it seems, be a sheriff's bailiff (*n*). A sheriff's bailiff cannot make a deputy (*o*). The warrant should be directed to the officer who is to execute the writ (*p*); but it seems that it may be directed to the chief bailiff of a liberty and his deputies, as there may be known deputies within the franchise, and the sheriff may make them his bailiffs without further describing them (*q*). A variance between the writ and warrant will not, it seems, affect the validity of the execution of the writ (*r*). Where an arrest took place on a warrant which required the defendant to arrest "*A. B.* and *two others*," it was held, that the warrant was good and the arrest legal, the defendant not having been misled by the warrant (*s*). The warrant need not specify the Court out of which the writ issued (*t*). Where an instrument in the form of a common warrant was directed by the sheriff to the bailiff of a franchise, describing him as "my bailiff," and requiring the arrest to be made in his, the sheriff's, bailiwick, it was held not to be a mandate (*u*). If the warrant be directed to A. B., and after it is

Contents of warrant.

Should not be

(*e*) Gilb. C. B. 27: *Piggott* v. *Wilkes*, 3 B. & Ald. 502: *Bell* v. *Jacobs*, 1 M. & P. 309; 4 Bing. 523: *Sparks* v. *Spink*, 7 Taunt. 311.

(*f*) *Clerk* v. *Withers*, 1 Salk. 322.

(*g*) Dalton, 103.

(*h*) See the forms, Chit. Forms.

(*i*) *Hamon* v. *Lord Jermyn*, 1 Ld. Raym. 189.

(*k*) 1 Bl. Com. 346. See *Morris* v. *Parkinson*, 1 C. M. & R. 163.

(*l*) *Hamilton* v. *Dalziel*, 2 W. Bl. 952: *Porter* v. *Viner*, 1 Chit. Rep. 613, n. See *Foster* v. *Blakelock*, 5 B. & C. 331.

(*m*) And see *Alderson* v. *Davenport*, 1 D. & L. 966.

(*n*) *Cuckson* v. *Winter*, 2 M. & R. 313.

(*o*) *Jackson* v. *Hill*, 10 A. & E. 484, per *Patteson*, J. And see *Cuckson* v. *Winter*, 2 M. & R. 315: *Blatch* v. *Archer*, Cowp. 65.

(*p*) See *Housin* v. *Barrow*, 6 T. R. 122.

(*q*) *Jackson* v. *Hill*, 10 A. & E. 486, per *Littledale*, J.

(*r*) *Rose* v. *Tomlinson*, 3 Dowl. 49: *Astley* v. *Goodjer*, 2 Dowl. 619. Sheriff having a good writ makes an ill warrant, yet he may justify under the writ; but, semble, the bailiff cannot. *R.* v. *Fowler*, 1 Ld. Raym. 586.

(*s*) *Williams* v. *Lewis*, 1 Chit. Rep. 611.

(*t*) *Astley* v. *Goodjer*, 2 Dowl. 619; 2 C. & M. 682; 4 Tyr. 414. The warrant on a writ of mesne process must, it seems, have stated the day and year of the issuing of the process upon which it was founded, as set down on the process itself. 6 G. 1, c. 21, s. 54.

(*u*) *Jackson* v. *Hill*, 10 A. & E. 477.

issued A. B. inserts the name of C. D. (*x*), or if the direction or any other part of it be left blank, and filled up after it is issued (*y*), the warrant will be void, and any arrest, &c. under it illegal. The sheriff must not make out the warrant until he has the writ in his actual possession. If he does, and the writ be executed, he will be subject to an action (*z*), and the execution will be invalid. The warrant should be delivered to the officer to whom it is directed. It may be delivered to him on a Sunday (*a*). He is not justified in executing the writ before the warrant is delivered to him (*b*). Where plaintiff's solicitor obtained from the sheriff's deputy in London a warrant, which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the Dead-letter Office, the Court held that the sheriff could not be called upon to return the writ (*c*).

altered after it is issued.

Not to be made before the sheriff has received writ.

Should be delivered to officer named.

The officer named in the warrant should execute the writ (*d*). It is not necessary, however, that the officer to whom the warrant is directed should be the person who actually executes the writ, or even be within sight when it is executed; but he must be *acting* in its execution; he cannot go upon another business, or stay at home and send a third person to execute it (*e*).

Party named in warrant should execute the writ.

A notice of motion or summons to discharge a party improperly arrested should be directed to the plaintiff and not to the sheriff (*f*).

Rule to discharge party improperly arrested.

20. *When, where, and how executed, when directed to Sheriff, &c.*] —It is the duty of the sheriff to execute the writ when directed to him within a reasonable time after he receives it for execution, and if he omit doing so an action may be maintained against him (*g*), by the party suing out the writ; but in order to sustain such action

20. When, where, and how executed.

(*x*) *Housin* v. *Barrow*, 6 T. R. 122. See *Pearson* v. *Yewens*, 5 Bing. N. C. 489; 7 Dow. 1. 451: *Robinson* v. *Yewens*, 5 M. & W. 149; 7 Dowl. 377: *Collins* v. *Yewens*, 2 P. & D. 439.

(*y*) *Burslem* v. *Fern*, 2 Wils. 47: *R.* v. *Hood*, 1 Mood. C. C. 281.

(*z*) Formerly, under stat. 6 G. 1, c. 21, s. 53, he was liable to a penalty of 10*l.*; but this statute is repealed by 33 & 34 V. c. 99, s. 2; cp. R. M. 1654, s. 2, ante, p. 32. See *Hall* v. *Roche*, 8 T. R. 187.

(*a*) *Samuel* v. *Buller*, 1 Ex. 439; 17 L. J., Ex. 54.

(*b*) 4 Bac. Abr. 452: *Green* v. *Jones*, 1 Saund. 295, n. 5: *Hall* v. *Roche*, 8 T. R. 187: *Astley* v. *Goodjer*, 2 Dowl. 619: *Collins* v. *Yewens*, 10 Ad. & E. 570; 2 P. & D. 439.

(*c*) *Hart* v. *Weatherly*, 4 Dowl. 171.

(*d*) As to one of several parties, to whom a warrant is directed, executing it, see *Lee* v. *Vessey*, 1 H. & N. 90; 25 L. J., Ex. 271: *Boyd* v. *Durand*, 2 Taunt. 161; 2 M. & R. 316 a; Co. Lit. 181 b.

(*e*) *Blatch* v. *Archer*, Cowp. 65. And see *Rhodes* v. *Hull*, 26 L. J., Ex. 265: *Cuckson* v. *Winter*, 2 M. & R. 315 c: *Barrett* v. *Price*, 1 Dowl. 725; 2 M. & Sc. 634; 9 Bing. 566: *Fownes* v. *Stokes*, 4 Dowl. 125; 2 M. & Sc. 634. As to the sheriff's liability, when the follower of the bailiff executes the writ in his absence, see *Gregory* v. *Cotterell*, 5 E. & B. 571; 25 L. J., Q. B. 33; noticed ante, p. 35.

(*f*) *Rhodes* v. *Hull*, 26 L J., Ex. 265.

(*g*) *Dennis* v. *Whetham*, L. R., 9 Q. B. 345; 43 L. J., Q. B. 129; Com. Dig. Temps (D): *Moreland* v. *Leigh*, 1 Stark. 388: *Carlile* v. *Parkins*, 3 Stark. 163: *Randell* v. *Wheble*, 10 Ad. & E. 719; 2 P. & D. 602: *Mason* v. *Paynter*, 1 G. & D. 381; 1 Q. B. 974: *Brown* v. *Jarvis*, 5 Dowl. 281: *Slade* v. *Hawley*, 13 M. & W. 757: *Pitcher* v. *King*, 5 Q. B. 758: *Hooper* v. *Lane*, 10 Q. B. 546, where defendant was arrested on a void writ at the suit of another person, and was on that account discharged. See *S. C.* in error, 2 H. L. 443.

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in the case of a *fi. fa.* actual damage arising from the neglect must be proved (*h*). In the case of a *ca. sa.* it appears such action would lie without any proof of actual damage (*i*). The sheriff is also liable to attachment if he omit to execute the writ (*j*). The sheriff is bound to sell the goods taken under a *fi. fa.* within a reasonable time, and before the issuing or return of a *venditioni exponas* (*k*). If the sheriff has several writs in his hands against the same person, he is bound to execute them all, giving priority to each in the order in which they came into his hands (*l*). But though the sheriff has a reasonable time for executing the writ, that does not excuse him in refusing to execute it when he has the opportunity, if required to do so, and nothing occurs to prevent him; and therefore, for such a refusal, an action may also be supported against him (*m*).

Sheriff must use diligence.

The writ when directed as above may be executed at any time before it is returnable, and while it is in force (*n*). As to when a writ is returnable, *see ante*, p. 800. And as to how long a writ remains in force, *see ante*, p. 803. If the writ be made returnable on a particular day, it may be executed at any time of such day (*o*). It may be executed either by day or night (*p*), and on any day except Sunday (*q*). If a bailiff execute a writ before it comes to the sheriff's hands, or before the warrant is made on it, the bailiff is a trespasser (*r*).

When executed.

If the defendant die after a *fi. fa.* is sued out, the writ may, it seems, notwithstanding, be executed on his goods in the hands of the executor, &c. (*s*). So, if the plaintiff die after execution sued

Death after issuing of writ.

(*h*) *Hobson* v. *Thelluson*, L. R., 2 Q. B. 642, 647, 651; 36 L. J., Q. B. 302; 16 L. T., N. S. 837: cp. *Dennis* v. *Whetham*, supra. See *Bales* v. *Wingfield*, 4 Q. B. 580, n., contra. As to its being necessary that the plaintiff should sustain actual damage, in order to enable him to sustain an action against the sheriff for an omission to execute mesne process, see *Williams* v. *Mostyn*, 7 Dowl. 38: *Randell* v. *Wheble*, 10 Ad. & El. 728.

(*i*) *Clifton* v. *Hooper*, 6 Q. B. 468. See *Hobson* v. *Thelluson*, supra, where this is shown to be an exception to the general rule.

(*j*) *Harvey* v. *Harvey*, 26 Ch. D. 644. See post, p. 812.

(*k*) *Jacobs* v. *Humphrey*, 2 C. & M. 413: *Bales* v. *Wingfield*, 2 N. & M. 831: *Aireton* v. *Davis*, 9 Bing. 740; 3 M. & Sc. 138: *Doker* v. *Hasler*, 2 Bing. 479; 10 Moore, 210.

(*l*) *Dennis* v. *Whetham*, supra.

(*m*) *Mason* v. *Paynter*, 1 Q. B. 974; 1 Gale & D. 381, per *Denman*, C. J.

(*n*) *Simpson* v. *Heath*, 5 M. & W. 631; 7 Dowl. 832: *Thomas* v. *Harris*, 1 Dowl., N. S. 798: *Greenshields* v. *Harris*, 9 M. & W. 775; 2 Dowl., N. S. 272. A *fi. fa.* is in force until it is *completely* executed. *Jordan* v. *Binckes*, 13 Q. B. 757; 7 D. & L. 30; 18 L. J., Q. B. 277.

(*o*) *Maud* v. *Barnard*, 2 Burr. 812: *Towne* v. *Crowder*, 2 C. & P. 355. See 2 Saund. 101 i: *Dyke* v. *Blakstone*, 2 Ld. Raym. 1449.

(*p*) 2 Ord. 436. See *Mackalley's case*, 9 Co. 66: *Anon.*, 2 Chit. 357.

(*q*) 29 C. 2, c. 7, s. 6. And see *Atkinson* v. *Jameson*, 5 T. R. 25: *Taylor* v. *Phillips*, 3 East, 155: *Loveridge* v. *Plaistow*, 2 H. Bl. 29: *Percival* v. *Stamp*, 9 Ex. 167; 23 L. J., Ex. 25: *Ex p. Egginton*, 23 L. J., M. C. 41. But bail may take their principal on that day (*Anon.*, 6 Mod. 231); or after a negligent escape defendant may be retaken on it. *Parker* v. *Moore*, 2 Salk. 626; 2 Ld. Raym. 1028. And see *Featherstonehaugh* v. *Atkinson*, Barnes, 373: *Atkinson* v. *Jameson*, supra: *Anon.*, Willes, 459, 460. As to arresting a party on criminal process on a Sunday by contrivance for the purpose of detaining him in custody on another day on civil process, see Ch. CXXVII.

(*r*) *Greene* v. *Jones*, 1 Saund. 299, n. 5: *Astley* v. *Goodjer*, 2 Dowl. 619: *Hall* v. *Roche*, 8 T. R. 188; ante, p. 809, n. (*z*).

(*s*) 3 Wils. 399; Comb. 33: *Wither* v. *Harris*, 2 Ld. Raym. 808; 12 Mod. 130, 241: *Rankin* v. *Harwood*, 10

out, the writ may, notwithstanding, be executed, and his executor, &c. shall have the money (*t*); or, if there be no executor, and administration be not as yet granted, the money shall be brought into Court, and there deposited until some person appear to claim it as representative of the deceased (*u*).

After bankruptcy, &c.

As to executing an execution after the bankruptcy of the party against whom it is issued, *see Vol. 2, Ch. CII.*

After countermand.

The sheriff should not execute the writ after it has been countermanded (*x*), otherwise he will be liable in trespass (*y*). The solicitor in the action for the judgment creditor may countermand the execution of a *fi. fa.* (*z*). A solicitor has no right, in respect of his lien on a judgment, to cause a defendant to be arrested on a *ca. sa.* after the plaintiff has directed the sheriff not to execute the writ even though the plaintiff and defendant collude together to defraud him of his lien; but the remedy is to apply for relief to the equitable jurisdiction of the Court (*a*).

Where executed.

The writ may be executed at any place within the county, city, &c. to the sheriff of which the writ is directed, but not out of it, or the execution will be irregular (*b*).

In Queen's presence, &c.

It cannot be executed in the Queen's presence, nor in the Queen's Courts of Justice whilst the Queen's justices are there sitting, nor within the verge of her royal palace (*c*) (that is, as to the palace of Westminster, from Charing Cross to Westminster Hall, 28 *H.* 8, *c.* 12), unless by the leave of the Board of Green Cloth (*d*); nor in the Tower (*e*), except, perhaps, by leave of the governor. But this privilege does not extend to

In Tower.

Jur. 794: *Wright* v. *Mills*, 4 H. & N. 488; 28 L. J., Ex. 223.

(*t*) *Cleve* v. *Vere*, Cro. Car. 459: *Harrison* v. *Bowden*, 1 Sid. 29: *Clerk* v. *Withers*, 2 Ld. Raym. 1073; 1 Salk. 322; 6 Mod. 290: *Ellis* v. *Griffith*, 16 M. & W. 106; 16 L. J., Ex. 66, where plaintiff died after *ca. sa.* issued. *Todd* v. *Wright*, 16 L. J., Q. B. 311.

(*u*) *Clerk* v. *Withers*, supra; 2 Bac. Abr. Execution (L.). And see *Dunsford* v. *Gouldsmith*, 8 Moore, 145: *Fothergill* v. *Walton*, 4 Bing. 711; 1 M. & P. 743. See *Turner* v. *Pulman*, 2 Ex. 508: *Marsh* v. *Wooley*, 1 D. & L. 84; 6 Sc. N. R. 555: *Berry* v. *Irwin*, 8 C. B. 532: *Ewart* v. *Jones*, 14 M. & W. 774.

(*x*) *Hunt* v. *Hooper*, 1 D. & L. 626; 12 M. & W. 664; 13 L. J., Ex. 183: *Barker* v. *St. Quintin*, 1 D. & L. 542; 12 M. & W. 441: *National Ass. Co.* v. *Best*, 4 H. & N. 605; 27 L. J., Ex. 19: *Howard* v. *Cauty*, 2 D. & L. 115. Quære whether notice to the sheriff's officer not to execute the writ is notice to the sheriff, *S. C.*: and see *Futcher* v. *Hinder*, 3 H. & N. 757; 28 L. J., Ex. 28. As to the sheriff selling for his poundage after notice from plaintiff to withdraw, see post, p. 827. See *Semple* v. *Keene*, 3 H. & N. 753; 28 L. J., Ex. 151.

(*y*) *Barker* v. *St. Quintin*, supra.

(*z*) *Levi* v. *Abbott*, 4 Ex. 588; 7 D. & L. 185; 19 L. J., Ex. 62: *Futcher* v. *Hinder*, 28 L. J., Ex. 28: *Withers* v. *Parker*, 28 L. J., Ex. 292; 4 H. & N. 524: *Lovegrove* v. *White*, L. R., 6 C. P. 440; 40 L. J., C. P. 253.

(*a*) *Barker* v. *St. Quintin*, supra.

(*b*) *Greenshield* v. *Pritchard*, 8 M. & W. 148: *Hammond* v. *Taylor*, 3 B. & Ald. 408. And see *Chase* v. *Joyce*, 4 M. & Sel. 414. To set aside an arrest in a wrong county, the affidavit must, it seems, state or show that the arrest did not take place on the borders of the proper county, and that there is no dispute as to the boundaries. *Webber* v. *Manning*, 1 Dowl. 24: *Storer* v. *Rayson*, 4 D. & R. 739: *Lloyd* v. *Smith*, 1 Dowl. 372.

(*c*) 3 Bl. Com. 289.

(*d*) *R.* v. *Stobbs*, 3 T. R. 735. And see *Winter* v. *Miles*, 1 Camp. 475; 10 East, 579. The Court of Common Pleas, however, refused to discharge a defendant arrested upon a *capias* within the verge without such leave. *Sparks* v. *Spink*, 7 Taunt. 311.

(*e*) See *Batson* v. *M'Lean*, 2 Chit. Rep. 51: *Bell* v. *Jacobs*, 1 M. & P. 309.

PART X.

In gaol.

In district surrounded by another county.

How writ executed.

Entering house.

Breaking open door, &c.

Hampton Court Palace, which is not now a royal residence (*f*). There is no objection to arresting defendant in the gaol of the county, &c., if he be there merely for his own purposes, and not a prisoner (*g*). As to the execution of writs in districts and places parcel of one county, but wholly situate in and surrounded by another, *see ante*, p. 798. Writs are now executed in counties palatine in the same way as in other counties, *cf. Com. Law Proc. Act*, 1852, *s.* 122 (*repealed*).

The manner in which the several writs of execution must be executed will be mentioned hereafter, while treating of each particular writ. The sheriff may enter the house of the defendant when the outer door is open, or through any other opening, to seize his person or goods; and this though neither he nor his goods be therein, if there is reasonable ground for suspecting that he or they are there (*h*). And the sheriff may enter the house of a third person to execute a *ca. sa.* or *fi. fa.*, if the defendant or his goods be actually therein (*i*), but not otherwise (*k*). On a *fi. fa.* against the goods of an intestate in the hands of the administratrix and her husband, the sheriff may enter the house of the husband to search for the goods of the intestate, though none be found therein (*l*). The sheriff must not remain on the premises longer than is reasonably necessary for the removal of the defendant or his goods, unless with the licence of the defendant or other the occupier of the premises, otherwise he will be a trespasser (*m*).

The sheriff cannot break open any outer door or window (*n*), of the party's dwelling-house in order to execute a writ of execution (*n*): except in the case of a writ of attachment issued against a party for contempt of Court (*o*), and except in the case of a writ of *habere facias possessionem*, in which case he may, if necessary, break open the door, if he be denied entrance by the tenant (*p*). If any person be present who can open the door it should not be broken open without a previous demand and refusal of admission (*q*). It seems that the sheriff may open an outer door if it be only latched (*r*), and that goods may be taken through the window of a

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(*f*) *Att.-Gen.* v. *Dakin*, L. R., 2 Ex. 290; 36 L. J., Ex. 157; L. R., 3 Ex. 288; 37 L. J., Ex. 150; L. R., 4 H. L. 338; 39 L. J., Ex. 113. As to Holyrood Palace, see *Earl of Strathmore* v. *Laing*, 2 Wils. & Shaw, Scotch App. 6.

(*g*) *Lovitt* v. *Hill*, 4 Dowl. 579.

(*h*) *Semayne's case*, 5 Co. 92; 1 Sm. L. C. 7th ed. 105.

(*i*) Id.

(*k*) *Morrish* v. *Murray*, 13 M. & W. 52; 2 D. & L. 199: *Johnson* v. *Leigh*, 1 Marsh. 565; Com. Dig. "Execution" (C), 5.

(*l*) *Cooke* v. *Birt*, 5 Taunt. 765; 1 Marsh. 333.

(*m*) Post, p. 838: *Playfair* v. *Musgrove*, 14 M. & W. 239; 3 D. & L. 73; 15 L. J., Ex. 26: *Ash* v. *Dawnay*, 8 Ex. 237; 22 L. J., Ex. 59.

(*n*) 5 Co. 91; 1 Sm. L. C. 105: *Semayne* v. *Gresham*, Moore, 668; Yelv. 28; Cro. El. 908; 2 Bac. Abr. "Execution" (N): *Duke of Brunswick* v. *Slowman*, 8 C. B. 317; 18 L. J., C. P. 299: *Percival* v. *Stamp*, 9 Ex. 167; 23 L. J., Ex. 25.

(*o*) *Harvey* v. *Harvey*, 26 Ch. D. 644; 51 L. T. 508; 33 W. R. 76.

(*p*) *Semayne's case*, 5 Co. 91; 1 Sm. L. C. 7th ed. 105.

(*q*) *White* v. *Wiltshire*, Palm. 54. See *Ratcliffe* v. *Burton*, 3 B. & P. 223.

(*r*) *Ryan* v. *Shilcock*, 7 Ex. 72; 21 L. J., Ex. 55. In this case it was held that a landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it.

house if open (*s*). Having got peaceable entrance, he may in all cases break open any inner door, cupboards, trunks, &c., if necessary (*t*). When the execution is at the suit of the Queen (*u*), even in the case of a *capias utlagatum* (*x*), the sheriff may break open the outer door of the defendant's dwelling-house, having first signified the cause of his coming and desired admission (*y*). The above rule extends only to the party's dwelling-house; therefore the sheriff may, if necessary, break open the outer door of a barn or out-house, not connected or within the same curtilage with the dwelling-house, without a previous demand and refusal of admission (*z*). Also, after such demand and refusal, the sheriff may break open the outer door of a dwelling-house belonging to a third person, if defendant has, upon a pursuit, taken refuge there, or his goods be brought there to prevent the execution (*a*). Or, if defendant, after being arrested on a *capias*, escape into either his own or another's dwelling-house, the officer will be justified, on fresh pursuit, in breaking the outer door to retake him (*b*). Also, if, after a peaceable entrance of the party's dwelling-house, the sheriff or his officer be locked in, he may justify breaking open the outer door in order to get out; and the Court will probably grant an attachment against the defendant (*c*). So, if the officer seizes under a *fi. fa.*, and is unable to carry away the goods without opening the outer door, if neither defendant nor any one on his behalf be present whom the officer could ask to open it, he is justified in breaking it open in order to carry away the goods (*d*). So, it seems, if an officer, being in a house for the purpose of executing a writ of execution, be forcibly turned out of it, he may, if necessary, break open an outer door to get in again (*e*). If the sheriff break open an outer door when he is not justified in doing so, this does not, it seems, vitiate the execution, but merely renders him liable to an action of trespass (*f*). The Court, or a Judge, however, will in general discharge the party out of custody when arrested, or restore the goods when taken by such means.

Showing warrant.

In executing the writ, a sworn and known officer, be he sheriff, under-sheriff, bailiff, or sergeant, need not show his warrant or writ, although demanded; but a special bailiff must show his warrant if the party demands it, otherwise the latter need not obey it (*g*). And the known officer, upon the execution of the writ,

(*s*) 1 Roll. Abr. 617, pl. 7. See *Sandon* v. *Jervis*, 27 L. J., Q. B. 279; 28 L. J., Ex. 156.

(*t*) *R.* v. *Bird*, 2 Show. 87: *Lee* v. *Gansel*, Cowp. 1: *Hutchinson* v. *Birch*, 4 Taunt. 619.

(*u*) 6 Co. 91 b.

(*x*) *R.* v. *Bird*, 2 Show. 87.

(*y*) 5 Co. 91: *Sir Thomas Kemp and Windsor's case*, 4 Leon. 41: *Semayne* v. *Gresham*, Cro. El. 909.

(*z*) *Penton* v. *Browne*, 1 Sid. 186.

(*a*) *Semayne's case*, 5 Co. 93 a: *Penton* v. *Browne*, 1 Sid. 186; Foster, 319. See *Johnson* v. *Leigh*, supra, n. (*k*).

(*b*) Lofft. 390: *Anon.*, 6 Mod. 105. See *Lloyd* v. *Sandilands*, ant. 250.

(*c*) *White* v. *Wiltshire*, Palm. 52; Cro. Jac. 555; 2 Roll. Rep. 132.

(*d*) *Pugh* v. *Griffiths*, 3 N. & P. 187.

(*e*) *Aga Kurboolie Mahomed* v. *The Queen*, 4 Moore, P. C. 239.

(*f*) 5 Co. 93 a. But see 2 Bac. Abr. "Execution" (N): *Duke of Brunswick* v. *Slowman*, 8 C. B. 317; 18 L. J., C. P. 299: *Percival* v. *Stamp*, 9 Ex. 167; 23 L. J., Ex. 25.

(*g*) *Mackally's case*, 9 Co. 66; Bac. Abr. "Sheriff" (N). But see *Hall* v. *Roche*, 8 T. R. 188, where Lord *Kenyon* expressed a strong opinion that the warrant ought to be produced, at least where demanded.

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ought to declare the contents of his warrant, at whose suit he executes it, out of what Court, and when returnable, to the end that the defendant may pay the money (*h*).

Posse comitatus.

The sheriff must, by the Statute of Westminster, raise the *posse comitatus*, if it be necessary, in order to execute a writ of execution (*i*).

Should be executed on the right party.

Care should be taken that the writ be executed against the right party; if executed against a stranger, the sheriff will be liable to an action of trespass. If father and son have the same name of baptism and surname, and a writ of *fi. fa.* issue against the son, without the addition of "the younger," *primâ facie* the father is intended; but this is only a *primâ facie* intendment; and if the sheriff take the father's goods under the writ, and to an action of trespass by the father plead that the *fi. fa.* was issued against him, the *primâ facie* intendment may be rebutted by proof that the writ issued against the son (*k*). If a sheriff's officer, without any direction from the execution creditor, or any interference by him, in executing a *fi. fa.* seizes a stranger's goods, who makes a claim, and the officer takes out an interpleader summons, and the execution creditor appears and accepts an issue to try the ownership of the goods, the execution creditor does not thereby become liable to an action of trespass for the wrongful act of the sheriff's officer in taking the goods (*l*). It seems that the writ *de identitate nominis* does not apply to a simple taking by plaintiff of the wrong person or goods; and even if it did, it would not take away the right to bring trespass also (*k*). A direction by the solicitor to the sheriff, to seize under a writ of execution, is an act done by an agent within the scope of his authority, and binds the principal; the client, therefore, is liable in trespass for the act of the solicitor in directing the sheriff to take the goods of a wrong party (*k*). A writ of summons issued by A. against his debtor, J. W. K., was by mistake served on M. K., who stated that he was not J. W. K.; M. K. did

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(*h*) *Mackally's case*, 9 Co. 66: *Countess Rutland's case*, 6 Id. 54 a.

(*i*) See *May* v. *Probie*, Cro. Jac. 419: *R.* v. *Baldwin*, Barnes, 430: *Slie* v. *Finch*, 2 Roll. Rep. 57. The sheriff might raise the *posse comitatus* in order to execute mesne process, but it was not compulsory on him to do so. *Walde* v. *Lambert*, Noy, 40: *Crompton* v. *Ward*, 1 Str. 432. See *Howden* v. *Standish*, 6 C. B. 504; 18 L. J., C. P. 33.

(*k*) *Jarmain* v. *Hooper*, 1 D. & L. 769; 7 Sc. N. R. 663. As to the execution creditor not being liable where the goods of a wrong party have been taken by the sheriff, by a subsequent ratification of his act, see *Wilson* v. *Tumman*, 6 Sc. N. R. 894; 6 M. & G. 236: *Woollen* v. *Wright*, infra. Action against the sheriff for false imprisonment; plea, that plaintiff represented herself to be a person against whom a writ of *ca. sa.* had issued, directed to defendant; new assignment, that defendant detained plaintiff in custody after she had informed him that she was not the person; rejoinder, that plaintiff was lawfully in custody in the first instance, and that the subsequent imprisonment was a continuation of that:—Held, that plaintiff was not estopped from denying that she was the person against whom the writ had issued. *Dunston* v. *Paterson*, 2 C. B., N. S. 495. See further as to the liability of the sheriff, the execution creditor and the solicitor, for a seizure of the goods of the wrong person, post, p. 850. As to when the sheriff can maintain an action against a solicitor for making a false statement in the indorsement on the writ, whereby the sheriff seized the goods of a third party, see *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129.

(*l*) *Woollen* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513.

not appear to the writ, and took no notice of the summons, but judgment was entered up in the action against J. W. K., and a *ca. sa.* issued on the judgment, commanding the sheriff to take J. W. K.; the sheriff thereupon arrested M. K.: held, that the sheriff was liable to an action for false imprisonment at the suit of M. K., and that the facts would not warrant the sheriff in alleging by way of justification that the *ca. sa.* directed him to arrest M. K. by the name of J. W. K. (*m*). As to taking a wrong party's goods in execution, *see post*, p. 850.

As to the course to be adopted by the sheriff in the case of an adverse claim set up by a third party to goods, &c. taken in execution, *see Vol.* 2, *Ch. CXXI.* Interpleader.

21. *Attachment for interfering with Sheriff.*]—If the execution debtor, after the goods have been seized by the sheriff, and whilst they are in his possession, remove them out of such possession, the Court will grant an attachment against him so as to protect its officer (*n*). So the Court will grant an attachment against a third party claiming to be the owner of the goods who forcibly removes them out of the sheriff's possession (*o*). 21. Attachment for interfering with sheriff.

22. *Return of Writs, in what Cases, and how enforced, &c.*]—It is not usual for the sheriff to return writs of execution directed to him unless he is given notice to do so, although in strictness he is bound to return them when executed (*p*). Strictly speaking, no writ can be returned before it is returnable, although the Court or Judge may order a sheriff to return what he has done upon it, and so in some sense return the writ (*q*). It may be added, that a writ returnable immediately after it is executed, is not returnable until executed (*q*). In some cases it is absolutely necessary that the writ should be returned. Thus, if lands be extended on an *elegit*, it and the inquisition held under it must be returned, otherwise the tenant by *elegit* will have no title (*r*). Also, where the full amount of the judgment is not realized by the writ, and it is expedient to issue another writ to enforce payment of the remainder, it is, as we have seen (*ante*, p. 794), essential that the first writ should be returned, in order to recite the return in the fresh writ. It may sometimes be advisable to compel the sheriff to return the writ, in order to prevent improper conduct in the officer (*s*). It is also sometimes expedient to do so if the propriety of the sheriff's charges for executing the writ be questioned. 22. Return of writs.

There is no absolute right in all cases to compel the sheriff to return the writ (*t*). The true test whether he can be compelled to When sheriff cannot be compelled to return.

(*m*) *Kelly* v. *Lawrence*, 33 L. J., Ex. 197.

(*n*) *Burton* v. *Eynde, Exp. Sheriff of Yorkshire*, Cor. *Grove* and *Lopes*, JJ., May 11th, 1882, *ex rel. ed.*

(*o*) *Cooper* v. *Asprey*, 3 B. & S. 932; 32 L. J., Q. B. 209; 8 L. T., N. S. 355, where the Court refused to act on *Day* v. *Carr*, 7 Ex. 883, contra.

(*p*) 5 Co. 90; 4 Co. 64, 67: *Cheasley* v. *Barnes*, 10 East, 73: *Rowland* v. *Veale*, Cowp. 18.

(*q*) See per Cur. in *Lewis* v. *Holmes*, 10 Q. B. 898.

(*r*) 5 Co. 90 a; 4 Co. 74; 2 Inst. 396; Com. Dig. "Execution:" *Garraway* v. *Harrington*, Cro. Jac. 569: *Palmer* v. *Humphrey*, Cro. El. 584.

(*s*) See *Edmunds* v. *Watson*, 7 Taunt. 5.

(*t*) *Angell* v. *Baddeley*, 3 Ex. D. 45, 52; 47 L. J., Ex. 86.

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(t) so is whether the return would be of any use to the plaintiff (*u*). The sheriff cannot be made to return the writ where there has been any collusion between the sheriff's officer and the execution creditor or his solicitor (*x*), or where the action or execution of the writ has been compromised (*y*), or whilst an interpleader issue is pending (*z*), or where the writ has been executed by a special bailiff (*a*), or the like; and if, under the former practice, he were so ruled the sheriff might apply to a Court or Judge to set aside the rule (*a*). Where the plaintiff sent the warrant in a letter by post to the officer, but, the letter not being post paid, the officer refused to take it in, it was held that the sheriff could not be made to return the writ (*b*). Nor could he be compelled to return a *ca. sa.* where the defendant had become bankrupt, and the plaintiff consented to become his assignee (*c*). Nor if the writ is an absolute nullity (*d*); but he may be so if it is only irregular (*e*). In some of these cases, although the sheriff cannot be compelled in the ordinary way to return the writ, yet if he refused to return it he might, on a special application for that purpose, be ordered to return it on being indemnified to the satisfaction of the Master or otherwise.

After six months from expiration of office.

The sheriff can only be compelled to return the writ whilst he is in office, or within six months after he goes out of it (*f*). These months are lunar months (*g*). If he be given notice to return before the expiration of the six months, and he disobey the rule, the statute does not prevent an application for an attachment for such disobedience after that time (*h*). Perhaps under very special circumstances he might be ordered to make a return after the expiration of the six months (*i*). A rule under the former practice to compel the sheriff, six months after his retirement from office, to return a writ, was not a nullity; and if time was obtained on his behalf to return the writ, the relief conferred by the statute was waived, and the sheriff was liable to attachment on default (*k*). As to the transfer of writs, &c. to the incoming sheriff, *see* 3 & 4 *W.* 4, *c.* 99, *s.* 7; and as to his not being liable to return a writ unless it has been duly transferred to him, *see ante*, p. 33.

Who can compel return.

The party issuing the writ may in general compel the sheriff to return it if it become necessary for him to have such return (*l*).

(*t*) Per *Brett*, L. J., *Angell v. Baddeley*, 3 Ex. D. at p. 53.

(*u*) *Ruston* v. *Hatfield*, 3 B. & Ald. 204; 1 Chit. Rep. 613. See *Jordan* v. *Binckes*, cited ante, p. 800, n. (*u*).

(*x*) *Alchin* v. *Wells*, 5 T. R. 470: *Hodges* v. *Jordan*, 5 Dowl. 6: *Hepworth* v. *Sanderson*, infra.

(*y*) *Angell* v. *Baddeley*, supra.

(*z*) *Pallister* v. *Pallister*, 1 Chit. Rep. 614, n. And see *Harding* v. *Holden*, 2 M. & G. 914; 3 Sc. N. R. 293.

(*a*) *Hart* v. *Weatherley*, 4 Dowl. 171.

(*b*) Per *Tindal*, C. J., 8 Bing. 20: *Hepworth* v. *Sanderson*, 8 Bing. 19; 1 M. & Sc. 64.

(*c*) *Brown* v. *M'Millan*, 7 M. & W. 168, per *Parke*, B.

(*d*) See per *Parke*, B., *Jones* v. *Williams*, 8 M. & W. 357.

(*e*) 20 G. 2, c. 37, s. 2: *R.* v. *Jones*, 2 T. R. 1: *R.* v. *Adderley*, Doug. 463: *Yaroth* v. *Hopkins*, 3 Dowl. 711; 2 C. M. & R. 250: *Thomas* v. *Newman*, 2 Dowl., N. S. 33.

(*f*) 20 G. 2, c. 37, s. 2; *R.* v. *Jones*, 2 T. R. 1: *R.* v. *Adderley*, Doug. 463: *Yaroth* v. *Hopkins*, 3 Dowl. 711; 2 C. M. & R. 250: *Thomas* v. *Newman*, 2 Dowl., N. S. 33.

(*g*) *R.* v. *Adderley*, Doug. 463. See *R.* v. *Sheriff of Middlesex*, 4 East, 604.

(*h*) *R.* v. *Adderley*, Doug. 463, n.

(*i*) See *Wilton* v. *Chambers*, 3 Dowl. 333; sed quære.

(*k*) *Walker* v. *Davies*, 3 H. & N. 374; 27 L. J., Ex. 387.

(*l*) See *France* v. *Clarkson*, 2 Dowl. 532.

The party against whom the writ is issued may compel the sheriff to return it after the object of the writ has been effected. But it seems that this cannot be done by such party before that time except on special grounds (*m*). It has been held that a defendant, against whom a *fi. fa.* issued, might compel the sheriff to return it, whether the goods seized were sold to others or redeemed by himself, or although he paid the debt, &c. after the sheriff had kept possession for a considerable time at his desire, to enable him to pay without resorting to a sale (*n*).

Proceedings to compel return.

By *R. of S. C., Ord. LII. r.* 11, "No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not represented by a solicitor), or by his solicitor, calling upon the sheriff to return such writ or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of such sheriff."

Formerly it was necessary in order to compel the sheriff to return a writ to obtain a side-bar rule ordering him to do so. This practice is abolished by the above rule, and all that is now necessary is to serve the sheriff with a notice to return the writ (*o*). This notice takes the place of the rule granted under the former practice, and the decisions relating to the latter, so far as they are applicable at all, will no doubt be held to apply to the former.

Form of notice, and when it expires.

The notice calls upon the sheriff to return the writ within a certain time after it is delivered to his under-sheriff (*p*). In the case of London or Middlesex a four days' notice should be given, and in other cases eight days (*q*). If the notice be given to the late sheriff, it should style him "late sheriff" (*r*). As regards the counties palatine, the notice is given to the sheriff (*s*).

Service of.

The notice (with the name of the officer by whom the writ was executed indorsed on it) must be served at the office of the deputy or agent of the sheriff appointed to accept service of such rules (*t*). In London it is served at the deputy-secondary's, at his office, 19, Gresham Street, West, E. C.; in Middlesex, at the sheriff's office, 24, Red Lion Square, W. C.

Enlarging time for return.

The Court or a Judge may enlarge the time for making the return; and this is often granted where the justice of the case requires it for the sheriff's protection (*u*). It is often granted where there are adverse claims to the goods seized under a *fi. fa.*

Costs of.

The costs of the notice in general fall upon the party giving it, and the defendant is not liable for the same in the absence of an

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(*m*) *Richardson* v. *Trundle*, 8 C. B., N. S. 474; 29 L. J., C. P. 310: but see *Williams* v. *Webb*, 2 Dowl., N. S. 904; 12 L. J., C. P. 137: *Daniels* v. *Gomperts*, 3 Q. B. 322; 2 G. & D. 751.

(*n*) *Edmunds* v. *Watson*, 7 Taunt. 5; 2 Marsh. 330.

(*o*) See form, Chit. Forms, p. 406.

(*p*) See Chit. Forms, p. 406.

(*q*) Cp. R. 130, H. T. 1853.

(*r*) *R.* v. *Sheriff of Cornwall*, 7 Dowl. 600.

(*s*) See 1 Sell. 195; C. L. P. Act, 1852, s. 122, ante, p. 807.

(*t*) As to the appointment of such deputy, see 3 & 4 W. 4, c. 42, s. 20, noticed ante, p. 32. See *Cave* v. *Price*, Barnes, 30: *Vaughan* v. *Sawyer*, Id. 35: *R* v. *Coles*, Doug. 420.

(*u*) See *Jones* v. *Robinson*, 12 L. J., Ex. 415; 2 Dowl., N. S. 1044: *Wells* v. *Pickman*, 7 T. R. 174.

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express undertaking to pay them (*x*). If the notice be not obeyed, they will in general eventually fall on the sheriff.

Setting aside.

If the sheriff be given notice to return the writ and is desirous of setting it aside, his course is to apply to a Master at Chambers to set the notice aside (*y*).

Party by ruling sheriff not estopped from showing writ set aside.

A party, by giving notice to the sheriff to return a writ issued against him, is not estopped as against the party who sued it out from showing that it has been set aside, as the writ may be good as to the sheriff and all persons acting under him, and bad as to the party who sued it out, and this though the writ be returned and filed of record (*z*).

23. The return.

23. *The Return itself, &c.—Amendment of.*]—The sheriff must return the writ within the time limited by the notice or enlarged time, if any, allowed (or if the office be closed, as soon as it opens); otherwise he will be in contempt, and subject to an attachment (*a*). In order to make sheriffs punctual in their return of writs, it was ordered by the repealed *r.* 131, *H. T.* 1853, that "the officer with whom it is filed shall indorse the day and hour when it was filed." There is no similar provisions in the present rules. The fee on filing is 2*s.*, which is paid by a stamp impressed or adhesive on document filed. *See Appendix, post, Vol.* 2.

How made.

The return is made on the back of the writ itself, but if the return be long, a schedule is usually annexed and referred to in the indorsement on the writ (*b*).

Form of return.

The return must be reasonably certain (*c*); but so much certainty is not required in it as was formerly required in pleading (*d*). It must answer the whole writ (*e*) up to the period when it was made (*f*). It must not falsify the writ (*g*), or be contrary to a former return of the sheriff or of his predecessor (*h*). The sheriff ought to put his christian and surname to it (*i*); but the omission would not render it bad, though the sheriff might be amerced (*k*). And when there

(*x*) Cp. *Hutchinson* v. *Humbert*, 8 M. & W. 638.

(*y*) *De Moranda* v. *Dunkin*, 4 T. R. 119: *Hamilton* v. *Dalziel*, 2 W. Bl. Rep. 952: *Angell* v. *Baddeley*, 3 Ex. D. 49; 47 L. J., Ex. 86.

(*z*) *Jones* v. *Williams*, 8 M. & W. 349.

(*a*) R. 131, H. T. 1853, which orders, "when the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open." And see R. 133, H. T. 1853.

(*b*) See forms, Chit. Forms, p. 408 et seq.

(*c*) Bro. Return de Briefe, pl. 8; Roll. Abr. "Retorn" (L); Wats. Sheriff, 69.

(*d*) *Reynolds* v. *Barford*, 2 D. & L. 327; 7 M. & Gr. 449; 8 Sc. N. R. 233, and cases there cited.

(*e*) Roll. Abr. "Retorn" (M), 2; Wats. Sheriff, 69. Where a *venditioni exponas* to sell goods already taken in execution and a *fi. fa.* as to the residue were included in the same writ, and the sheriff made a return to the *venditioni exponas* without making any return as to the *fi. fa.*, it was held bad. *R.* v. *Sheriff of Monmouth*, 1 Marsh. 344.

(*f*) See *Palmer* v. *Potter*, Cro. Eliz. 512: *Perkins* v. *Meacher*, 1 Dowl. 21: *Cavenagh* v. *Collett*, 4 B. & Ald. 279: *Baker* v. *Davenport*, 8 D. & R. 606.

(*g*) Com. Dig. "Retorn" (E), 4: *Moor* v. *Watts*, 2 Salk. 581; 1 Ld. Raym. 613.

(*h*) Roll. Abr. "Retorn" (E), (F); Vin. Abr. "Retorn" (E), (T).

(*i*) *Dive* v. *Manningham*, Plowd. 63; Fitz. Retorn, 8. See *Stroud* v. *Watts*, 2 C. B. 929; 15 L. J., C. P. 196.

(*k*) *Dalston* v. *Thorpe*, Cro. El. 767. Sed quære, see Watson, Sheriff, 69.

are two sheriffs, both ought to put their names, or it will be no return at all (*l*). Where a new sheriff makes a return to a writ which has been executed by a predecessor (but which is not usual), he should return that his predecessor delivered it to him with the latter's return thereon (*m*). Any defect in the formal part of the return will be cured by the words "in manner and form as I am within commanded" (*n*). The forms of returns to each particular writ of execution, and what may be the subject-matter of the return, will be noticed hereafter while treating of each particular writ.

Return in case of bailiff of a liberty.

When the bailiff of a liberty has the execution and return of a writ, the sheriff may return that he commanded the bailiff to execute the writ; and if the bailiff has not made a return, the sheriff should return that fact accordingly; or if he has made a return, the sheriff should return it (*o*). If the bailiff sends an insufficient return, the sheriff should return that the bailiff has made no return (*p*). If the sheriff return that he commanded the bailiff, &c., when the sheriff himself might have entered the liberty, the return is void (*q*). Where both the sheriff and the high bailiff had obtained time to return a writ of *ca. sa.*, and the sheriff afterwards in due time returned *cepi corpus*, it was held that as plaintiff had got all which he had a right to require, the high bailiff could not be compelled to return the mandate (*r*).

On a writ to county palatine.

Writs into the counties palatine are returned in the same way as other writs.

Return, how far conclusive.

The return is conclusive between the same parties in the same action, but not against other parties, or in another action (*s*). Even in another action, however, the return is *primâ facie* evidence of the facts stated in it (*t*). The sheriff is generally concluded by his return (*u*); and the bailiff of a liberty is, it seems, concluded by it, although false, and his remedy over is against the sheriff (*x*). But the sheriff's officer is not for the purpose of his own justification so concluded (*y*). A sheriff is bound by a return of rescue to a *ca. ad resp.* (*u*). Where the sheriff levied and sold the goods of a defendant under a *fi. fa.*, and, *after notice* that defendant had petitioned

(*l*) *Lamb* v. *Wiseman*, Hob. 70: *Curle's case*, 11 Rep. 4.

(*m*) *R.* v. *Sheriff of Middlesex*, 4 East, 604.

(*n*) Fitz. Retorn, 44; Wats. Sheriff, 68.

(*o*) See form, Chit. Forms, p. 413. See *Boothman* v. *Earl of Surrey*, 2 T. R. 5—10.

(*p*) Roll. Abr. "Retorn" (M), 2, 3; Watson on Sheriff, 76.

(*q*) Fitz. Retorn, 53.

(*r*) *Jackson* v. *Taylor*, 5 Dowl. 140.

(*s*) Dalton, 189; Roll. Abr. "Retorn" (O): *Gibson* v. *Brooke*, Cro. El. 859: *Mounson* v. *Browne*, Sir W. Jones, 417. See *Leonard* v. *Simpson*, 2 Bing. N. C. 176; 2 Sc. 335: *Jackson* v. *Hill*, 10 A. & E. 477; 2 P. & D. 455: *Standish* v. *Ross*, 3 Ex. 527; 19 L. J., Ex. 185, where the fiat was issued against the debtor after the return. If the return be false, the party who is injured by it may maintain an action against the sheriff, see post, p. 820. In an action against a bailiff of a liberty, for the escape of a prisoner in execution, the plaintiff is not concluded by the return of the sheriff to the writ of *ca. sa.*: *Jackson* v. *Hill*, supra.

(*t*) *Gifford* v. *Woodgate*, 11 East, 297: *Jackson* v. *Hill*, supra. See *Cator* v. *Stokes*, 1 M. & Sel. 599.

(*u*) *Brasyer* v. *Maclean*, L. R., 6 P. C. 398; 44 L. J., P. C. 79.

(*x*) *Shaw* v. *Simpson*, 1 Ld. Raym. 184.

(*y*) *Parker* v. *Mosse*, Cro. Eliz. 181.

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the Insolvent Court, returned *fieri feci*, it was held that he was bound by that return, and to pay over the money to plaintiff although the defendant was afterwards discharged under the Insolvent Act (*z*). But where the sheriff returned to a *fi. fa.* that he had levied, it was held, in an action against him for not paying over the money, that, notwithstanding his return, he might be admitted to prove that defendant became bankrupt before judgment, and that plaintiff knew of his insolvency before action brought (*a*). And the sheriff is only estopped by his return to a writ of *fi. fa.* to the extent of the levy mentioned therein from saying that it was not made on the goods of the party against whom the *fi. fa.* issued (*b*). Therefore, the sheriff is not estopped from contending that the goods seized beyond the amount mentioned in the return were the property of a third person to whom they had been fraudulently assigned, as against creditors, by the party against whom the execution issued (*b*). If a sheriff returns that he has seized goods of the execution debtor he is not estopped from showing in an action for a false return, that the goods were not the property of such debtor, but belonged to a bill of sale holder, and that therefore the plaintiff had sustained no actual damage by reason of the false return (*c*). In a return to a writ of *fi. fa.* the sheriff is not bound by the value of the goods he returns (*d*).

False return.

The Court will not, in general, try the truth of a return on affidavits (*e*). But if the return be false, the party who is injured by it (*f*) may maintain an action against the sheriff (*g*), if he can prove that he has sustained *actual damage* by reason of the false return, but not otherwise (*h*). Therefore, if the sheriff return *non est inventus*, when he has taken, or might have taken, the defendant, he is liable to an action (*i*). So, if he return *nulla bona* to a *fi. fa.*, when he has had an opportunity of making a levy (*k*), the plaintiff may bring an action against the sheriff for the false return,

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(*z*) *Field* v. *Smith*, 2 M. & W. 388; 5 Dowl. 735.

(*a*) *Brydges* v. *Walford*, 6 M. & Sel. 42. In this case there was no laches on the part of the sheriff, as there was in *Field* v. *Smith*, supra. See *Clutterbuck* v. *Jones*, 15 East, 78: *Standish* v. *Ross*, 3 Ex. 527; 19 L. J., Ex. 185.

(*b*) *Searfe* v. *Halifax*, 7 M. & W. 288.

(*c*) *Stimson* v. *Farnham*, L. R., 7 Q. B. 175; 41 L. J., Q. B. 52: *Remmett* v. *Lawrence*, 15 Q. B. 1004; 20 L. J., Q. B. 25: *Levy* v. *Hale*, 29 L. J., C. P. 127, 130.

(*d*) *Chambers* v. *Coleman*, 9 Dowl. 588: *Wintle* v. *Lord Chetwynde*, 7 Dowl. 554.

(*e*) *Goubot* v. *De Crouy*, 2 Dowl. 86. See *Barber* v. *Mitchell*, 2 Dowl. 574.

(*f*) *Wylie* v. *Birch*, 4 Q. B. 556; 12 L. J., Q. B. 250.

(*g*) *Dennis* v. *Whetham*, L. R., 9 Q. B. 345; 43 L. J., Q. B. 129; Dalton, 190; Vin. Abr. "Retorn" (O), 47. See *Brasyer* v. *Maclean*, L. R., 6 P. C. 398; 44 L. J., P. C. 79, where the sheriff of a colony was held liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him on a *ca. ad resp.* for the damage which resulted to the plaintiff therefrom.

(*h*) *Wylie* v. *Birch*, 4 Q. B. 556; 12 L. J., Q. B. 250: *Stimson* v. *Farnham*, L. R., 7 Q. B. 175; 41 L. J., Q. B. 52: *Hobson* v. *Thellusson*, 36 L. J., Q. B. 302. See *Levy* v. *Hale*, 29 L. J., C. P. 127: *Dennis* v. *Whetham*, L. R., 9 Q. B. 345, 347; 43 L. J., Q. B. 129. And the sheriff is not estopped by his return from showing the real facts, and that plaintiff has sustained no actual damage. *Stimson* v. *Farnham*, supra.

(*i*) *Beckford* v. *Montague*, 2 Esp. 475; ante, p. 807.

(*k*) See *Slade* v. *Hawley*, 13 M. & W. 757.

though, since the return, he has brought an action on the judgment, and obtained a judgment thereon (*l*). If the sheriff, on a *fi. fa.*, return that he has levied part of the debt, and *nulla bona* as to the residue, the creditor, by accepting the part levied on account of his debt, does not preclude himself from bringing an action against the sheriff for a false return (*m*). In an action for a false return, the sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud (*n*). But if the judgment be absolutely void (*o*), or fraudulent, it will be a defence (*p*). In an action for a false return of *nulla bona* to a *fi. fa.*, if the plaintiff prove the debtor to be possessed of certain goods, it is no defence for the sheriff to show a prior execution to an amount of greater value, if to that execution the sheriff has returned *nulla bona*; nor is it any defence when he has not in fact made any levy under the plaintiff's writ for him to show that the prior writs were in his hands, if the plaintiff shows that these were fraudulent as against the creditor (*q*); nor if the sheriff has the proceeds of the goods in his hands, can he defend himself on the ground that the *fi. fa.* for the false return on which the action is brought, was delivered at the sheriff's office at a quarter past six o'clock on the day on which it was returnable (*r*). It was considered in one case that, if the sheriff returns *nulla bona*, and there is a recovery against him for a false return, this vests no property in the goods in him or the plaintiff, but that they remain in the defendant, and are liable to a subsequent execution for his debt (*s*); but, according to a more recent decision, this is not the case (*t*). It may be proper here to mention that no action lies against the sheriff for a false return made by his bailiff in the county court (*u*); and this, it seems, is the case, though the return was made with the sheriff's privity and by his direction (*x*).

Obtaining particulars after return.

After the sheriff has returned the writ, either party may compel him to deliver particulars of the manner in which he has disposed of the proceeds of the execution (*y*).

Amendment of return.

The return may, in general, be amended (*z*), and this even after execution executed; and in some cases, although the application for the amendment be not made by the sheriff himself (*a*). Where a levy was made under a *fi. fa.*, and the plaintiff's solicitors, who had subsequently become the defendant's solicitors, unfairly in-

(*l*) *Pitcher* v. *King*, 9 A. & E. 288; 1 P. & D. 297: *Wordall* v. *Smith*, 1 Camp. 332.

(*m*) *Holmes* v. *Clifton*, 10 A. & E. 673, overruling *Benyon* v. *Garratt*, 1 Car. & P. 154.

(*n*) *Tyler* v. *Duke of Leeds*, 2 Stark. Rep. 218: *Imray* v. *Magnay*, 11 M. & W. 277, per Cur. See *Christopherson* v. *Burton*, 3 Ex. 162; 18 L. J., Ex. 60.

(*o*) *Lane* v. *Chapman*, 11 A. & E. 966.

(*p*) *Penn* v. *Scholey*, 5 Esp. 243: *Harrod* v. *Benson*, 8 B. & C. 219, per Lord *Tenterden*. See *Imray* v. *Magnay*, supra.

(*q*) *Dennis* v. *Whetham*, L. R., 9 Q. B. 345; 43 L. J., Q. B. 129.

(*r*) *Towne* v. *Crowder*, 2 Car. & P. 355. See 2 Vern. 238.

(*s*) *Underwood* v. *Mordant*, 2 Vern. 239.

(*t*) *Clegg* v. *Woolan*, MS. 1832.

(*u*) *Pitcher* v. *King*, 9 A. & E. 288; 1 P. & D. 297: *Brown* v. *Copley*, 8 Sc. N. R. 350.

(*x*) *Clegg* v. *Woolan*, MS. 1832.

(*y*) *Cooper* v. *Thomas*, Tr. Vac. 1849, in which *Talfourd*, J., made an order at Chambers, after fully considering the point.

(*z*) 8 H. 6, c. 12, s. 6: *Thorpe* v. *Hook*, 1 Dowl. 494. See *R.* v. *Sheriff of Monmouth*, 1 Marsh. 344.

(*a*) *Thorpe* v. *Hook*, 1 Dowl. 501.

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duced the sheriff to make a false return to the *fi. fa.*, which showed a larger sum to have been received by the sheriff than was the fact, the Court ordered the return to be amended according to the truth, and the solicitors to pay the costs, though the sheriff was no party to the rule (*b*). But where a sheriff returned that the goods he had seized were in his hands for want of buyers, the Court refused an application made after an action had been brought against him for a false return, and he had obtained an order for time to plead on the usual terms, taking short notice of trial for the sittings in the next term, to amend the return by substituting that of *nulla bona* (*c*). And where the sheriff, under a *fi. fa.* and a writ of extent, seized not only the defendant's goods, but also goods belonging to a stranger which were on the premises, and the sheriff returned to both writs that he had seized goods to the amount, but that they remained in his hands for want of buyers; and the sheriff being obliged afterwards, by order of the Court of Exchequer, to levy the amount of the extent upon the defendant's goods, and not upon the goods of the stranger, and having no longer goods of the defendant to satisfy the *fi. fa.*, applied to the Court of Queen's Bench for leave to amend his return to the latter writ: the Court refused to allow the amendment, saying that as he had seized sufficient property of the defendant under this writ, he must be accountable to the plaintiff for it; but that had he, as soon as he received the order of the Court of Exchequer, stated the facts of the case to that Court, they would have relieved him from his embarrassment (*d*). And the Court in one case refused to allow an amendment in the return to a writ of *fi. fa.* after they had quashed the return to the writ of *venditioni exponas* on motion (*e*). The Court have refused to allow the plaintiff the costs of opposing a rule moved for by the sheriff to amend a clerical error in a return to a writ of *ca. sa.* (*f*).

24. Attachment for not returning.

24. *Attachment for not returning.*]—If the sheriff, having been duly served with the notice for the return of the writ as above mentioned, does not make his return within the time limited by such notice, or, it seems, if he makes a return insufficient upon the face of it (*g*), he will be in contempt and subject to an attachment (*h*). It has been held that a return of the writ on a day in vacation after the time fixed by the rule for its return was no answer to an application for such an attachment (*i*), though it would have been if the rule was for a return on a day in term (*k*). Nor is it an answer to it, that the plaintiff, after the sheriff's default, and before moving for the attachment, desired him to proceed with the execution (*i*).

(*b*) *Green* v. *Glasbrook*, 2 Bing. N. C. 143; 2 Sc. 261. See *Rowe* v. *Tapp*, 9 Price, 317.

(*c*) *Wylie* v. *Pearson*, 1 Dowl., N. S. 807.

(*d*) MS. E. T. 1817. See *Saunders* v. *Bridges*, 3 B. & Ald. 95. But see *Tomlinson* v. *Shynn*, 4 Moore, 505; 2 B. & B. 77.

(*e*) *Rowe* v. *Tapp*, 9 Price, 317: *Dod* v. *Coleman*, 9 Dowl. 916.

(*f*) *Cassidy* v. *Stewart*, 4 Sc. N. R. 187.

(*g*) Roll. Abr. "Retorn" (M), 1; Wats. Sheriff, 76; *Wilton* v. *Chambers*, 1 H. & W. 582.

(*h*) See *Alchin* v. *Wells*, 5 T. R. 470. See *Evans* v. *James*, 6 Sc. 354, where a writ and a rule to return it were delivered to the sheriff at the same time.

(*i*) *Howitt* v. *Rickaby*, 9 M. & W. 52; 1 Dowl., N. S. 389; R. 133, H. T. 1853.

(*k*) *Williamson* v. *Harrison*, 9 M. & W. 225; 1 Dowl., N. S. 664.

If the return be good upon the face of it, but false, the only remedy is by action (*l*). Where the return is informal, the Court will, in general, allow it to be amended, and set aside the attachment, upon the sheriff paying the costs (*m*). Where the writ was lost, of which fact the sheriff gave notice to the plaintiff, and that defendant was in custody, the Court set aside an attachment for not returning it (*n*).

Motion for, when made.

Before the Judicature Acts, if the sheriff so in contempt had been ruled by the Court to return the writ, and the rule expired *in term*, you might move the Court for the attachment on the day following (*o*); or, if it expired on the last day of term, then you might move for it on that day, at the rising of the Court (*p*); or, if it expired in vacation, you might move for it on the first or any subsequent day of the next term.

How obtained.

The application to attach the sheriff is made on notice of motion entituled in the action (*q*). or to a Judge at Chambers by a summons. The application must be supported by an affidavit showing a due service of the notice to return the writ (*r*), and that a search has been made for the writ, and that it has not been returned. If the motion be for an attachment for an insufficient return, the affidavit, instead of stating that the writ was not returned should verify a copy of the return (*s*). The notice of motion must state in general terms the grounds of the application, and a copy of the affidavit must be served with it (*t*).

What it is, and to whom directed.

The attachment is a criminal process, directed to the coroner (unless he be the defendant in the cause, in which case it is directed to elisors) (*u*), when it issues against the present sheriff; or to the present sheriff, when it issues against the late sheriff (*x*), commanding him to attach the sheriff, so that he have him in Court (*y*), to answer "for certain trespasses and contempts by him lately done and committed in our Court before," &c.

How sued out and prosecuted (*z*).

The attachment, it seems, is sued out and prosecuted thus:— *Issue the writ of attachment as directed post, Vol. 2, Ch. LXXXIII. Leave it with the coroner to be executed, and leave with him your bill of costs. If, upon applying to the coroner, he do not pay you the money, give the coroner notice to return the writ. In London or Middlesex give four days' notice, in other cases eight. If afterwards*

(*l*) *Goubot* v. *De Crouy*, 2 Dowl. 86. See *Hall* v. *Jones*, 4 Dowl. 712, ante.

(*m*) *R.* v. *Sheriff of Kent*, 2 M. & W. 316; 5 Dowl. 451. And see further, post, p. 833; ante, p. 821.

(*n*) *R.* v. *Sheriff of Kent*, 1 Marsh. 289.

(*o*) See R. M. 32 G. 3, Q. B.

(*p*) Vol. 2, Ch. CXXII., *R.* v. *Sheriff of Surrey*, 11 East, 591; 1 Chit. Rep. 356 a: *R.* v. *Sheriff of Shropshire*, 9 Jur. 12, Q. B.

(*q*) R. of S. C., Ord. LII. rr. 2, 4: *Jupp* v. *Cooper*, 5 C. P. D. 26; 28 W. R. 324: cp. *Fowler* v. *Ashton*, 45 L. T. 46.

(*r*) See *Harmer* v. *Tilt*, 2 Marsh. 251. See form of affidavit, Chit. F., p. 414. As to the costs which the sheriff will be ordered to pay, see *In re Heiron's Estate, Hale* v. *Ley*, 12 Ch. D. 794; 48 L. J., Ch. 688. See *R.* v. *Smithies*, 3 T. R. 351: *Barnard* v. *Berger*, 1 N. R. 121.

(*s*) *Wilton* v. *Chambers*, 1 H. & W. 582.

(*t*) R. of S. C., Ord. LII. r. 4.

(*u*) *R.* v. *Sheriff of Glamorganshire*, 1 Dowl., N. S. 308; ante, p. 797.

(*x*) 1 Sellon, 201.

(*y*) *R.* v. *Wilkins*, 1 Str. 624.

(*z*) Before the Jud. Acts, in the Q. B., the attachment issued out of the Crown Office; but this is not so now. The proceedings for an attachment against the sheriff seldom proceed further than issuing the writ of attachment.

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on the fifth day after the service of the order in London or Middlesex, or the ninth day in any other county, you find, upon searching at the proper office, that the writ has not been returned, make an affidavit of the service of the notice, and that the writ has not been returned, and thereupon serve notice of motion on the coroner for an attachment against him, directed to elisors. Draw up the order if made. Issue the writ of attachment as directed post, Ch. LXXXIII.; then deliver it to the elisors to be executed. If, however, the coroner return that he has taken the sheriff, then the course is to move for a habeas corpus to bring in the body of the sheriff (*a*). *Sue out the writ and deliver it to the coroner, and, if he then fail to bring in the body or pay the money, proceed to attachment against him for his disobedience. See further as to the proceedings on attachment, post, Ch. LXXXIII.*

Setting aside attachment.

If any of the proceedings against the sheriff be irregular, the Court will set them, or any attachment founded on them, aside, with costs. So, although the attachment be regular, it seems that, if the plaintiff has not sustained any injury by the sheriff's neglect to return the writ, the attachment may be set aside on payment of costs and making the return (*b*). And where an attachment issued against the sheriff for not returning a writ of *venditioni exponas*, the Court set it aside, on payment of costs, and on payment to plaintiff of the balance in the sheriff's hands, after payment of previous executions, and the expenses, &c., such balance being all that the plaintiff was fairly entitled to (*c*). Where the return is informal, the Court will, in general, allow it to be amended, and set aside the attachment upon the sheriff paying the costs (*d*).

25. Poundage and expenses of execution.

25. *Poundage and Expenses of Execution.*]—At common law, the sheriff was bound to execute the Queen's writs, without any fee or reward, and he cannot now claim any such fee or reward, unless it be conferred upon him by statute (*e*).

Upon fi. fa. under 28 Eliz. (*f*).

1. Upon executing a *fieri facias*, the sheriff is by 28 *El.* c. 4 (*f*), entitled to 12*d.* for every 20*s.*, if the sum levied does not exceed 100*l.*, and 6*d.* for every 20*s.* over and above that sum (*g*); if he exacts more, he is by that Act liable to a penalty of 40*l.*, one moiety to the Queen and the other to the informer, and also to an action by the party grieved for treble damages (*h*). The 7 *W.* 4 *&*

(*a*) See *R.* v. *Whaley*, 1 Chit. Rep. 249. See the forms, Chit. Forms, p. 417.

(*b*) *R.* v. *Sheriff of Essex*, 8 Sc. 363; 8 Dowl. 5: *R.* v. *Sheriff of Devon*, 17 L. J., C. P. 116.

(*c*) *R.* v. *Sheriff of Herts*, 9 Dowl. 916.

(*d*) See ante, p. 821.

(*e*) See 2 Inst. 210: per Lord *Ellenborough* in *Graham* v. *Grill*, 2 M. & Sel. 294: *R.* v. *Palmer*, 2 East, 411: *Colls* v. *Coates*, 11 A. & E. 826, per *Coleridge*, J.; Stat. of Westminster 1, c. 16.

(*f*) This statute is styled 29 Eliz. in the revised edition of the statutes; but it should be cited as 28. *Rumsey* v. *Tufnell*, 2 Bing. 255. See Watson on Sheriff, 2nd ed. 101, n. (*g*).

(*g*) *Lyster* v. *Bromley*, Sir W. Jones, 307; Cro. Car. 286. See *Bryne* v. *Hutchinson*, 9 Ir. R., C. L. 75, Q. B., when on a *fieri facias* marked for 30*l.* 8*s.* 11*d.* the sheriff, by seizure and sale of a term of years, levied 530*l.*, and with the assent of the attorney of the execution debtor retained poundage fees on the whole sum levied, and it was held that he was entitled to poundage fees on the sum marked on the writ and no more.

(*h*) See *Anon.*, 1 Salk. 331: *Woodgate* v. *Knatchbull*, 2 T. R. 158: *R.* v. *Marsack*, 6 T. R. 771: *Savage* v. *Smith*, 2 W. Bl. 1101: *Tyte* v. *Glode*, 7 T. R. 267: *Deacon* v. *Morris*, 2

1 *V. c.* 55, though it enumerates and repeals other statutes, does not mention the statute of *Eliz.*, or the statute 3 *G.* 1, c. 15, or 43 *G.* 3, *c.* 46, *s.* 5, and consequently these statutes are not repealed by it. Accordingly it has been held, that the sheriff on executing a *fi. fa.*, is still entitled to poundage under the Act of *Eliz.*, as well as to his fees under 7 *W.* 4 *&* 1 *V. c.* 55 (*i*). By this latter Act (which see *ante*, p. 36), the amount of the sheriff's fees on the execution of civil process is regulated by what is allowed by the Masters under the sanction of the Judges, and a remedy is given for extortion by summary application to one of the superior Courts. *See the Table of Fees allowed in pursuance of this Act, in the Appendix, at the end of the Second Volume.*

Under 7 W. 4 & 1 V. c. 55.

Though the sheriff be put to extra trouble and expense, even by the conduct of the execution debtor in making the levy, he is not entitled to more fees than those mentioned in that table (*k*), unless, indeed, the sheriff has performed any duty not provided for by the table, in which case it would seem from it that he may, *upon a special application* (*l*), obtain such an allowance for it as one of the Masters may allow. It was held before 7 *W.* 4 *&* 1 *V. c.* 55, that the sheriff could not charge the expenses of selling the goods by auction, because he is bound to sell the goods himself; but, if the auction were at the request of the plaintiff or defendant, the party so requesting must have paid the expenses of it (*m*). Also, before that Act, the sheriff was not entitled to the expense incurred in taking and keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they were not sold, on account of his refusing to give an indemnity against the claims of third persons (*n*); also, he was not entitled to retain anything beyond the regular poundage, for expenses incurred by keeping possession of the goods, in consequence of an injunction (*o*). But the Judges of the Common Pleas seem to have been of opinion, that, where the sheriff did anything beyond his official duty, in allowing

Extra trouble and expense.

B. & Ald. 393: *Berton* v. *Lawrence*, 5 Ex. 816; 1 L. M. & P. 668; 20 L. J., Ex. 46; post, p. 828.

(*i*) *Davies* v. *Griffiths*, 4 M. & W. 377; 7 Dowl. 204: *Pilkington* v. *Cooke*, 16 M. & W. 615; 17 L. J., Ex. 141: *Wrightup* v. *Greenacre*, 10 Q. B. 1.

(*k*) *Slater* v. *Hames*, 7 M. & W. 413; 9 Dowl. 221; 10 L. J., Ex. 100: *Davies* v. *Edmonds*, 12 M. & W. 31; 1 D. & L. 395; 13 L. J., Ex. 1: *Phillips* v. *Lord Canterbury*, 1 D. & L. 283; 11 M. & W. 619; 12 L. J., Ex. 401, where it was held, that a sheriff, who has seized goods under a *fi. fa.*, and disposed of them by appraisement and bill of sale, is not entitled to deduct the expenses of the appraisement and sale. *Marshall* v. *Hicks*, 10 Q. B. 15; 16 L. J., Q. B. 134. See *Gaskell* v. *Sefton*, 14 M. & W. 803, *noticed in the Appendix, as to keep of cattle.* As to persons impounding cattle being bound to supply same with food, &c., see 12 & 13 V. c. 92; as to recovering for such food and selling the cattle for the same, &c., see 17 & 18 V. c. 60, s. 1. As to the costs of advertisements where goods advertised under the Bankruptcy Act, 1861, see *Braithwaite* v. *Marriott*, 32 L. J., Ex. 24.

(*l*) See the Table of Fees at the end of Vol. 2.

(*m*) *Woodgate* v. *Knatchbull*, 2 T. R. 157. By the Bank. Act, 1883, s. 145 (post, p. 839), the sheriff is bound in all cases over 20*l.* to sell by public auction, unless otherwise ordered. It will be seen by referring to the Table of Fees that a percentage is now allowed upon every sale by auction: *Bushell* v. *Boord*, 4 D. & L. 359.

(*n*) *Bilke* v. *Havelock*, 3 Camp. 374.

(*o*) *Buckle* v. *Bewes*, 3 B. & C. 688; 5 D. & R. 495.

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time for dividing the property seized into lots, for the benefit of selling them to more advantage, *at the instance of the defendant*, the officer was entitled to some remuneration beyond poundage (*p*).

Fee for search or discharge.

Upon a levy of debt and costs under a *fi. fa.*, the officer is not entitled to charge a fee for "search" or "discharge" (*q*).

Meaning of term "incidental expenses" in Judge's order.

Where a Judge's order gave the plaintiff leave to sign judgment, issue execution, and levy the debt and costs, together with the costs of execution, sheriff's poundage, officer's fees, and *all other incidental expenses*; it was held, that the sheriff under an execution issued under this order could not levy, nor was the defendant liable to pay, as incidental expenses, the costs of a rule to return the writ (*r*).

When sheriff entitled to poundage.

The sheriff is not entitled to poundage, &c. where there has been no seizure (*s*), or where the money is paid (*t*), or tendered (*u*) to him without any seizure (*s*). But he is entitled to poundage, &c. where the amount is obtained directly or indirectly through the seizure, although there is no sale (*x*). Thus he is so entitled when he is paid out by the execution debtor (*y*), or where the parties, after seizure of the goods, enter into a compromise before the sheriff sells them (*z*). Where a sheriff's officer went with a warrant for executing a writ of *fi. fa.* to the execution debtor's shop, told the debtor the particulars of the warrant, and that unless payment were made a man must remain in possession, and the debtor thereupon paid the amount demanded, which included poundage and levy fees; it was held that this was sufficient to render poundage and levy fees payable (*a*). Where after seizure of goods under a writ of execution, but before sale, the judgment and subsequent proceedings are set aside for irregularity, and the goods are therefore not sold, the sheriff is not entitled to poundage (*b*). It seems that he is entitled to poundage on the whole proceeds of the sale, although a portion of it is paid over to the landlord for rent (*c*).

Levying poundage, &c.

By *R. of S. C., Ord. XLII. r.* 15 (*d*), "In every case of execution

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(*p*) *Stevens* v. *Rothwell*, 6 Moore, 338; 3 B. & B. 143.

(*q*) *Masters* v. *Lowther*, 11 C. B. 948; 21 L. J., C. P. 130.

(*r*) *Hutchinson* v. *Humbert*, 8 M. & W. 638; 1 Dowl., N. S. 78.

(*s*) *Nash* v. *Dickenson*, L. R., 2 C. P. 252: *Mortimore* v. *Cragg*, 3 C. P. D. 216, 219, 220: *Bissicks* v. *Bath Colliery Co.*, 3 Ex. D. 174, 175: *Alchin* v. *Wells*, 5 T. R. 470: *Chapman* v. *Bowlby*, 8 M. & W. 249: *Holmes* v. *Sparks*, 12 C. B. 242; 21 L. J., C. P. 194.

(*t*) *Graham* v. *Grill*, 2 M. & Sel. 296.

(*u*) *Colls* v. *Coates*, 11 A. & E. 826; 3 P. & D. 511: *Brun* v. *Hutchinson*, 2 D. & L. 43, where there was a colourable levy only, and it was held that the sheriff was not entitled to poundage.

(*x*) *Mortimer* v. *Cragg*, 3 C. P. D. 216; 47 L. J., C. P. 348 (C. A.), overruling *Roe* v. *Hammond*, 2 C. P. D. 300; 46 L. J., C. P. 791. See *Bissicks* v. *Bath Colliery Co.*, 3 Ex. D. 174; 47 L. J., Ex. 408 (C. A.): *In re Craycroft, Ex p. Browning*, 8 Ch. D. 596; 47 L. J., Ch. 96, where the sale was restrained by injunction.

(*y*) *Mortimer* v. *Cragg*, supra.

(*z*) *Rawstorne* v. *Wilkinson*, 4 M. & Sel. 256: *Bullen* v. *Ansley*, 6 Esp. 111. See *Sneary* v. *Abdy*, 1 Ex. D. 299; 45 L. J., Q. B. 803.

(*a*) *Bissicks* v. *Bath Colliery Co., Limited*, supra.

(*b*) *Miles* v. *Harris*, 12 C. B., N. S. 550; 31 L. J., C. P. 361.

(*c*) *Davies* v. *Edmonds*, 12 M. & W. 31. It was taken for granted, however, in this case, that it was the sheriff's duty to sell and pay the rent to the landlord, which is not so. *Cocker* v. *Musgrove*, 9 Q. B. 223. See *Gore* v. *Gofton*, 1 Str. 643; post, p. 841.

(*d*) See C. L. P. Act, 1852, s. 123, the former enactment, which was similar to this.

the party entitled to execution may levy the poundage, fees, and expenses of execution (*e*), over and above the sum recovered."

The poundage, fees and expenses of the execution may be levied, whether the execution be on behalf of the plaintiff or the defendant. Within these terms, "expenses of the execution," are included expenses of *levying*, keeping possession, selling, &c., and they are not confined to the costs of the writ only (*f*). But the costs of an interpleader order, obtained by the sheriff or other similar officer, are not within them (*g*). A party, in levying for these expenses must always take care to levy only such a reasonable sum as would be allowed upon taxation, otherwise the Court or a Judge will order the excess to be restored, with costs (*h*). Where the plaintiff, having signed judgment for 23*l.* debt and costs, took out a *fi. fa.* for 24*l.*, the 1*l.* being claimed for costs of execution under 43 *G.* 3, *c.* 46, *s.* 5, and an attempt was made to levy, which failed, defendant having no goods; defendant then tendered 23*l.*, which plaintiff refused, and issued an *elegit* for 24*l.*: it was held, that the tender was insufficient, the plaintiff being entitled, under the enactment, to the costs claimed above the 23*l.*; and the Court refused to set aside the *elegit* (*i*).

How recovered.

The sheriff may maintain an action for his poundage, &c. against the party at whose suit the writ is to be executed (*k*); or he may retain it out of the money levied under the execution, or he may levy for it, though the writ is not indorsed to levy them (*l*). The solicitor is not liable to the sheriff for his fees when he merely delivers the writ to him to be executed without naming any special bailiff (*m*). The sheriff cannot refuse to execute a writ until his

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(*e*) These expenses may be levied by the plaintiff, though he is not, by reason of the County Courts Act, entitled to recover the costs of the action. *Armitage* v. *Jessop*, L. R., 2 C. P. 12; 36 L. J., C. P. 63. The plaintiff having recovered judgment, issued a writ of *fi. fa.* to levy on the goods of the defendant; the sheriff returned *nulla bona;* the plaintiff thereupon issued a writ of *ca. sa.*, endorsed to satisfy the same debt, together with the costs of the abortive writ of *fi. fa.;* the defendant was taken in execution upon the writ of *ca. sa.:* it was held, that the plaintiff was not entitled to recover the costs of the abortive writ of *fi. fa.* under sect. 123 of the C. L. P. Act, 1852. *Marquis of Salisbury* v. *Ray*, 8 C. B., N. S. 193; 29 L. J., C. P. 225. See the former enactment, 43 G. 3, c. 46, s. 5.

(*f*) Under sect. 46 of the Bank. Act, 1883, it has been held that the words "costs of execution" do not entitle the sheriff to poundage. *In re Ludmore*, 13 Q. B. D. 415; 53 L. J., Q. B. 418.

(*g*) *Hammond* v. *Nairn*, 9 M. & W. 221; 1 Dowl., N. S. 351, nom. *Hammond* v. *Navin*. And see *Hutchinson* v. *Humbert*, ante, p. 826: and *Smith* v. *Darlow*, infra, n. (*l*).

(*h*) *Benwell* v. *Oakley*, 2 Taunt. 174.

(*i*) *Bayley* v. *Potts*, 8 A. & E. 272. The 43 G. 3, c. 46, s. 5, was the Act in force upon this subject at the time of the passing of the C. L. P. Act, 1852. This decision seems to apply to the present rule.

(*k*) *Tyson* v. *Paske*, 2 Ld. Raym. 1212; 1 Salk. 333. See *Rawstorne* v. *Wilkinson*, 4 M. & Sel. 256: *Foster* v. *Blakelock*, 5 B. & C. 328; 8 D. & R. 48: *Evans* v. *Manero*, 7 M. & W. 468; 9 Dowl. 256. See *Bunbury* v. *Matthews*, 1 Car. & K. 380: *Marshall* v. *Hicks*, 10 Q. B. 15, where it was held that a payment made by the execution creditor was not the subject of a set-off.

(*l*) *Curtis* v. *Mayne*, 2 Dowl., N. S. 37. See *Smith* v. *Darlow* (C. A.), 26 Ch. D. 605; 53 L. J., Ch. 626; 32 W. R. 665.

(*m*) *Royle* v. *Busby* (C. A.), 6 Q. B. D. 171; 50 L. J., Q. B. 196, dissenting from *Brewer* v. *Jones*, 10 Ex. 655; 24 L. J., Ex. 143, and following *Maybery* v. *Mansfield*, 9

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fees are paid (*n*); and a bond or promise before the writ is executed to pay them is, it seems, void (*o*). Nor is he justified in taking goods to secure his poundage, after he has consented to their being delivered to a third person under a claim of property (*p*). It is open to doubt whether a sheriff can proceed to a sale of the defendant's goods in order to pay himself thereout the amount of his poundage, after compromise between the parties, and a notice from the plaintiff to withdraw; or whether he must not trust to his remedy by action against the plaintiff; it would seem, according to some cases, that he has a right to sell (*q*); and, according to others, that he has not (*r*). The costs of the writ, &c. do not constitute a debt due from the execution debtor to the execution creditor (*s*).

Effect of bankruptcy.

As to the effect of bankruptcy on the sheriff's right to fees, &c., *see post, Vol. 2, Ch. CII., "Proceedings by and against Bankrupts."*

Remedy for extortion.

Besides the remedy for extortion given by 28 *El. c.* 4, the party upon whom it is committed may maintain an action for money had and received against the sheriff; and in such an action it is not necessary to prove a tender of the sum actually due (*t*). The party guilty of the extortion may also be indicted at common law (*u*). But the sheriff, though he may be sued, cannot be indicted for the extortion of his officer (*x*). The treble damages mentioned in the statute of *Eliz.* are calculated at three times the amount of the damages found by the jury (*y*); the damages themselves being in general the sum overcharged (*z*). By 7 *W.* 4 & 1 *V. c.* 55, *ss.* 3, 4, *ante*, p. 36, there is a remedy for extortion by summary application to the Court against the offender. It seems that since this enactment an action for extortion can be brought against the sheriff for taking a greater fee than allowed by that Act (*a*).

Q. B. 754: cp. *Walbank* v. *Quarterman*, 3 C. B. 94. See *Newman* v. *Merriman*, 26 L. T. 397, where it was held that the sheriff's officer, who had been employed by the solicitor to execute the writ, could not recover his costs where the execution had proved abortive, and resulted in no benefit to the execution creditor. See as to this, *Royle* v. *Busby*, supra.

(*n*) *Hescott's case*, 1 Salk. 330; Noy, 75.

(*o*) *Bridge* v. *Cage*, Cro. Jac. 103. And see *Bilke* v. *Havelock*, 3 Camp. 374.

(*p*) *Goode* v. *Langley*, 7 D. & C. 26.

(*q*) See per *Wightman*, J., in *Curtis* v. *Mayne*, 2 Dowl., N. S. 37. But see as to the effect of a countermand, *Hunt* v. *Hooper*, 12 M. & W. 664; 13 L. J., Ex. 183; ante, p. 811.

(*r*) *Sneary* v. *Abdy*, 1 Ex. D. 299; 45 L. J., Q. B. 803, where there was a composition in bankruptcy accepted by the execution creditor, and the sheriff had notice thereof before sale.

(*s*) *Ex p. Toleman, In re Milnes*, W. N. 1884, 163.

(*t*) *Searfe* v. *Halifax*, 7 M. & W. 288. See *Reynolds* v. *Barford*, 8 Sc. N. R. 233; 13 L. J., C. P. 177; from which case it seems the Court will not quash a return upon the ground that by it the sheriff claims more possession money than he is entitled to.

(*u*) *Smith* v. *Mall*, 2 Roll. Rep. 263; Palm. 318.

(*x*) *Woodgate* v. *Knatchbull*, 2 T. R. 148, per *Gould*, J.: *Sanderson* v. *Baker*, 3 Wils. 316: *Woods* v. *Finnis*, 7 Ex. 362; 21 L. J., Ex. 138.

(*y*) *Woodgate* v. *Knatchbull*, 2 T. R. 149: *Buckle* v. *Bewes*, 6 D. & R. 1; 4 B. & C. 154.

(*z*) *Woodgate* v. *Knatchbull*, 2 T. R. 148. And see *Buckle* v. *Bewes*, 3 B. & C. 688; 5 D. & R. 495.

(*a*) *Usher* v. *Walters*, 4 Q. B. 553: *Curlewis* v. *Bird*, 1 Dowl., N. S. 752, per *Coleridge*, J.: *Pilkington* v. *Cooke*, 16 M. & W. 615; 17 L. J., Ex. 141: *Wrightup* v. *Greenacre*, 10 Q. B. 1; 16 L. J., Q. B. 246: *Berton* v. *Lawrence*, 5 Ex. 816; 20 L. J., Ex. 46; 1 L., M. & P. 668; ante, p. 825.

Poundage and expenses upon a ca. sa.

2. Upon executing a *ca. sa.* the sheriff was (before 5 & 6 *V. c.* 98, *infra*), by 28 *El. c.* 4, entitled to 12*d.* in every 20*s.*, if the sum did not exceed 100*l.*; and 6*d.* for every 20*s.* over and above that sum, in the same manner as upon a *fi. fa.*; which, by 3 *G.* 1, *c.* 15, *s.* 17, was to be calculated upon the real debt *bonâ fide* due, and claimed by the plaintiff, and which sum he was thereby required to mark and specify on the back of the writ before the same was delivered to the sheriff to be executed (*b*). If the writ was indorsed by mistake for a larger sum than the amount really due, and after the debtor had been taken in execution the mistake was corrected by a Judge's order, the sheriff's claim for this poundage must have been regulated accordingly; and therefore, in such a case, he was only entitled to poundage upon the sum really due (*c*). It was also held, that the sheriff's right to poundage under this Act was not affected by 7 *W.* 4 & 1 *V. c.* 55 (*d*); and that the sheriff was entitled to this poundage, although defendant went to prison without paying the debt (*e*); or although the defendant was already in custody of the sheriff when the *ca. sa.* was delivered to him (*f*). And where a *ca. sa.* was delivered to the sheriff indorsed to return *non est inventus*, and the party directed thereby to be taken surrendered himself, and was thereupon arrested by the sheriff, it was held, that the latter was entitled to poundage (*g*). It was considered that the plaintiff could not levy it under a *ca. sa.* (*h*). But now, by 5 & 6 *V. c.* 98, *s.* 31, after 1st March, 1843, no poundage shall be payable to sheriffs, bailiffs and others, for taking the body of any person in execution; but there shall be payable to the sheriff or other person having the return of writs, upon every such execution against the body, such fees only as shall be allowed to be taken by sheriffs or other officers concerned in the execution of process under the sanction and authority of the Judges of the Courts of Common Law at Westminster, pursuant to 7 *W.* 4 & 1 *V. c.* 55. *See ante*, p. 36; *and see Appendix* (*i*).

By 5 & 6 Vict. c. 98.

The party entitled to execution may levy the fees and expenses of the execution over and above the sum recovered (*k*).

May be levied.

The sheriff and officer are entitled to the same fees on an order of committal, or to arrest under the Debtors Act, 1869 (32 & 33 *V. c.* 62), as on a *ca. sa.*

Upon an order of committal.

3. Upon executing an *elegit* or *habere facias possessionem*, the sheriff is, by 3 *G.* 1, *c.* 15, *s.* 16 (*l*), entitled to 12*d.* in every 20*s.* of the

Poundage and expenses upon an elegit or ha. fa. po.

(*b*) See *Evans* v. *Manero*, infra, per *Parke*, B.

(*c*) *Evans* v. *Manero*, 7 M. & W. 463; 9 Dowl. 256.

(*d*) *Davies* v. *Griffiths*, 4 M. & W. 377; 7 Dowl. 204.

(*e*) *Lake* v. *Turner*, 4 Burr. 1981.

(*f*) *Taylor* v. *Ward*, Tidd, 9th ed. 1040.

(*g*) *Magnay* v. *Monger*, 4 Q. B. 817.

(*h*) See *Hayley* v. *Racket*, 5 M. & W. 620: *Pitcher* v. *Roberts*, 2 Dowl., N. S. 394.

(*i*) It seems that 5 & 6 V. c. 98, did not apply where a party had been taken on a *ca. sa.* before 1st March, 1843. *Bunbury* v. *Matthews*, 1 C. & K. 380. See *Jones* v. *Robinson*, 2 Dowl., N. S. 1044, where the sheriff was put to expenses by reason of defendant being too ill to be removed.

(*k*) Ord. XLII. r. 15, ante, p. 826.

(*l*) That statute entitles the sheriff to poundage, although no mention is made of elegit in the enacting part of it. *Nash* v. *Allen*, 4 Q. B. 784; 12 L. J., Q. B. 298: *Carter* v. *Hughes*, 2 H. & N. 714; 27 L. J., Ex. 225.

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yearly value of the lands (*n*), &c., whereof possession of seisin shall be given, if such yearly value exceed not the sum of 100*l.*; and 6*d.* in every 20*s.* of the yearly value above that sum (*o*). The sheriff is not entitled to poundage on an *elegit* unless the land is actually extended under the writ (*p*).

Upon a levari facias.

4. As to a sheriff before 7 *W.* 4 & 1 *V. c.* 55, not being entitled to poundage upon executing a writ of *levari facias* for a Crown debt, *see Stevens* v. *Rothwell*, 6 Moore, 338; 3 B. & B. 143.

26. How far a discharge of judgment and remedy for amount levied.

26. *How far a Discharge of Judgment and Remedy for Amount levied.*]—This will be found noticed, while treating of the particular writs of execution, *post*, *Ch. LXXV. et seq.* As to the entry of satisfaction, *see Ch. LXXII.*, *ante*.

27. Irregular execution.

Setting it aside, &c.

27. *Irregular Execution.*]—If the writ of execution be irregular, or ought not to have issued (*q*), the Master at Chambers will, in general, set it aside, and, if goods or money have been levied under it, order them to be restored, or, if the party be in custody under it, order him to be discharged. So, if the execution has been irregularly executed, he will, in general, order such restoration or discharge. But the execution will not, as we have seen, *ante*, p. 803, in general, be set aside, where too large a sum has been levied; all the Master will do in such a case is to compel the execution creditor to refund the overplus.

Time for applying to set aside.

The application for the order should be made by summons as early as possible (*r*).

Who may make application.

Third parties cannot in general make the application (*s*). A defendant is not disqualified by want of interest, on account of a fiat in bankruptcy having issued against him and being still in operation, from moving to set aside an execution levied on his goods against good faith, though the debt, warrant, and judgment are unimpeached (*t*).

(*n*) Not on the amount to be levied. *Nash* v. *Allen*, 4 Q. B. 784; 12 L. J., Q. B. 298.

(*o*) See *Price* v. *Hollis*, 1 M. & Sel. 105.

(*p*) *Carter* v. *Hughes*, 2 H. & N. 714, 718; 27 L. J., Ex. 225, 229. See *Mortimore* v. *Cragg*, 3 C. P. D. 216, per *Bramwell*, L. J., at p. 218.

(*q*) See *Turner* v. *Pulman*, 2 Ex. 513: *Backhouse* v. *Mellor*, 28 L. J., Ex. 141: and see *Davis* v. *Shapley*, 1 B. & Ad. 54, where a *fi. fa.* issued after the defendant had obtained his certificate from the Court of Bankruptcy.

(*r*) Within what time an irregularity must in general be taken advantage of, see ante, Ch. XLII. See *Austin* v. *Davey*, 8 Jur. 1138, M. T. 1844, B. C.: *Brooks* v. *Hodson*, 2 D. & L. 256; 8 Sc. N. R. 224; 13 L. J., C. P. 202: *Warne* v. *Haddon*, 9 Dowl. 960: *Jones* v. *Davies*, 1 B. C. R. 290, where defendant alleged he had not been served with process and knew nothing of the action: *Alcock* v. *Sutcliffe*, 4 D. & L. 619, per *Erle*, J., where the application was made by assignees. And see *Butterworth* v. *Williams*, 4 D. & L. 82: *Constable* v. *Fothergill*, 2 Dowl. 591: *Davies* v. *Watkins*, 2 Dowl., N. S. 930: *Pocock* v. *Cockerton*, 7 Dowl. 21: *Greenshield* v. *Pritchard*, 8 M. & W. 148. See *Goodtitle* d. *Murrell* v. *Baditile*, 9 Dowl. 1009.

(*s*) This is so stated in all the earlier editions of this work, though no authority is cited. *Bowser* v. *Lloyd*, 9 Dowl. 1029, would appear to support this view. It has been held at Chambers that a third party claiming to be the owner of the goods seized could make the application. *Barton* v. *Dickens & Co.*, Jud. Ch., Nov. 30, 1880, cor. *Bowen*, J., *ex rel. ed.*

(*t*) *Pinches* v. *Harvey*, 1 Q. B. 868; 1 G. & D. 236.

Successive applications.

It would seem that a party in execution under a *ca. sa.*, may make successive applications to set it aside on different grounds of objections, all of which were discoverable at the time of the first application; but this is doubtful (*u*). Where a summons to set aside an execution on the ground that defendant was not indebted to plaintiff, had been heard and dismissed by a Judge at Chambers; it was held, that it was competent for the party to make a subsequent similar application to the Court on additional affidavits (*x*).

Restraining action, costs, &c.

On setting aside the execution, the Court, unless the applicant was entitled to it as a matter of right (*y*), will in general restrain him from bringing any action, unless a strong case of damage be shown (*z*); and even where a party is entitled to set aside the execution, &c. *ex debito justitiæ*, the Court will not in general give him his costs of the order for that purpose, unless he will consent not to bring any action (*a*). If the terms of bringing no action be not imposed at the time of disposing of the summons, he cannot afterwards be restrained from bringing an action (*b*). If costs be granted, a stay of proceedings may be ordered until they are paid (*c*). If the application be by one of several defendants, the costs must be paid to him, and not to any other party (*d*). If costs are refused, the costs cannot be recovered as damages in an action of trespass for taking the goods under colour of the execution (*e*). If the application be asked with costs, and dismissed, the practice in general is to dismiss it with costs.

When party may justify under irregular writ.

Although the *writ* be irregular (*f*), yet unless it be set aside, the party at whose suit it is issued and his solicitor may justify under it (*g*). But after it has been set aside for *irregularity* they cannot do so (*g*); and the latter is liable in trespass, as well as the former

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(*u*) *Bicknell* v. *Wetherell*, 1 Q. B. 914; 1 G. & D. 460. See *Davies* v. *Watkins*, 2 Dowl., N. S. 930: *Claridge* v. *Mackenzie*, 5 M. & G. 251: *Thorpe* v. *Beer*, 2 B. & Ald. 373. And see Vol. 2, Ch. CXXIII.

(*x*) *Pike* v. *Davies*, 6 M. & W. 546: see Vol. 2, Ch. CXXIII.

(*y*) *Stockbridge* v. *Sussans*, 6 Jur. 437, Q. B., T. T. 1842: *Rhodes* v. *Hull*, 26 L. J., Ex. 265: *Cash* v. *Wells*, 1 B. & Ad. 375, where the proceedings were set aside, being against good faith.

(*z*) *Lorimer* v. *Lule*, 1 Chit. Rep. 134, 238: *Wentworth* v. *Bullen*, 9 B. & C. 840. A defendant having been arrested on a *ca. sa.* after plaintiff had proved his debt under a fiat against him, applied by summons for his discharge, and to set aside the *ca. sa.*; the judge made the order, imposing as a term, that the defendant should bring no action; having availed himself of the order so as to obtain his discharge, it was held that the defendant could not move to set aside so much of it as restrained him from bringing an action. *Hayward* v. *Duff*, 12 C. B., N. S. 346: *Wilcox* v. *Odden*, 15 C. B., N. S. 837.

(*a*) *Cash* v. *Wells*, 1 B. & Ad. 375. The Court will not interfere with the discretion of a Judge in this respect. *Bartlett* v. *Stinton*, L. R., 1 C. P. 483; 35 L. J., C. P. 238.

(*b*) *Abbott* v. *Greenwood*, 7 Dowl. 534.

(*c*) *Wenham* v. *Dormes*, 3 A. & E. 450.

(*d*) *Showler* v. *Stoakes*, 2 D. & L. 2.

(*e*) *Loton* v. *Devereux*, 3 B. & Ad. 343.

(*f*) Where there is no writ, or only a void writ, trespass lies. See *Cameron* v. *Lightfoot*, 2 W. Bl. 1192: *Parsons* v. *Loyd*, 3 Wils. 341, at p. 345. A plaintiff who issued a *ca. sa.* on a judgment for less than 20*l.* contrary to 7 & 8 V. c. 96, was held liable to an action of trespass, though the writ had not been set aside. *Brooks* v. *Hodgkinson*, 4 H. & N. 712; 29 L. J., Ex. 93.

(*g*) *Philips* v. *Biron*, 1 Stra. 509: *Codrington* v. *Lloyd*, 8 A. & E. 449: *Blanchenay* v. *Burt*, 4 Q. B. 707: *Jones* v. *Williams*, 8 M. & W. 349; 9 Dowl. 702: *Prentice* v. *Harrison*,

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for an arrest or seizure made under it (*h*). When the writ is regular, but is founded on a judgment or order which is afterwards set aside, but not as irregular, it is a protection to all parties (*i*); and so it is if the judgment be reversed or set aside as erroneous (*k*), for the wrong is then the act of the Court: but if the judgment be set aside for irregularity, or as signed in bad faith, it is still a protection to the sheriff, or his officer, or a gaoler (*l*), who need not rely on the judgment to support the justification; but it is no protection to the party (*m*), or his solicitor (*n*), who cannot rely on the writ without showing a judgment to support it. The party against whom the execution issued is not estopped, as against the party who sued it out, from showing that the writ has been so set aside. by afterwards giving the sheriff notice to return it, as the writ may be good as to the sheriff and all persons acting under him, and bad as to the party who sued it out; and this though the writ be returned and filed of record (*o*). Whether set aside or not, the sheriff and his officer, and all persons acting under the sheriff, are, in general, protected by it, however irregular (*p*), provided it be not *void* on the face of it, or did not issue from a Court without jurisdiction, and provided he or they do not join in the same plea with the party (*q*). A *bonâ fide* purchaser also will gain a title under the sheriff unless the writ be *void*, or the goods were the goods of a stranger and not of the party against whom the execution issued (*r*);

Irregular execution, how far operative.

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4 Q. B. 852: *Rankin* v. *De Medina*, 1 C. B. 183; 2 D. & L. 813: *Collett* v. *Foster*, 2 H. & N. 356; 26 L. J., Ex. 412: *Williams* v. *Smith*, 14 C. B., N. S. 596: *Smith* v. *Sydney*, L. R., 5 Q. B. 203; 39 L. J., Q. B. 144. If the writ is only *erroneous*, a party may justify under it after it has been set aside for an act done under it before it is set aside. *S. C.*: *Wilson* v. *Tummon*, 6 Sc. N. R. 894; 6 M. & G. 236; 1 D. & L. 513: *Green* v. *Elgie*, 5 Q. B. 99; 14 L. J., Q. B. 162.

(*h*) *Codrington* v. *Lloyd*, 8 A. & E. 449: *Barker* v. *Braham*, 3 Wils. 368: *Bates* v. *Pilling*, 6 B. & C. 38; 9 D. & R. 44. See *Green* v. *Elgie*, 5 Q. B. 99. A solicitor is not liable in trespass, jointly with a bailiff, for executing a precept out of the jurisdiction of a local court. *Sowell* v. *Champion*, 2 N. & P. 627; 6 A. & E. 407. See further as to a solicitor's liability, ante, p. 118.

(*i*) *Smith* v. *Sydney*, L. R., 5 Q. B. 203; 39 L. J., Q. B. 144.

(*k*) *Williams* v. *Smith*, 14 C. B., N. S. 596, 623: *Bank of United States* v. *Bank of Washington*, 6 Peters, U. S. 8.

(*l*) *Brown* v. *Watson*, 23 L. T. 745: *Parsons* v. *Lloyd*, 3 Wils. at p. 345: *Nash* v. *Swinburn*, 4 Sc. N. R. 562; 2 M. & Gr. 853: *Greaves* v. *Keene*, 4 C. P. D. 73.

(*m*) *Parsons* v. *Lloyd*, 3 Wils. 341: *Williams* v. *Smith*, 14 C. B., N. S. 596, 619.

(*n*) *Barker* v. *Braham*, 3 Wils. 368: *Williams* v. *Smith*, 14 C. B., N. S. 596, 619.

(*o*) *Jones* v. *Williams*, 8 M. & W. 349; 9 Dowl. 702; 10 L. J., Ex. 253.

(*p*) *Woolley* v. *Clark*, 5 B. & Ald. 744, 746, per *Best*, J.: *Ives* v. *Lucas*, 1 Car. & P. 7: *Jones* v. *Williams*, 8 M. & W. 356; 9 Dowl. 710, per *Parke*, B.: *Butcher* v. *Steuart*, 11 M. & W. 857; 1 D. & L. 308; 1 Smith, L. C. 219 b; 12 L. J., Ex. 391: *Brown* v. *Watson*, 23 L. T. 745. As to when it is necessary for a sheriff in an action against him to prove the judgment, see *White* v. *Morris*, 11 C. B. 1015; 21 L. J., C. P. 185. As to the sheriff's warrant being evidence of the writ, see *S. C.*, and *Bessey* v. *Wyndham*, 6 Q. B. 166; 14 L. J., Q. B. 7: *Haylock* v. *Sparke*, 22 L. J., M. C. 67.

(*q*) *Philips* v. *Biron*, 1 Str. 509: *R.* v. *Harrison*, 15 East, 615: *Bates* v. *Pilling*, 6 B. & C. 38; 9 D. & R. 44: *Hooper* v. *Lane*, 10 Q. B. 546.

(*r*) 1 Ves. 195: *Doe* v. *Murless*, 6 M. & Sel. 110: *Doe* v. *Thorn*, 1 M. & Sel. 425: *Anon.*, Dyer, 363, pl. 24; 5 Rep. 90; post, p. 840.

in which latter case the owner may recover even against a *bonâ fide* purchaser for value (*s*).

The setting aside of the writ, even though it be a *ca. sa.* (*t*), does not prevent the plaintiff from issuing and executing another writ (*u*).

If writ set aside, another may be issued.

28. *Amendment of Writ.*]—The *R. of S. C., Ord. XXVIII. r.* 12 (*ante*, p. 442), gives very extensive powers to the Court or a Judge of amending proceedings, and applies to writs of execution.

28. Amendment of writ.

Under the above rule, amendments will be allowed in all cases where they would have been before the *Com. Law Proc. Act*, 1852, and in many other cases. Before the *Com. Law Proc. Act*, 1852, writs of execution might be amended for a misprision of the clerks, by 8 *H.* 6, *c.* 12; and the Court or a Judge might allow them to be amended in the *teste* (*x*), the return (*y*), the names of the parties (*z*), the sum recovered by the judgment (*a*), the form of action (*b*), and the like (*c*), even after they had been executed and returned (*d*), or after a day and a year had elapsed (*e*), and this even as against bail (*f*). An amendment was also frequently allowed, even after a rule nisi obtained to set the writ aside (*g*). The amendment might be made by the award of execution on the roll (*h*) (and for this purpose the entry of the award of it on the roll must have been made, and the roll produced in Court, or before the Judge, at the time the application was made), or by the record of the judgment (*i*). An amendment, however, would be refused where it would prejudice the rights of third persons; as where the party against whom the execution issued subsequently became bankrupt (*k*). Where, by allowing the amendment of a

(*s*) *Farrant* v. *Thompson*, 2 D. & R. 1: *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362.

(*t*) *Collins* v. *Beaumont*, 10 A. & E. 225.

(*u*) Com. Dig. "Execution" (H): *Fish's case*, Godb. 372; Latch, 193; Gilb. Execution, 54: *M'Cormack* v. *Melton*, 1 C., M. & R. 525; 3 Dowl. 215: *Mackie* v. *Warren*, 2 M. & P. 279; 5 Bing. 176.

(*x*) *Engleheart* v. *Dunbar*, 2 Dowl. 202: *Campbell* v. *Cumming*, 2 Burr. 1188. See *Bradley* v. *Baillie*, 1 Sc. 78; 3 Dowl. 111.

(*y*) *Thorpe* v. *Hook*, 1 Dowl. 501: *Hunt* v. *Kendrick*, 2 W. Bl. 836: *Atkinson* v. *Newton*, 2 B. & P. 336. As to amending the writ by enlarging the time for its return, see *Hildyard* v. *Baker*, 2 Dowl. 16; 1 C. & M. 611.

(*z*) *Thorpe* v. *Hook*, 1 Dowl. 501: *Mackie* v. *Smith*, 4 Taunt. 322: *Newnham* v. *Law*, 5 T. R. 577.

(*a*) *Laroche* v. *Wasbrough*, 2 T. R. 737: *Arnell* v. *Weatherby*, 3 Dowl. 464: 1 C., M. & R. 831: *M'Cormack* v. *Melton*, 1 A. & E. 331; 3 N. & M. 801. And see *Mouys* v. *Leake*, 8 T. R. 416, n.: *Webber* v. *Hutchins*, 8 M. & W. 319: *Bicknell* v. *Wetherell*, infra.

(*b*) *Bicknell* v. *Wetherell*, 1 Q. B. 914; 1 G. & D. 460.

(*c*) See *Shaw* v. *Maxwell*, 6 T. R. 450.

(*d*) *Thorpe* v. *Hook*, *M'Cormack* v. *Melton*, *Arnell* v. *Weatherby*, *Bicknell* v. *Wetherell*, supra.

(*e*) *Bicknell* v. *Wetherell*, supra.

(*f*) *Engleheart* v. *Dunbar*, 2 Dowl. 202.

(*g*) *Arnell* v. *Weatherby*, *Engleheart* v. *Dunbar*, supra.

(*h*) *Atkinson* v. *Newton*, 2 B. & P. 336. The Courts can now allow of an amendment although there is nothing in writing to amend by. See R. of S. C., Ord. XXVIII. r. 12, supra, and C. L. P. Act, 1852, s. 222.

(*i*) *Thorpe* v. *Hook*, 1 Dowl. 501: *Browne* v. *Hammond*, Barnes, 10.

(*k*) *Webber* v. *Hutchins*, 8 M. & W. 319: *Brooks* v. *Hodson*, 8 Sc. N. R. 223: *Hunt* v. *Pasman*, 4 M. & Sel. 329: *Phillips* v. *Tanner*, 6 Bing. 327; 3 M. & P. 562.

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ca. sa., the bail would be fixed, the Court would give them an opportunity of freeing themselves (*l*).

It may be added, that the statutes of jeofails did not extend to writs of execution.

Amendment of indorsement.

As to amending the indorsement when the sheriff has been directed to levy too large or too small a sum, *see ante*, p. 803.

29. Restitution.

29. *Restitution.*]—If, after money is levied under a writ of execution, the judgment be reversed or set aside, the party against whom the execution was sued out shall have restitution. If a term or goods be sold under a *fi. fa.* it is only the money for which they were sold, and not the term or goods themselves, which shall be restored (*m*); but if the judgment be reversed before the term or goods are sold, the term or goods must be delivered back to the party (*n*). So, if lands be extended, under an *elegit*, and the judgment be afterwards reversed, the lands shall be restored (*o*). Where the judgment is set aside for irregularity, &c., restitution (when necessary) forms part of the order; and if the goods or money be not restored, the Court will grant an attachment. Where restitution of the sums paid by defendant is awarded, the plaintiff is bound only to repay defendant what has been properly paid by him (*p*). As to the mode of restitution, where the judgment has been reversed on appeal, *see post, Ch. LXXXV.* If the writ of execution has been indorsed to levy too large a sum, and the levy has been made accordingly, as we have seen *ante*, p. 804, the Court will order the overplus to be refunded.

30. Fraudulent execution.

30. *Fraudulent Execution.*]—Although there is strong reason to believe that a *fi. fa.* has been issued in order to defraud a *bonâ fide* creditor, and that the sheriff is a party to the fraud, the Court will not, in general, interfere summarily to compel the sheriff to pay over the proceeds of the levy to the *bonâ fide* creditor, but the question of fraud must be left to a jury (*q*). Perhaps, however, in a clear case, the Court might interfere summarily (*r*). If the right of no creditor intervenes, the sheriff is bound to sell under a writ on a judgment fraudulent as against creditors, for such judgment is good between the parties, and void only as against creditors; and if he sells under such a judgment to a *bonâ fide* purchaser, he cannot be compelled to re-seize the same goods, for the purchaser has a good title (*s*). *See Vol. 2, Ch. CXIV.*, as to a fraudulent warrant of attorney.

Money levied by a regular execution, under a judgment valid on the face of it, cannot be recovered back in an action for money had

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(*l*) *Bradley* v. *Baillie*, 1 Sc. 78; 3 Dowl. 111. See *Engleheart* v. *Dunbar*, *Arnell* v. *Weatherby*, supra.

(*m*) Ro. Abr. 778; 8 Co. 19, 143: *Eyre* v. *Woodfine*, Cro. El. 278; 2 Bac. Abr. "Execution" (Q): *Doe* v. *Thorn*, 1 M. & Sel. 425.

(*n*) See 2 Ro. Abr. 491.

(*o*) Ro. Abr. 778: *Goodyere* v. *Ince*, Cro. Jac. 246; Yelv. 179; 2 Bac. Abr. "Execution" (Q).

(*p*) *Whalley* v. *Barnett*, 2 Dowl. 33.

(*q*) *Barber* v. *Mitchell*, 2 Dowl. 574. See *Remmett* v. *Lawrence*, 15 Q. B. 1004; 20 L. J., Q. B. 25: *Christopherson* v. *Burton*, 3 Ex. 160; 18 L. J., Ex. 60.

(*r*) Per *Patteson*, J., Id. See *Imray* v. *Magnay*, 11 M. & W. 275; 12 L. J., Ex. 188, per *Parke*, B.

(*s*) *Imray* v. *Magnay*, 11 M. & W. 276, per *Parke*, B.: *Christopherson* v. *Burton*, supra.

and received, on the ground that judgment was signed, or execution issued, fraudulently, for the whole sum named in the judgment, where part had been already paid. The remedy, in case of such fraud, is by application to the Court in which the action was brought, or to a Master at Chambers, to set aside the judgment and execution (*t*). The application should be to set aside the latter only, if there was no fraud so far as the judgment is concerned.

(*t*) *De Medina* v. *Grove*, 10 Q. B. 152; 15 L. J., Q. B. 287.

CHAPTER LXXV.

WRIT OF FIERI FACIAS.

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1. What.

1. *What.*]—The writ of *fieri facias* is a judicial writ, that lieth for him who hath recovered any debt or damages in the Queen's Courts.

By *Ord. XLIII. r.* 1, "Writs of *fieri facias* and of *elegit* shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed."

2. In what cases and when to be sued out.

2. *In what Cases and when to be sued out.*]—By *Ord. XLII. r.* 17, "Every person to whom any sum of money or any costs shall be payable under a judgment or order, shall, *so soon as the money or costs shall be payable*, be entitled to sue out one or more writ or writs of *fieri facias* or one or more writ or writs of *elegit* to enforce payment thereof, subject nevertheless as follows:—

(a) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(b) The Court or a Judge may at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit."

As to the time when the writ may be issued, *see ante*, p. 789.

3. Form of.

3. *Form of.*]—Forms of writ are given in Appendix H. to the *R. of S. C.*, 1883, and their use is prescribed by *Ord. XLII. r.* 14 (*a*).

(*a*) See forms, Chit. F. p. 319 et seq.

The writ must be so moulded as to follow the substance of the judgment or order.

Direction, teste, return, and form of.

As to the direction, teste, and return of the writ, *see ante*, pp. 797—800. This writ, like other writs of execution, must strictly pursue the judgment, and be warranted by it, or it will be irregular, and in some cases void, *see ante*, p. 796.

4. How sued out and indorsed.

4. *How sued out and indorsed.*]—*Get a blank form of writ, and fill it up in accordance with the judgment or order. Then procure a præcipe* (*b*) *stamped with a 5s. impressed fee stamp* (see Orders in App., post, Vol. 2), *and having filled it up, attend at the writ office with the writ or office copy of the judgment, or the order and the præcipe. The officer will compare the writ with the office copy, judgment or order, and will then seal the writ and return it and the office copy, judgment or order to you, and he will retain the præcipe. Indorse the writ thus: "Levy the whole* [or *l.* the sum you are entitled to levy for] (*c*), *and interest thereon at the rate of 4l. per cent. per annum, from the —— day of ——* 18— [the day when the judgment was entered up, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be] (*d*); *besides sheriff's poundage, officer's fees, costs of levying and all other legal incidental expenses.—This writ was issued by P. S., No.* 20, *Gray's Inn Square, London, solicitor for the plaintiff, 1st Jan.* 18—." It may here be observed, that a sheriff may levy under a *fi. fa.* the amount of his fees authorized by 7 *W.* 4 & 1 *V. c.* 55, although not indorsed on the writ (*e*). *It is as well to indorse on the writ the place of abode and addition of the party against whom it is issued, or such other description of him as you may be able to give* (*f*). As to the indorsement of the solicitor's name and place of abode, &c., and as to the indorsements in general upon writs of execution, *see ante*, p. 800.

5. Delivery to sheriff, &c.

5. *Delivery of Writ to be executed.*]—As to this, *see ante*, p. 806.

6. By whom, when, where, and how executed.

6. *By whom, when, where, and how executed.*]—By whom the writ is to be executed, *see ante*, p. 807; and as to the warrant for its execution and the bailiff, appointed by it, *see ante*, p. 808; and as to when and where writs of execution may in general be executed, *see ante*, p. 809. As to how far doors may be broken open, *see ante*, p. 812. As to the necessity for showing the warrant, &c. *see ante*, p. 813.

Seizure of the goods, &c.

The officer, in execution of this writ, enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them (*g*). Seizing part of the goods in the name of

(*b*) See form of præcipe, Chit. F. p. 389.

(*c*) See ante, p. 801. As the writ directs the sheriff to levy for the whole sum and the indorsement is merely restrictive, the sheriff is bound to levy the full amount indorsed; provided it do not exceed the sum mentioned in the writ; and he may justify under it, though in fact there be not so much due to the plaintiff at the time. As to maintaining an action against the plaintiff for an excessive indorsement, &c., see ante, p. 803.

(*d*) See Ord. XLII. r. 14, ante, p. 799, and note to form of writ.

(*e*) *Curtis* v. *Mayne*, 2 Dowl., N. S. 37.

(*f*) See ante, p. 801.

(*g*) See *Blades* v. *Arundale*, 1 M. & Sel. 711: *Ackland* v. *Paynton*, 8 Price, 95: *Doker* v. *Hasler*, 2 Bing. 479: *Bird* v. *Bass*, 6 M. & G. 143.

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the whole is a good seizure of the whole (*h*). Only such quantity of goods should be seized as is reasonably sufficient to satisfy the amount indorsed on the writ and expenses (*i*). After the seizure, the officer gets an auctioneer to make an inventory of the goods, and to remove and sell them, or to sell them on the premises, if the defendant, or the person on whose premises the goods are, consent to it (*j*). He is allowed to remain on the premises a reasonable time to *remove the goods* (*k*). If he remains longer, without the leave of the occupier, he is liable to an action of trespass (*l*). It is his duty to remove the goods to a place of safe custody until they can be sold; for if they be rescued, he is liable to the plaintiff for their value (*m*). And it is said, if the sheriff take cattle, and return that he has taken cattle to the value of 100*l*., and afterwards the cattle die for want of meat, he is answerable for the value returned (*n*). If there be several writs of *fi. fa.* in the sheriff's hands at the time of the seizure, he is considered to seize under all of them (*o*). Immediately upon the seizure of the goods, the sheriff acquires such a special property in them that he may maintain trover or trespass against any person who takes them (*p*). But the seizure of them does not divest the defendant of his property in them (*q*). It confers only a right to sell, and the defendant may, after the seizure, sell the goods subject to the right of the execution creditor (*r*). As to how far the seizure operates as a discharge of the judgment, *see post*, p. 896 (*s*). The judgment creditor or his solicitor in the action may direct the sheriff to withdraw from possession (*t*).

As to what amounts to a seizure, see also *Nash* v. *Dickenson*, L. R., 2 C. P. 252: *Mortimore* v. *Cragg*, 3 C. P. D. 216, 219. The seizure is not good if the warrant is not produced, and the seizure in no way made public. *Ex p. Jones, Re Williams*, 42 L. T. 157, Bk.; but see ante, p. 813. No action lies against a party for shutting the doors of his house against the plaintiff who comes to do execution of the goods of another, which are in his house. *Semayne's case*, 5 Co. 91; Com. Dig. Action on the Case, B. 3.

(*h*) *Cole* v. *Davies*, 1 Ld. Raym. 724: *Gladstone* v. *Padwick*, L. R., 6 Ex. 203; 40 L. J., Ex. 154.

(*i*) *Gawler* v. *Chaplin*, 2 Ex. 503; Noy's Rep. 59; Com. Dig. Ex. c. 5; 18 L. J., Ex. 42.

(*j*) See *Aikenhead* v. *Blades*, 5 Taunt. 198.

(*k*) See *Playfair* v. *Musgrove*, 14 M. & W. 239; 15 L. J., Ex. 26, where a term of years was taken in execution. See ante, p. 812.

(*l*) *Ash* v. *Dawnay*, 8 Ex. 237; 22 L. J., Ex. 59.

(*m*) *Sly* v. *Finch*, Cro. Jac. 514.

(*n*) Id. 515: *Clerk* v. *Withers*, 2 Ld. Raym. 1075; 1 Salk. 322. See stat. 12 & 13 Vict. c. 92: cp. *Dargan* v. *Davies*, 2 Q. B. D. 118; 46 L. J., M. C. 122.

(*o*) See post, p. 861.

(*p*) *Wilbraham* v. *Snow*, 2 Saund. 47; 1 Sid. 438.

(*q*) *Giles* v. *Grover*, 9 Bing. 128: *Burnell* v. *Hunt*, 5 Jur. 650: *Woodland* v. *Fuller*, 11 A. & E. 859: *Playfair* v. *Musgrove*, 14 M. & W. 239; 15 L. J., Ex. 26.

(*r*) *Union Bank of London* v. *Lenanton* (C. A.), 3 C. P. D. 243; 47 L. J., Ex. 409: *Woodland* v. *Fuller*, supra, per *Littledale*, J.

(*s*) Goods in the possession of the sheriff under an execution, issued either by the grantee of a bill of sale or by a third person, are not in the apparent possession of the grantor within the Bills of Sale Act, 1878. *Ex p. Saffery, In re Brenner*, 16 Ch. D. 668. As to the order and disposition clause in the repealed Bank. Act (12 & 13 V. c. 106, s. 125) applying after seizure, see *Barrow* v. *Bell*, 5 El. & Bl. 540; 25 L. J., Q. B. 2; *Fletcher* v. *Manning*, 12 M. & W. 571.

(*t*) *Levi* v. *Abbott*, 4 Ex. 588; 19 L. J., Ex. 62: *Walker* v. *Hunter*, 2 C. B. 324, ante, p. 811.

Sale of the goods.

The sheriff cannot keep the goods himself and pay the plaintiff his debt (*u*), nor deliver them to the plaintiff in satisfaction of his debt, as was formerly done on an *elegit* (*x*): but they must be sold, if the defendant do not immediately satisfy the plaintiff for the debt, costs and expenses.

By the *Bankruptcy Act*, 1883 (46 & 47 *V. c.* 52), *s.* 145, "Where the sheriff sells the goods of a debtor under an execution for a sum exceeding twenty pounds (including legal incidental expenses), the sale shall, unless the Court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale." The Court has a discretionary power to order a sale by private contract, and may do so on an *ex parte* application by the judgment creditor in the absence of the other creditors of the judgment debtor (*y*). The order may be made by a Master at Chambers (*z*).

The goods must first be seized, because the sheriff cannot make a valid contract for sale until he has actually seized the goods (*a*).

There is no objection to his *selling* them to the execution creditor, or to any person in trust for him, at their real value (*b*), provided the sale be by auction (*c*). The sheriff may sell the goods after he is out of office (*d*). The sheriff must sell in a reasonable time, and if he neglects to do so, and the execution creditor thereby sustains damage, an action may be maintained against him for his breach of duty (*e*). If the sheriff sell more goods than are sufficient to satisfy the writ, he is liable in trover for the goods unnecessarily sold (*f*). If the amount to be levied does not exceed twenty pounds the sheriff is not obliged to sell them by public auction (*g*); indeed, if before 7 *W.* 4 & 1 *V. c.* 55 (the Act for better regulating the fees payable to sheriffs on the execution of civil process), he sold them by auction, the expense attending it would have fallen on himself, unless the plaintiff or defendant expressly required the auction (*h*). By the table of fees sanctioned by the Judges under the statute (*i*), a percentage, graduated according to the amount of the sum levied, is allowed for every sale by auction. The sheriff should sell for the best price that can be reasonably obtained (*k*). It seems that, if a very inadequate price be offered for the goods,

(*u*) Noy, 107.

(*x*) *Thompson* v. *Clerk*, Cro. El. 504; *Langdon* v. *Wallis*, 1 Lutw. 589: *Bealy* v. *Sampson*, 2 Vent. 95.

(*y*) *Hunt* v. *Fensham*, 12 Q. B. D. 162; 32 W. R. 316.

(*z*) *Hunt* v. *Clifford*, W. N. 1884, 86; Bitt. Ch. Cas. 136.

(*a*) *Ex p. Hall*, *In re Townsend*, 14 Ch. D. 132; 42 L. T. 162.

(*b*) *Ex p. Villars*, *In re Rogers*, L. R., 9 Ch. 432; 43 L. J., Bk. 76 (C. A.): *Petit* v. *Benson*, Comb. 452: *Stratford* v. *Twynan*, Jac. 418; per Cur. *Leader* v. *Danvers*, 1 B. & P. 360.

(*c*) Bank. Act, 1883, s. 145, supra.

(*d*) *Doe* v. *Donston*, 1 B. & Ald. 230: *Ayre* v. *Aden*, Cro. Jac. 73; Yelv. 44; Wats. Sheriff, 188. But see *Langdon* v. *Wallis*, 1 Lutw. 589; 2 Saund. 47 ee.

(*e*) *Bales* v. *Wingfield*, 4 Q. B. 580, n.: *Jacobs* v. *Humphrey*, 2 C. & M. 413.

(*f*) *Aldred* v. *Constable*, 6 Q. B. 370. See *Gawler* v. *Chaplin*, 2 Ex. 503.

(*g*) Bankruptcy Act, 1883, s. 145: *Ex p. Villars*, supra.

(*h*) *Woodgate* v. *Knatchbull*, 2 T. R. 157.

(*i*) See ante, p. 36. See the Appendix at the end of the Second Volume.

(*k*) See *Mullett* v. *Challis*, 20 L. J., Q. B. 161; 16 Q. B. 239: *Gawler* v. *Chaplin*, 2 Ex. 503; 18 L. J., Ex. 42.

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the sheriff should not sell them; but, if necessary to make a return, should return that they remain in his hands for want of buyers, and wait until he shall be served with a *venditioni exponas*, under which he will be obliged to sell them for whatever price may be offered (*l*). If he wilfully delay to sell for an unreasonable time, and thereby injure the defendant, he will be liable to an action (*m*). A sale by the sheriff is for ready money and immediate delivery. A sheriff, after selling enough to satisfy an execution, is not justified in selling more, on the supposition that by accident, for which he is not answerable, the amount levied may become insufficient (*n*). An assignment of a term of years must be in writing (*o*); but subject to the Bankruptcy Act, s. 145 (*ante*, p. 839), goods may be sold by the sheriff in any way (*p*).

Sale of a term.

The receipt given by the sheriff is not a bill of sale, and does not require registration (*q*). The Bills of Sale Act, 1882, only applies to bills of sale given as security for money, and does not affect absolute bills of sale. If the sheriff sells by a bill of sale it must be stamped (*r*).

Levying poundage, &c.

Besides the amount of the debt, the sheriff also levies his poundage and expenses, as mentioned *ante*, p. 826.

Returning surplus.

If any surplus remain, the sheriff is not bound to search for the execution debtor in order to pay it to him, but he may retain it in his hands until it be demanded (*s*).

Effect of sale by sheriff.

The sale or assignment by the sheriff of the goods or chattels of the defendant taken on a *fi. fa.* conveys an indefeasible title to a *bonâ fide* vendee; so much so, that if the writ be afterwards vacated, the defendant shall not be restored to his goods (*t*). And in one case, *Parke*, B., whilst delivering the judgment of the Court, said "If, indeed, the right of no creditor intervenes, the sheriff is bound to sell under a writ on a fraudulent judgment, for such judgment is good between the parties, and void only against creditors; and if he sells under such a judgment to a *bonâ fide* purchaser, and not to the fraudulent plaintiff himself, he cannot be compelled to reseize the same goods, for the purchaser has a good title" (*u*). But, if the writ were void, or if the goods were the goods of a stranger, and not of the defendant, the sale of the

(*l*) *Keightley* v. *Birch*, 3 Camp. 521. But see *Burnard* v. *Leigh*, 1 Stark. 43.

(*m*) *Carlile* v. *Parkins*, 3 Stark. 163: *Aveton* v. *Davis*, 9 Bing. 740; 3 M. & Sc. 138: *Doker* v. *Hasler*, 2 Bing. 479; 10 Moore, 210: *Jacobs* v. *Humphrey*, 2 C. & M. 413. It seems from those cases that the action might be brought before the sheriff makes his return or is given notice to make it. See *Rowe* v. *Ames*, 6 M. & W. 747; 8 Dowl. 750: *Slade* v. *Hawley*, D. & L. 700; 13 M. & W. 757.

(*n*) *Aldred* v. *Constable*, 6 Q. B. 370.

(*o*) *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372; post, p. 847.

(*p*) *Hernaman* v. *Bowker*, 11 Ex. 760; 25 L. J., Ex. 69, where there was no public auction or bill of sale.

(*q*) *Woodgate* v. *Godfrey*, 4 Ex. D. 59, affirmed in C. A., 5 Ex. D. 24: *Marsden* v. *Meadows*, 7 Q. B. D. 80.

(*r*) 33 & 34 V. c. 97, s. 57; see *Bellamy* v. *Saull*, 4 B. & S. 265; 32 L. J., Q. B. 366.

(*s*) Noy, 69: *Jefferies* v. *Sheppard*, 3 B. & Ald. 696.

(*t*) *Doe* v. *Thorn*, 1 M. & Sel. 425: *Anon.*, Dyer, 363, pl. 24; 5 Rep. 90 b; 1 Ves. 195: *Doe* v. *Murless*, 6 M. & Sel. 110: ante, p. 832. See *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 376, per *Alderson*, B.: *Giles* v. *Grover*, 9 Bing. 159; 2 M. & Sc. 197, per *Alderson*, B. See form of a bill of sale, Chit. Forms, p. 418.

(*u*) *Imray* v. *Magnay*, 11 M. & W. 276; 2 Dowl., N. S. 531: 12 L. J., Ex. 188: *Christopherson* v. *Burton*, 3 Ex. 160; 18 L. J., Ex. 60.

sheriff would convey no property (*x*); and the real owner may recover even against a *bonâ fide* purchaser for value (*y*).

Indemnity bond.

A bond to the sheriff conditioned to pay the money into Court (*z*), or to indemnify the sheriff from any proceedings for his return to the writ (*a*), or for any irregularity in executing it (*b*), is valid, notwithstanding the statute 23 *H.* 6, *c.* 9, relative to bonds to sheriffs.

Payment of debt, &c. to officer.

The defendant, instead of allowing the writ to be executed, may pay the debt and costs, &c. as directed to be levied, to the sheriff or officer; and this will be deemed a good discharge to the defendant of the execution, and he might plead it in bar to an action on the judgment (*c*). If the sheriff seize or sell the goods after a tender of the debt and costs, he would, it seems, be a trespasser (*d*).

7. Payment of rent and taxes.

7. *Payment of Rent and Taxes.*]—By 8 *Anne*, *c.* 14 (*e*), *s.* 1, "No goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrear shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this Act; and the sheriff or other officer (*f*) is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money." By 7 *&* 8 *V. c.* 96, *s.* 67, "No landlord of any tenement, let at a weekly rent, shall have any claim or lien upon any goods taken in execution under the process of any Court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment." *See the enactment as to growing crops, post*, p. 844.

7 & 8 Vict. c. 96.

Cases within

The statute of *Anne* contemplates a tenancy subsisting at the

(*x*) Ante, p. 832.

(*y*) *Farrant* v. *Thompson*, 2 D. & R. 1; 5 B. & Ald. 826.

(*z*) *Beaufage's case*, 10 Co. 99 b.

(*a*) 1 Saund. 161, n. But see *Wright* v. *Lord Verney*, 3 Doug. 240. See form of bond, Chit. Forms, p. 422.

(*b*) *Rogers* v. *Reeves*, 1 T. R. 421.

(*c*) *Taylor* v. *Bekon*, 2 Lev. 203; T. John. 97: *Swinstead* v. *Lydal*, 5 Mod. 296: *Rook* v. *Wilmot*, Cro. Eliz. 209; Bac. Ab. "Execution" (D). See *Gregory* v. *Cotterell*, 5 El. & Bl. 571; 25 L. J., Q. B. 33, noticed ante, p. 809, where the payment was made at the bailiff's office in his absence. As to the sheriff's right to poundage after, see ante, p. 828.

(*d*) See *Lefans* v. *Moregreen*, 1 Keb. 655.

(*e*) Chap. 14 in Ruffhead's edition, chap. 18 in the revised edition. The statute is generally known as c. 14.

(*f*) It extends to a bailiff of a liberty, see *Palgrave* v. *Windham*, 1 Str. 212.

the stat. of Anne.

time of the execution (*g*), at a rent certain (*h*). It does not apply where the landlord is himself the execution creditor (*i*). It must also be understood as extending only to the immediate landlord; and, therefore, a ground landlord has no claim for his rent under an execution against the under-lessee (*k*). It extends, however, to the case of lessee and under-tenant (*l*); also to that of the trustee of an outstanding satisfied term in trust for mortgagees, and to attend the inheritance (*m*). And an executor or administrator is entitled to the benefit of the statute, as to arrears due to the testator in his lifetime (*n*). Also, where, on the sale of land, it was agreed that the vendee should pay the vendor 100*l.* a-year until the purchase was completed, it was held, that the vendor was a landlord, and entitled to the benefit of the statute (*o*). Forehand rent due at the time of seizure is within the statute (*p*). It applies to executions issued by defendants for costs (*q*).

To what goods the statute applies.

It is said that this statute is not confined to goods and chattels which are distrainable in point of law (*r*). Where to an action on the case against the sheriff, under the statute, for taking, "by virtue of a *fi. fa.* against S.," goods which were on premises demised by the plaintiff to J., and for which premises a quarter's rent was due, and removing the goods after notice, without paying the rent, the defendant pleaded that he did not take *modo et formâ*; the goods taken were not the property of S.; and the sheriff accounted for them to the real owner; the Court held, that, *on this issue*, the plaintiff was nevertheless entitled to the verdict: and per *Patteson*, J., "The landlord here might have distrained the goods to whomsoever the · belonged; and the sheriff, by seizing, has done him all the harm against which the statute meant to protect landlords" (*s*).

Effect of intervening bankruptcy.

Where the sheriff had seized under a *fi. fa.*, and afterwards received notice before sale of the landlord's claim for rent in arrear, and afterwards a fiat of bankruptcy, overreaching the execution, issued, the assignees were held entitled to the goods, unless the landlord had made a distress for rent (*t*).

(*g*) *Cox* v. *Leigh*, L. R., 9 Q. B. 333; 43 L. J., Q. B. 123. Therefore the sheriff is not liable for removing the goods without first paying the rent where the tenancy determined before the seizure, though within six months before it. Id. See *Riseley* v. *Ryle*, 10 M. & W. 101; 1 Dowl., N. S. 660: and *Riseley* v. *Ryle*, 11 M. & W. 16: *Hodgson* v. *Gascoigne*, 5 B. & A. 88, where the landlord had brought ejectment.

(*h*) *Riseley* v. *Ryle*, 11 M. & W. 16.

(*i*) *Taylor* v. *Lanyon*, 6 Bing. 536.

(*k*) *Bennet's case*, 2 Str. 787.

(*l*) *Thurgood* v. *Richardson*, 7 Bing. 428.

(*m*) *Colyer* v. *Speer*, 4 Moore, 473; 2 B. & B. 67.

(*n*) *Palgrave* v. *Windham*, 1 Str. 212. But it seems that letters of administration have not relation for that purpose (1 Str. 97).

(*o*) *Saunders* v. *Musgrave*, 6 B. & C. 524; 9 D. & R. 529.

(*p*) *Harrison* v. *Barry*, 7 Price, 690. See *Cook* v. *Harris*, 1 Ld. Raym. 367: *Yates* v. *Radtledge*, 5 H. & N. 249; 29 L. J., Ex. 117, where mortgagor was tenant to mortgagee.

(*q*) *Henchett* v. *Kimpson*, 2 Wils. 140.

(*r*) See *Riseley* v. *Ryle*, 11 M. & W. 22.

(*s*) *Forster* v. *Cookson*, 1 Q. B. 419; 1 G. & D. 58, sed quære. See *Lee* v. *Lopes*, 15 East, 230: *White* v. *Binstead*, infra. See *Beard* v. *Knight*, 8 El. & Bl. 865; 27 L. J., Q. B. 359, where the bailiff of a County Court seized goods belonging to a stranger.

(*t*) *Gethin* v. *Wilkes*, 2 Dowl. 189. See now Bank. Act, 1883, s. 42.

The landlord cannot claim for more rent than was due at the time the goods were first taken possession of under the writ (*u*). He is entitled to the full year's rent, though he has been used to remit a portion of it to the tenant (*x*). If two years' rent be due, and one year's rent be paid under one execution, he cannot claim the second year's rent under a second execution in the sheriff's hands at the same time as the first execution (*y*). He is not obliged to pay the sheriff poundage on the amount of the rent levied by him (*z*).

What amount landlord entitled to.

The present practice is for the sheriff to take enough to satisfy both the landlord and the execution creditor, and to make the payment to each of them (*a*). If a sheriff, on executing a *fi. fa.*, receive notice of, or know of, a year's rent being due, and the party suing out the execution does not choose to pay the year's rent, the former should withdraw without selling (*b*). If he remove any part of the goods without the rent due being paid, he will be liable to an action (*c*). A bill of sale by him is not a removal of the goods within the meaning of the Act (*d*). Unless there be such a removal, the landlord has no claim upon the sheriff; therefore, the landlord has no such claim if the defendant pay the debt before the goods are removed or the like (*e*). So, if there be any irregularity in the execution of the writ, so as to render it void (*f*), or if the landlord consent to the removal, though such consent be founded on receiving an undertaking for the rent, which afterwards turns out to be void (*g*), the sheriff is not liable to the landlord. Where the sheriff seized the goods of A. under an execution against the goods of B., and after the making of an interpleader order, and before the trial of the issue, paid the landlord a quarter's rent out of the proceeds of the goods, it was held, that the sheriff was bound to pay over the amount of the quarter's rent, as well as the rest of the proceeds of the sale, to A., after the decision of the issue in his favour (*h*).

Duty and liability of sheriff.

The landlord's remedy against the sheriff under the Act is either

Landlord's

(*u*) *Hoskins* v. *Knight*, 1 M. & Sel. 245, where the Court intimated, that if the sheriff remains beyond a reasonable time on the premises, so as to injure the rights of the landlord, the latter could maintain an action on the case (at p. 247). And see *Keightley* v. *Birch*, 3 Camp. 521: *Riseley* v. *Ryle*, 11 M. & W. 16: *Augustin* v. *Challis*, 1 Ex. 279; 17 L. J., Ex. 73: *Reynolds* v. *Barford*, 7 M. & Gr. 449; 8 Sc. N. R. 233; 2 D. & L. 449.

(*x*) *Williams* v. *Lewsey*, 1 M. & Sc. 92; 8 Bing. 28.

(*y*) *Dodd* v. *Saxby*, 2 Str. 1024.

(*z*) *Gore* v. *Gofton*, 1 Str. 643.

(*a*) *Wintle* v. *Freeman*, 11 A. & E. 548, per *Patteson*, J.: *Gawler* v. *Chaplin*, 2 Ex. 503; 18 L. J., Ex. 42. And see post, p. 863, as to sheriff's return.

(*b*) *Foster* v. *Hilton*, 1 Dowl. 35: *Calvert* v. *Joliffe*, 2 B. & Ad. 418. And see *Colyer* v. *Speer*, 4 Moore, 473; 2 B. & B. 67: *Riseley* v. *Ryle*, 11 M. & W. 16, per *Parke*, B.: *Cocker* v. *Musgrove*, 9 Q. B. 223; 15 L. J., Q. B. 365.

(*c*) *Colyer* v. *Speer*, 4 Moore, 473; 2 B. & B. 67: *Calvert* v. *Joliffe*, 2 B. & Ad. 418, supra.

(*d*) *Smallman* v. *Pollard*, 7 Sc. N. R. 911; 1 D. & L. 901. See *West* v. *Hedges*, Barnes, 211: *Henchett* v. *Kimpson*, 2 Wil. 140.

(*e*) 1 Sellon, 535: *White* v. *Binstead*, 13 C. B. 304; 22 L. J., C. P. 115.

(*f*) *Hann* v. *Capell*, Barnes, 199. But see *Forster* v. *Cookson*, 1 G. & D. 58; 1 Q. B. 419.

(*g*) *Rotherey* v. *Wood*, 3 Camp. 24.

(*h*) *White* v. *Binstead*, 13 C. B. 304; 22 L. J., C. P. 115.

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remedy against the sheriff.

by action (*i*), or by motion to the Court. An action for money had and received will not lie for the year's rent, even after sale (*k*). If the landlord moves, the Court may stay the proceedings on the sheriff paying over the proceeds of the sale, which the Court would not do if the landlord brought an action (*l*). Formerly, it was held, that to entitle the landlord to either remedy, he must have made a demand, and given notice to the sheriff of the rent due before the goods were removed (*m*), but this has since been decided otherwise: and a notice to the sheriff, even after the removal of the goods, provided it be before he has actually paid over the money, will be sufficient to ground a motion to the Court (*n*); and, in the case of an action, it is not necessary to prove a formal notice; if it can be shown that the sheriff or his officer knew, previously to the removal of the goods, that there was rent due to the landlord, it will be sufficient (*o*). In such an action, no averment of notice to the execution creditor is necessary (*p*).

Against execution creditor.

It seems doubtful whether any action lies for the landlord, under this Act, against the execution creditor (*p*).

Cannot distrain.

Goods taken in execution cannot be distrained on for the year's rent, as they are *in custodiâ legis* (*q*); and this is so even where the goods are in the hands of the sheriff's vendee (*q*).

Growing crops.

By 14 & 15 *V. c.* 25, *s.* 2, "In case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of *fieri facias*, or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer" (*r*).

Taxes.

By stat. 43 & 44 V. c. 19 (The Taxes Management Act, 1880), *s.* 88 (1), "No goods or chattels whatever belonging to any person at the time any of the duties or the land tax became in arrear shall be liable to be taken by virtue of any execution or other process, warrant or authority whatever, or by virtue of any assignment

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(*i*) *Riseley* v. *Ryle*, 11 M. & W. 16. And per *Parke*, B., in this case—"The provision of the statute is, that the sheriff shall not *take* the goods unless the landlord's rent be paid before their *removal;* that is, shall not remove them unless the rent be first paid. That may well be translated as directing that the sheriff shall pay the rent to the landlord before the removal of the goods, or else shall be liable for damages." *Green* v. *Austin*, 3 Camp. 260: *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455: *Rotherey* v. *Wood*, 3 Camp. 24: *Palgrave* v. *Windham*, 1 Str. 212. And see *Wintle* v. *Freeman*, 11 A. & E. 539, per *Patteson*, J.

(*k*) *Green* v. *Austin*, 3 Camp. 260.

(*l*) *Foster* v. *Hilton*, 1 Dowl. 35: *Henchett* v. *Kimpson*, 2 Wils. 141.

(*m*) *Waring* v. *Dewberry*, 1 Str. 97.

(*n*) MS. H. 1820: *Arnitt* v. *Garnett*, 3 B. & Ald. 440: *Yates* v. *Radtledge*, 5 H. & N. 249; 29 L. J., Ex. 117.

(*o*) *Riseley* v. *Ryle*, 11 M. & W. 20, per *Parke*, B.: *Andrews* v. *Dixon*, 3 B. & Ald. 645.

(*p*) *Riseley* v. *Ryle*, 11 M. & W. 16.

(*q*) *Wharton* v. *Naylor*, 12 Q. B. 673; 17 L. J., Q. B. 278.

(*r*) See *Peacock* v. *Purvis*, 2 B. & B. 362; 5 Moore, 79; *Wright* v. *Dewes*, 3 N. & M. 790; 1 Ad. & El. 641.

on any account or pretence whatever, except at the suit of the landlord for rent, unless the party at whose suit the said execution or seizure shall be sued or made, or to whom such assignment shall be made, shall, before the sale or removal of such goods or chattels, pay or cause to be paid to the collector all arrears of the said duties or land tax which shall be due at the time of seizing such goods or chattels, or which shall be payable for the year in which such seizure shall be made, provided such duties and land tax shall not be claimed for more than one year.

"(2). In case the duties and land tax shall be claimed for more than one year, then the said party at whose instance such seizure shall have been made, paying the said collector the aforesaid duties and land tax due for one whole year, may proceed in his seizure as he might have done if no duties and land tax had been so claimed; but in case of refusal to pay the said duties and land tax the said collector is hereby authorized and required to distrain such goods and chattels, notwithstanding such seizure or assignment, and to proceed to the sale thereof according to this Act, in order to obtain payment of the whole of the said duties and land tax so assessed, together with the reasonable costs and charges attending such distress and sale; and every such collector so doing shall be indemnified by virtue of this Act." The statute extends to land tax, inhabited house duty, property and income taxes (*s*).

8. What sort of property may be taken, and how disposed of.

Wearing apparel, tools, &c.

8. *What sort of Property may be taken, and how disposed of.*]—Before 8 *& 9 V. c.* 127, the general rule of law was that the sheriff might seize and sell all the personal goods and chattels belonging to the defendant that he could find (*t*), and which could be sold (*u*), with the exception of wearing apparel actually in use (*x*), and perhaps goods in the personal possession of the defendant (*y*). By that Act, *s.* 8, after reciting that "it is expedient to protect the actual necessaries of or belonging to judgment debtors from being seized in execution," it is enacted, "that, from and after the passing of this Act, the wearing apparel and bedding of any judgment debtor, or his family, and the tools and implements of his trade, the value of such apparel, bedding, tools and implements not exceeding in the whole the value of *5l.*, shall not be liable to seizure under any execution or order of any Court against his goods and chattels."

1 & 2 V. c. 110, s. 12.

The 1 *& 2 V. c.* 110, *s.* 12, enacts, "That, by virtue of any writ of *fieri facias* to be sued out of any superior or inferior Court [after the time appointed for the commencement of this Act] (*z*), or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques (*a*), bills of exchange, promissory notes, bonds, specialties,

(*s*) The stat. 43 G. 3, c. 99, s. 37, is repealed by 43 & 44 V. c. 19, s. 4.

(*t*) 3 Co. 12.

(*u*) Com. Dig. "Execution" (C) 4. See *Legge* v. *Evans*, 6 M. & W. 36; 8 Dowl. 177.

(*x*) *Hardistey* v. *Barney*, Comb. 356: *Swabolf* v. *Alford*, 3 M. & W. 254.

(*y*) See per *Parke*, *B.*, Id.

(*z*) I. e., 1st October, 1838. The words in brackets are repealed by stat. 37 & 38 V. c. 96, sched.

(*a*) See *Watts* v. *Jefferey*s, 3 Mac. & Gord. 422; 15 Jur. 435, Ch., where

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Money, bank notes, securities, &c.

or other securities for money (*b*), belonging to the person against whose effects such writ of *fieri facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount by such writ of *fieri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived (*c*); and that the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ, the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: *provided*, that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action."

What deeds, writings, &c. may be taken.

Previously to this Act, nothing could have been taken in execution that could not be sold; therefore, deeds, writings, &c., could not have been taken in execution (*d*); nor can they even since that Act, unless they be securities for money, within the meaning of it. For instance, a title deed (even, it would seem, if pledged with the debtor), or a letter, or a guarantee, for some collateral act, or any other deed or writing, which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot be taken. But it would seem that all instruments containing an un-

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the Court of Chancery allowed a cheque in the hands of the Accountant-General to be taken in execution. But see *Courtoy* v. *Vincent*, 15 Beav. 486; 21 L. J., Ch. 291.

(*b*) As to whether this includes Exchequer bills, see *Ex p. Chaplin*, 3 Y. & C. 397. In *Stokoe* v. *Cowan*, 29 Beav. 637; 30 L. J., Ch. 882, it was held that a policy of assurance on the life of the debtor was a security for money under this section, sed quære. The contrary has been held in Ireland. *Alleyne* v. *Darcy* (L. C.), 5 Ir. Ch. R. 55: *In re Sargeant's Policy* (M. R., June, 1879), 7 L. R., Ir. 66, where *Stokoe* v. *Cowan* was cited but not followed.

(*c*) See *Mutton* v. *Young*, 4 C. B. 371; 11 Jur. 414, C. P.

(*d*) Com. Dig. "Execution" (C), 4: *Francis* v. *Nash*, Hardw. 53: *Legge* v. *Evans*, 6 M. & W. 36; 8 Dowl. 177.

conditional covenant or agreement for payment of a specific sum of money to the execution debtor for his own benefit, are within the words "other securities for money," and may be taken.

Money. Debts.

The word "money," used in the above enactment, means specific gold and silver coin, or bank notes, and not debts due to the debtor (*e*). Therefore, money in the sheriff's hands, taken in execution by him at the suit of the debtor (*f*), or the produce of an execution at his suit (*g*), or the surplus of a former execution against him (*h*), even at the suit of the same execution creditor (*i*), cannot be taken in execution under the above enactment. Nor will the Court stay such money in the sheriff's hands, to satisfy a present execution (*k*). Nor does the above enactment give power to seize money in execution while in the hands of a third person as trustee for the debtor (*l*). And where a party, privileged from arrest, having been taken on a *ca. sa.* by the sheriff of G., paid the money to the sheriff, and obtained a Judge's order to have it refunded, but, when the town agent was about to do so, the money was claimed by the sheriff of M., under a *fi. fa.* directed to him, it was held that the money could not be taken under the *fi. fa.* (*m*). Debts due to the debtor must be got at, if at all, by the process of attachment, noticed *post*, *Ch. LXXXII.*

Money in debtors' pockets, &c.

A question may arise, whether money, &c. in the actual possession of the debtor, in his pockets, or the like, &c., can be taken. It would seem that it cannot, any more than wearing apparel on a man's person can be (*n*).

Terms for years, &c. (*o*).

The sheriff, under a *fi. fa.*, cannot sell an estate in fee or for life (*p*), unless, perhaps, an estate *pur autre vie* (*q*); but he may sell a lease or term for years belonging to the defendant, and execute an assignment of it (*r*), under his seal of office, to the purchaser (*s*);

(*e*) See per *Alderson*, B., in *Harrison* v. *Paynter*, 6 M. & W. 387; 8 Dowl. 349. See *Brown* v. *Perrot*, 4 Beav. 585. Money, bank notes, and other valuable things current as cash, could not be taken under a *fi. fa.* before the Act, even, perhaps, if in the debtor's own desk. *Armisted* v. *Philpot*, 1 Doug. 231; Tidd, 9th ed. 1002. As to attaching debts due or accruing due to the judgment debtor, see post, Ch. LXXXII.

(*f*) *Collingridge* v. *Paxton*, 11 C. B. 683; 21 L. J., C. P. 39.

(*g*) *Wood* v. *Wood*, 4 Q. B. 397; 12 L. J., Q. B. 141: *Knight* v. *Criddle*, 9 East, 48: *Padfield* v. *Brine*, 3 B. & B. 294; 7 Moore, 127.

(*h*) *Harrison* v. *Paynter*, supra. And see *Robinson* v. *Peace*, 7 Dowl. 94: *Masters* v. *Stanley*, 8 Dowl. 169.

(*i*) *Fieldhouse* v. *Croft*, 4 East, 510. See *Staple* v. *Bird*, Barnes, 214.

(*k*) *Willows* v. *Ball*, 2 New Rep. 376.

(*l*) *Robinson* v. *Peace*, 7 Dowl. 94, per *Parke*, B.: *Bell* v. *Hutchison*, 8 Jur. 895, B. C.: *France* v. *Campbell* and *Winter* v. *Campbell*, 9 Dowl. 914, where under the old practice money had been deposited in Court in lieu of bail.

(*m*) *Masters* v. *Stanley*, 1 Dowl. 169.

(*n*) See per *Parke*, B., *Sunbolf* v. *Alford*, 3 M. & W. 254; ante, p. 815. See Vin. Abr. "Necessity" (B), 3.

(*o*) See as to extending a term for years under an *elegit*, post, Ch. LXXVI.

(*p*) 3 Co. 13.

(*q*) *Johnson* v. *Streete*, Comb. 291, quære.

(*r*) Until assignment the term remains in the debtor. *Doe* d. *Hughes* v. *Jones*, 1 Dowl., N. S. 352.

(*s*) 3 Co. 13; 8 Co. 172; 4 Co. 74: *Taylor* v. *Cole*, 3 T. R. 294. And see 2 Saund. 68 c: *Doe* v. *Donston*, 1 B. & Ald. 230: *Mother* v. *O'Grady*, 41 L. T. 562, Ir. Q. B. And *Doe* d. *Westmoreland* v. *Smith*, 1 M. & R. 137, where the term seized was a tenancy from year to year. The term is a chattel within the bailiwick only where the land is, and not where the lease is; at least this would seem to be so in analogy to the case of its being *bona notabilia* where the land

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and the same of a term for years acquired by marriage (the execution having the same effect as a disposal by the husband (*t*)), and the same of an annuity for years (*u*). Where an outgoing tenant had agreed to assign the residue of his term to the incoming tenant, it was held, that the sheriff, before any actual assignment made, might sell the residue under a *fi. fa.* against the tenant, and put upon it the value agreed to be given by the incoming tenant (*x*). The sheriff cannot, however, sell an equity of redemption (*y*), or an equitable estate in leaseholds (*z*). When he sells a term for years, he cannot turn the tenant in possession out, in order to give possession to the purchaser (*a*), unless, perhaps, where the defendant himself is in possession (*b*). If the tenant, however, will voluntarily relinquish possession, the sheriff, of course, may give possession to the purchaser (*c*). If the sheriff sell a term before the return of the writ, he may execute the assignment after the return (*d*). The assignment may be made by the under-sheriff in the name and under the seal of office of the sheriff (*e*). It must be in writing (*f*). Where it was made by parol, the Court held, that the estate remained in the debtor (*g*). The term is not vested in the sheriff by seizure (*h*).

Fixtures.

The sheriff, under the writ, cannot sell things fixed to the freehold, and which go to the heir and not to the executor (*i*); such as furnaces, ovens, doors, windows, &c. (*k*), hearths, chimney-pieces, &c. (*l*), fixed machinery (*m*), even though the freehold is in the debtor (*n*). Where a mill, with mill machinery, was demised for a term, and the tenant, without leave, severed the machinery, it was held, that the property in the machinery reverted to the landlord,

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is. See Com. Dig. "Administrator" (B), 4; 1 Wms. Exors. 194. As to its not being necessary to seize the lease itself, see *Coleman* v. *Harperson*, 1 F. & F. 330.

(*t*) Per *Buller*, J., *Farr* v. *Newman*, 4 T. R. 638.

(*u*) *York* v. *Twine*, Cro. Jac. 79; Com. Dig. "Execution" (C), 4. As to an annuity out of coal duty descendible to heirs, see *Radburn* v. *Jarvis*, 3 Beav. 450.

(*x*) *Sparrow* v. *Bristol*, 1 Marsh, 10.

(*y*) See 3 Atk. 739: *Scott* v. *Scholey*, 8 East, 467: *Metcalfe* v. *Scholey*, 2 New. Rep. 461; Tidd, 9th ed. 1003. As to an execution creditor being entitled to an equitable term belonging to his debtor, *Gore* v. *Bowser*, 24 L. J., Ch. 316, 440. As to seizing an outstanding term vested in a trustee upon trust to attend the inheritance upon an execution against the owner of the inheritance, see *Doe* d. *Phillips* v. *Evans*, 1 C. & M. 450.

(*z*) *In re Duke of Newcastle, Ex p. Padwick*, 39 L. J., Ch. 68.

(*a*) *R.* v. *Deane*, 2 Show. 85: *Taylor* v. *Cole*, 3 T. R. 292. See Bac. Abr. "Execution" (C), in which it is said, that the purchaser to obtain the actual possession must bring ejectment. And see *Playfair* v. *Musgrove*, infra.

(*b*) *Taylor* v. *Cole*, 3 T. R. 298.

(*c*) Id. 292.

(*d*) *Doe* d. *Stephens* v. *Donston*, 1 B. & Ald. 230.

(*e*) *Doe* d. *James* v. *Brawn*, 5 B. & Ald. 243.

(*f*) 29 C. 2, c. 3, s. 3.

(*g*) *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372; 1 Dowl., N. S. 352; 11 L. J., Ex. 50.

(*h*) *Playfair* v. *Musgrove*, 14 M. & W. 239; 3 D. & L. 72; 15 L. J., Ex. 26.

(*i*) *Winn* v. *Ingilby*, 5 B. & Ald. 625; 1 D. & R. 247. And see *Steward* v. *Lombe*, 4 Moore, 281; 1 B. & B. 506: *Scorall* v. *Boxall*, 1 Y. & J. 398.

(*k*) Com. Dig. "Execution." As to tramplates fixed to iron or wooden sleepers, see *Duke of Beaufort* v. *Bates*, 31 L. J., Ch. 481.

(*l*) *Poole's case*, 1 Salk. 368: *Elwes* v. *Mawe*, 3 East, 38.

(*m*) *Cross* v. *Barnes*, 46 L. J., Q. B. 479; 36 L. T. 693.

(*n*) *Place* v. *Fagg*, 4 M. & R. 277.

and that it could not be taken under a *fi. fa.* (*o*). And so it would be in every case where the tenant severs from the freehold fixtures which he cannot lawfully remove. But the sheriff may sell utensils fixed by the defendant for the purpose of his trade, such as coppers, vats or the like (*o*). So he may sell fixtures which may be removed by the tenant (*p*). Where he takes a lease and fixtures in execution, he may sell the fixtures separately, if he cannot find a purchaser for the whole (*q*).

Crops, &c.

Corn and other articles, which are raised by the industry of man, are emblements which go to the executor, and may be taken in execution; but things which yield no annual profit, or which are produced without the labour of man, are not emblements—they go to the heir, and cannot be taken in execution (*r*). Where the tenant continues in possession after a forfeiture, or is otherwise a trespasser, the crops cannot be seized under a *fi. fa.* against him (*s*). Clover, rye-grass, or artificial grass, growing under corn, cannot be seized (*t*). When the land is mortgaged, and the mortgagor is in possession, the growing crops may be taken in execution, provided they be *severed* before the mortgagee takes or demands possession, but not otherwise (*u*). As to growing crops being liable to be distrained for rent accruing due after the sale by the sheriff, *see ante*, p. 844.

In case of husbandry contracts, &c.

The seizure and sale of straw, chaff, turnips, manure, hay, grasses, roots, vegetables, &c. on lands let to farm, are regulated by 56 *G.* 3, *c.* 50, *s.* 1, which, after reciting that it is expedient that the execution of legal process should be so regulated as to be consistent with good husbandry, and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm, enacts, that no sheriff or other officer in England or Wales shall, by virtue of any process of any Court of law, carry off or sell or dispose of for the purpose of being carried off, from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever; nor any hay, grass, or grasses (whether natural or artificial), nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement entered into, and made for the benefit of the owner or landlord of any farm, such hay, grass, or grasses, tares and vetches, roots or vegetables, ought not to be taken off or

(*o*) *Farrant* v. *Thompson*, 5 B. & Ald. 826. See *Steward* v. *Lombe*, ubi supra.

(*p*) Com. Dig. "Execution" (C), 4; 3 Atk. 13. And see *Duck* v. *Braddyl*, M'Clel. 217: *Storer* v. *Hunter*, 3 B. & C. 368; 5 D. & R. 240: *Minshall* v. *Lloyd*, 2 M. & W. 450, per *Parke*, B.: *Dumergue* v. *Rumsey*, 33 L. J., Ex. 88, where, upon the construction of an agreement, it was held that the tenant had no power to remove fixtures during the term.

(*q*) *Barnard* v. *Leigh*, 1 Stark. 43.

(*r*) Gilb. Execution, 19: *Tompkinson* v. *Russell*, 9 Price, 287: *Poole's case*, 1 Salk. 368: *Scorall* v. *Boxall*, 1 Y. & J. 398. As to what are emblements, see 1 Williams on Executors, 11th ed. 709: *Graves* v. *Weld*, 5 B. & Ad. 105, 120; 2 N. & M. 725: *Kingsbury* v. *Collins*, 4 Bing. 202: *Rodwell* v. *Phillips*, 9 M. & W. 505, where per Cur. growing fruit goes to the heir.

(*s*) *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88.

(*t*) 56 G. 3, c. 50, s. 7, see post, p. 850.

(*u*) See *Bagnall* v. *Villar*, 12 Ch. D. 812; 48 L. J., Ch. 695.

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withholden from such lands, or which by the tenor or effect of such covenants or agreements ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice before he shall have proceeded to sale. Sect. 2, in substance enacts, that the tenant shall give notice to the sheriff of the existence of such covenants, and of the name and residence of the landlord; that the sheriff shall give notice to the landlord and his steward of the seizure, and, in case of their absence or silence, shall postpone the sale as long as he lawfully can. By sect. 3, it is provided, that the sheriff may sell such produce, subject to an agreement to expend it upon the land according to the custom of the country, where no covenant or agreement, and according to such covenant or agreement if shown, and the vendee is to have the use of all such necessary barns, &c., as the tenant would have been entitled to, and the sheriff shall assign for that purpose (*x*). The sheriff, on being indemnified, is to allow the landlord to bring actions in his name for breach of the agreement (*y*). And the sheriff, before sale of any crops or produce, shall by all ways and means make inquiry as to the name and residence of the landlord (*z*). Also, no clover, rye-grass, or artificial grass newly sown, and growing under any crop of standing corn, shall be sold under process (*a*). Provided, that the Act is not to extend to articles which the tenant may remove consistently with some contract in writing (*b*). The Act also enacts that the sheriff shall not be liable for any breach or omission of its provisions, unless wilful (*c*), and indemnifies all persons acting under it (*d*).

As to distraining growing crops taken in execution for rent, *see* 14 & 15 *V. c.* 25, *s.* 2, *ante*, p. 844.

Stock and plant of a railway company.

As to the restriction on execution against the railway stock and plant of a company, *see Vol.* 2, *Ch. XCII.*

9. Whose property may be taken.

9. *Whose Property may be taken.*]—In all cases the sheriff must at his peril execute the writ only on the goods of the party therein mentioned; for, if he seize the goods of a stranger, he will be liable to an action (*e*); and this although they are in the possession of, and apparently belong to the defendant (*f*).

(*x*) 56 G. 3, c. 50, s. 3. See, as to the right to sell a distress subject to such conditions, *Frusher* v. *Lee*, 10 M. & W. 709.

(*y*) 56 G. 3, c. 50, s. 4.

(*z*) Id. s. 5.

(*a*) Id. s. 7.

(*b*) Id. s. 8.

(*c*) Id. s. 9.

(*d*) Id. s. 10. Sect. 11 provides that bill of sale holders, &c. shall not take produce, manure, &c. in any other way than the bankrupt, &c. would have been entitled to do. See *Wilmot* v. *Rose*, 3 El. & Bl. 563; 23 L. J., Q. B. 281. So far as this section relates to an assignee of an insolvent debtor, it is repealed by the Stat. Law Rev. Act, 1873, 36 & 37 V. c. 91, sched.

(*e*) Bro. Abr. "Trespass," 99: *Anon.*, Keilw. 119: *Ackworth* v. *Kempe*, 1 Doug. 40: *Sanderson* v. *Baker*, 2 W. Bl. 832; 3 Wils. 309. And see *Dawson* v. *Wood*, 3 Taunt. 256: *Smith* v. *Plomer*, 15 East, 607: *Ladbroke* v. *Crickett*, 2 T. R. 649: *Davies* v. *Jenkins*, 11 M. & W. 755; 1 D. & L. 321: *Jarmain* v. *Hooper*, 6 M. & G. 827: *Carnaby* v. *Welby*, 8 A. & E. 872; 1 P. & D. 98: *Lockly* v. *Pye*, 8 M. & W. 133; 9 Dowl. 744: *Harrison* v. *Dixon*, 12 M. & W. 142; 13 L. J., Ex. 247: *Catterall* v. *Kenyon*, 3 Q. B 311. Pending an interpleader application, an injunction restraining the sheriff from retaining possession will not be granted. *Hilliard* v. *Hanson*, 21 Ch. D. 69; 47 L. T. 342; 31 W. R. 151.

(*f*) See *Dawson* v. *Wood*, 3 Taunt. 256: *Edwards* v. *Bridges*, 2 Stark.

If the execution creditor or his solicitor direct or induce the sheriff to seize particular goods as the goods of the execution debtor, which are in fact the goods of a third party, and the sheriff accordingly seizes them, the solicitor and the execution creditor, if he gives the direction himself or authorizes his solicitor to do so (*g*), will be liable in trespass to the person whose goods are seized (*h*), and will also be liable to compensate the sheriff for any damages he may have been held liable to pay in consequence of the seizure (*i*). But the solicitor of the execution creditor has no implied authority to give any direction to seize particular goods, and it is a question of fact in each case whether such authority was given (*g*). In the absence of such authority the execution creditor is not liable. The usual indorsement that "the defendant is a ——— and resides at ———" amounts to no more than a statement for the convenience of the sheriff, and does not render the execution creditor or his solicitor liable if it is not correct (*k*), unless, indeed, it be made fraudulently; but a special and specific indorsement, leading the sheriff to seize the goods of the wrong person, will render the execution creditor liable to the person whose goods are seized (*l*). In the absence of any express direction or inducement, neither the execution creditor nor the solicitor is liable for the act of the sheriff in seizing (*m*); nor does the execution creditor, by appearing on an interpleader summons, and taking an issue, render himself liable for the act of the sheriff in seizing, should it be found that the goods belong to a third party (*n*).

Inquest as to property.

If the sheriff have any doubt whether the goods are the property of the defendant, he may impanel a jury to inquire in whom the

396: *Saunderson* v. *Baker*, 2 W. Bl. 832: *Manders* v. *Williams*, 4 Ex. 339; 18 L. J., Ex. 437: *Bradley* v. *Cooper*, 1 C. B. 685. See post, p. 857, as to when possession of goods by the defendant, after a sale of them by him, is evidence of the sale being fraudulent. A judgment creditor is not bound by an estoppel precluding the judgment debtor from claiming the goods seized under the judgment. *Richards* v. *Johnson*, 4 H. & N. 660; 28 L. J., Ex. 322.

(*g*) *Smith* v. *Keal* (C. A.), 9 Q. B. D. 340; 51 L. J., Q. B. 487; 47 L. T. 142.

(*h*) Per Cur. *Wilson* v. *Tumman*, 6 M. & Gr. 236: *Rowles* v. *Senior*, 8 Q. B. 677; 15 L. J., Q. B. 231: *Sedman* v. *Walker*, 1 Ex. 589: *Brown* v. *Ludham*, 6 M. & P. 169; 6 Sc. N. R. 934: *Buchanan* v. *Kinning*, 2 L. M. & P. 526, 537: *Power* v. *Fleming*, 4 Ir. R., C. L. 404.

(*i*) *Humphrys* v. *Pratt*, 5 Bli., N. S. 154: *Evans* v. *Collins*, 5 Q. B. 804. In *Caldback* v. *Boon*, 7 Ir. R., C. L. 32, where a sheriff, sued for a wrongful arrest, defended the action without communicating with the execution creditor, who was liable to indemnify him, it was held, in a subsequent action by the sheriff against the execution creditor, that, to entitle the sheriff to recover the costs of defending the former action, it should be submitted to the jury to say whether the course pursued in defending the former action was reasonable under all the circumstances of the case.

(*k*) *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129; 2 L. T. 49: *Evans* v. *Collins*, supra.

(*l*) *Jarmain* v. *Hooper*, 6 M. & Gr. 827. See per Cur. *Childers* v. *Wooler*, supra. And see *Smith* v. *Keal*, supra.

(*m*) *Sowell* v. *Champion*, 6 Ad. & El. 407. If he had received the proceeds of the levy he could probably be compelled to return them. See per Cur. *Woollen* v. *Wright*, 1 H. & C. at p. 562.

(*n*) *Wilson* v. *Tumman*, 6 M. & Gr. 236; 6 Sc. N. R. 894: *Wooler* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513: cp. *Walker* v. *Olding*, 1 H. & C. 621; 32 L. J., Exch. 142.

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property is vested (*o*), which will have the effect of indemnifying the sheriff in making a return of *nulla bona* (*p*), or will mitigate the damages in an action of trespass, if he have seized and sold the goods (*q*). The Court will not set aside such an inquisition (*r*).

Interpleader.

Or if, after the sheriff has seized the goods, a third person claim them, and the execution creditor still insist on his right to have them sold, the sheriff may interplead, and so get rid of his responsibility (*s*).

As to a third person taking his goods out of the sheriff's possession, after they have been improperly seized, *see Cooper* v. *Asprey* (*t*).

The following are the cases in which questions as to the rights of third parties to the goods are most likely to arise:—

Goods of husband or wife (*u*).

It seems that the goods of a woman cohabiting with the defendant cannot be taken in execution, although she passes for his wife (*v*), unless the circumstances would warrant a jury in finding that the property was given up by the woman to the defendant (*x*).

The sheriff may sell a term vested in a husband in right of his wife, upon an execution against the husband (*y*), unless it have been vested in trustees for the benefit of the wife before marriage. But goods vested in trustees before marriage, for the benefit of the wife, cannot be taken in execution for the husband's debt (*z*). Property settled to the separate use of a married woman cannot be taken under an execution against her husband's goods (*a*). And the savings and investments of a married woman, like the income itself, become her separate estate, and are protected (*a*). Where furniture was settled upon a married woman, and she, with the income of property which was also settled to her separate use, purchased new furniture from time to time as the original wore out, and the whole was seized under an execution against her husband, it was held that no part of it was liable (*a*). Where a testator

(*o*) Bro. Abr. "Trespass," 99: *Anon.*, Keilw. 119: *Farr* v. *Newman*, 4 T. R. 633, 641. As to the costs of the inquisition, see *Doe* d. *Holt* v. *Roe*, 4 M. & P. 177; 6 Bing. 447, where a party gave a cognovit for 357*l.* and a mortgage for payment of the sum due, and costs of the judgment, and all other costs and charges attending the same; and an execution being issued, an inquisition became necessary in consequence of the debtor denying certain goods to be his, which denial turned out to be false; the mortgagee, having paid the sheriff the costs of the inquisition, was held entitled to claim them as against the debtor.

(*p*) *Roberts* v. *Thomas*, 6 T. R. 88. But see *Glossop* v. *Poole*, 3 M. & Sc. 175, contra.

(*q*) Dalt. 146: *Ackworth* v. *Kempe*, 1 Doug. 40.

(*r*) *Roberts* v. *Thomas*, 6 T. R. 88: *Aylwin* v. *Evans*, 52 L. J., Ch. 105; 47 L. T. 568. See fully, post, Vol. 2, Ch. CXV.

(*s*) Post, Ch. CXXI.

(*t*) 3 B. & S. 932; 32 L. J., Q. B. 209; 8 L. T. 355; 11 W. R. 641; 9 Jur., N. S. 1198.

(*u*) As to the effect of the Married Women's Property Acts, and as to the effect of a judicial separation, or an order for protection obtained under the Divorce Acts, see Vol. 2, Ch. CI.

(*v*) *Edwards* v. *Bridges*, 2 Stark. Rep. 396. See *Glasspoole* v. *Young*, 9 B. & C. 696; 4 M. & Ryl. 533, in which case there was a void marriage.

(*x*) *Edwards* v. *Farebrother*, 3 Car. & P. 524; 2 M. & P. 293. And see *Langford* v. *Foot*, 2 M. & Sc. 349.

(*y*) *Farr* v. *Newman*, 4 T. R. 638.

(*z*) *Cadogan* v. *Kennett*, Cowp. 432: *Jarman* v. *Woolloton*, 3 T. R. 618. And see 2 Vern. 239: *Darby* v. *Smith*, 8 T. R. 82: *Nunn* v. *Wilsmore*, Id. 521: *Dewey* v. *Bayntun*, 6 East, 257: *Izod* v. *Lamb*, 1 C. & J. 35: *Duncan* v. *Cashin*, infra.

(*a*) *Duncan* v. *Cashin*, L. R., 10 C. P. 554; 44 L. J., C. P. 396.

bequeathed all his property to his daughter (a single woman), in terms amounting to a gift to her, for her separate use, and appointed her sole executrix; she married after her father's death; and a sum of stock, part of the property bequeathed to her, was assigned to trustees, in trust for her separate use for life, and if she survived her husband, in trust for her absolutely, and if not, then in trust as she should appoint by will, and subject thereto in trust for her husband; but the settlement did not notice any other part of the property: it was held that the husband did not become entitled in his marital right to the property remaining unsettled, but was a trustee of it for his wife, and, therefore, it could not be taken in execution under a judgment recovered against him (*b*). Where a husband and wife lived apart, and at the death of the wife she was possessed of cash and bank-notes arising from property settled to her separate use: it was held, that the husband was entitled to them in his marital right (*c*). It may be added, that, on a *fi. fa.* against the wife, who marries pending the action, the husband's goods cannot be taken (*d*).

Separate estate of married woman.

As to execution against the separate estate of a married woman, *see post, Vol.* 2, *Ch. CI.*

Goods of testator.

The goods of a testator or intestate cannot, in general, be taken in execution for the personal debt of the executor or administrator unless the executor or administrator has made the goods his own (*e*). Where an executrix used the goods of her testator as her own, and afterwards married, and then treated them as her husband's, it was held, that, as they had made the goods their own, they could not object to the same being taken in execution for the husband's debt (*f*).

Goods of partners (*g*).

Under a *fi. fa.* against one of two partners, the sheriff may and should seize sufficient of the goods of both (*h*), and sell the defendant's undivided moiety (*i*) irrespective of the state of the accounts between them: in which case the vendee will, it is said, be tenant

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(*b*) *Newlands* v. *Paynter*, 10 Sim. 377; 4 M. & Cr. 408.

(*c*) *Molony* v. *Kennedy*, 10 Sim. 254. See *Sloper* v. *Cottrell*, 6 E. & B. 497; 26 L. J., Q. B. 7: *Carne* v. *Brice*, 7 M. & W. 183; 8 Dowl. 884: *Tugman* v. *Hopkins*, 5 Sc. N. R. 464; 4 M. & G. 389. But see *Duncan* v. *Cashin*, supra. As to the effect of the Married Women's Property Acts, see Vol. 2, Ch. CI.

(*d*) *Doe* d. *Taggart* v. *Butcher*, 3 M. & Sel. 557. As to the liability of a husband for his wife's debts before marriage, see Vol. 2, Ch. CI.

(*e*) *Farr* v. *Newman*, 4 T. R. 621: *Quick* v. *Staines*, 1 B. & P. 293; 2 Esp. Rep. 657. See 1 Wms. Exors. 11th ed. p. 639: *Fenwick* v. *Laycock*, 1 G. & D. 532: *Sykes* v. *Sykes*, L. R., 5 C. P. 113; 39 L. J., C. P. 179, where the goods were in the hands of a person who was carrying on the testator's business as agent for the executor.

(*f*) *Quick* v. *Staines*, 1 B. & P. 293. See 1 Wms. Exors. 11th ed. 639: *Gaskell* v. *Marshall*, 1 M. & Rob. 132; 5 Car. & P. 31.

(*g*) See Lindley on Partnership, 4th ed. 618 *et seq.* As to the manner in which execution may issue against partners, see Ord. XLII. r. 10, post, Vol. 2, Ch. XCIII.

(*h*) *Johnson* v. *Evans*, 7 Sc. N. R. 1035; 1 D. & L. 935; 7 M. & G. 240: *Farrar* v. *Beswick*, 1 M. & W. 682.

(*i*) *Holmes* v. *Mentz*, 4 Ad. & El. 131: *Johnson* v. *Evans*, supra: *Jacky* v. *Butler*, 2 Ld. Raym. 871. As to the sheriff not being liable in trover for the mere sale of the whole, see *Mayhew* v. *Herrick*, 7 C. B. 229; 18 L. J., C. P. 179. See *Fraser* v. *Kershaw*, 25 L. J., Ch. 445, where one partner had become bankrupt, and a *fi. fa.* issued against the other.

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in common with the other partner (*k*). The seizure does not divest the other partner of his property or possession in the goods seized (*l*), nor has the sheriff any right to remove or take the property out of the possession of the other partner (*m*); therefore, when the sheriff enters and takes possession of partnership property, he seizes in execution only the interest of the defendant in the goods (*l*); and so, if after he has seized under a writ of *fi. fa.* against one partner, a second writ of *fi. fa.* be delivered to him against both partners, he cannot be considered to have seized under it until he has actually done so (*l*). And so, if the sheriff, after seizing the joint effects of two partners for the separate debt of one, should receive a *fi. fa.* requiring him to levy for the separate debt of the other, he cannot return *nulla bona* to the second writ without rendering himself liable to an action for a false return (*l*). There appears to be much doubt as to what interest in the partnership property can be sold by the sheriff and what is the proper course to be adopted (*n*). According to the modern practice at law the sheriff should sell for such interest as the defendant has as partner; not for the degree of right which he may be found to have on a winding up of the affairs, because if the sheriff waited till that could be ascertained, the goods might remain unsold for an indefinite time; he must, however inconvenient it may be, sell the share of the defendant partner, and make the purchaser tenant in common with the other partners, and the purchaser must do the best he can to ascertain what interest there is (*o*).

If no objection be raised by the co-partners this course may still be adopted. But the Court of Chancery would formerly, on a bill filed by the judgment debtor's co-partner against the judgment debtor, the judgment creditor and the sheriff for that purpose, have restrained the sheriff from selling, and appointed a receiver, and directed the partnership accounts to be taken (*p*); and under the present system some analogous process could no doubt be adopted. It appears that the sheriff could not, strictly speaking, interplead in such a case (*q*). But possibly, on an interpleader summons, an order could be made, at all events by consent, appointing a receiver (say one of the co-partners, if solvent), ordering the sheriff to withdraw, dissolving the partnership, and directing the partnership accounts to be taken before a Master, and ad-

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(*k*) *Eadie* v. *Davidson*, 2 Doug. 650: *Pope* v. *Hayman*, Comb. 217: *Heydon* v. *Heydon*, 1 Salk. 392. And see *Morley* v. *Strombom*, 3 B. & P. 254, 238: *Bachurst* v. *Clinkard*, 1 Show. 169: *Garbett* v. *Veale*, 5 Q. B. 408; 1 D. & M. 458; 13 L. J., Q. B. 98: *Johnson* v. *Evans*, supra: *Dutton* v. *Morrison*, 17 Ves. 193: *Taylor* v. *Fields*, 4 Ves. 396; Tidd, 9th ed. 1807.

(*l*) *Johnson* v. *Evans*, supra.

(*m*) Per *Patteson*, J., in *Burnell* v. *Hunt*, 5 Jur. 650, at p. 651.

(*n*) See Lindley on Partnership, 4th ed. 687, 692, 693. See *Burton* v. *Green*, 3 Car. & P. 306. And see the note there.

(*o*) See per Lord *Denman*, C. J., in *Holmes* v. *Mentz*, 4 A. & E. 131: *Heydon* v. *Heydon*, 1 Salk. 392: *Chapman* v. *Koops*, 3 B. & P. 289: per *Patteson*, J., in *Burnell* v. *Hunt*, 5 Jur. 650; Lindley on Partnership, 4th ed. 689.

(*p*) Seton on Decrees, 4th ed. 1214; Lindley, 4th ed. 690, 691: *Bevan* v. *Lewis*, 1 Sim. 376.

(*q*) Because the sheriff can only seize the debtor's interest in the assets, and the co-partners can have no claim to that: *Holmes* v. *Mentz*, supra: *Anon.*, W. N. 1875, 204; Bitt. No. xlix; Lindley, 4th ed. 693. See a note by the learned L. J. in Seton on Decrees, 4th ed. 1214.

journing the further hearing until this was done. After the accounts were taken, the receiver should be directed to sell the debtor's share of the partnership, and out of the proceeds to pay the debts and costs, and to pay the balance, if any, to the judgment debtor. The other partner might buy in the debtor's share if he were able and willing to do so. In view of the difficulty as to the power of the sheriff to interplead and the power to make such an order, it will probably be necessary, in the absence of consent, for the co-partner to commence an action for the purpose, the sheriff's time for returning the writ being meantime enlarged; but, considering the expense, delay and inconvenience of such a course, the parties should, in most cases, consent to an order being made.

Where a *fi. fa.* was issued against one of two partners, and, while the sheriff was in possession, a fiat in bankruptcy issued against the firm, the sheriff, under an arrangement (the validity of which was afterwards questioned), allowed the messenger under the commission to take possession of the goods; the messenger kept possession accordingly, and the goods were sold by the assignees, who received the proceeds; the execution creditor sued them for money had and received: it was held, that even if the sheriff had sold the interest of the partner against whom execution issued, an account of the partnership liabilities must have been taken before the execution creditor could have sued for money had and received, and that he had no right of action (*r*).

Goods of bankrupts.

As to the effect of bankruptcy on an execution, and as to execution against the goods of bankrupts, *see Vol.* 2, *Ch. CII.*

Goods of companies being wound up.

As to when executions against the property of a company being wound up under 25 & 26 *V. c.* 89, are void, *see that Act*, *Vol.* 2, *Ch. XCII.*

Goods of surviving defendants.

If there be two or more defendants, and one of them die after final judgment, and before the issuing of the *fi. fa.*, it can be executed on the goods of the survivors only (*s*). As to execution after the death of a sole plaintiff or defendant, *see Vol.* 2, *Ch. LXXXVIII.*

Goods of ambassadors.

The goods or chattels of ambassadors and other envoys of foreign princes or states at this Court, and of their domestics and domestic servants, are privileged from being taken in execution (*t*).

Goods of clergymen.

The goods ecclesiastical of clergymen cannot be seized by the sheriff (*u*).

Goods distrained.

Goods distrained, being in the custody of the law, cannot be seized in execution (*x*).

Goods in possession of receiver.

When a receiver has been appointed by the Court and has taken possession, his possession is the possession of the Court, and the sheriff has no right, without leave of the Court, to seize goods

(*r*) *Garbett* v. *Veale*, 5 Q. B. 408. See *Fraser* v. *Kershaw*, 25 L. J., Ch. 445, where one of two partners became bankrupt, and a *fi. fa.* issued against the other.

(*s*) 2 Saund. 50 a, 72 k, o. As to the form of the writ in such a case, see ante, p. 796. As to obtaining leave to issue execution against a person not a party to the judgment, see Vol. 2, Ch. LXXXIV.

(*t*) 7 Anne, c. 12, s. 3. See Ch. CXXVII.

(*u*) 2 Inst. 472: *Walwyn* v. *Awberry*, 2 Mod. 257, Case 146. See further, Vol. 2, Ch. CIII.

(*x*) Bro. Abr. "Pledges," 28; Dy. 67 b, in marg.; Com. Dig. "Execution" (C), 3: *Reddell* v. *Stowey*, 2 M. & Rob. 358. And see *Turner* v. *Ford*, 15 M. & W. 212; 15 L. J., Ex. 215.

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in his possession (*y*), and will be guilty of a contempt of Court if he do so after notice of the receiver's appointment (*z*). If the receiver, although nominated, has not taken possession, the sheriff may seize without being guilty of any contempt (*a*). Before the Judicature Acts it was held that the sheriff could not call on the receiver and the creditor to interplead either at law (*b*) or in equity (*c*). In one case (*b*) where he attempted to do so he was restrained from doing so and ordered to withdraw and pay the costs, and the creditor was restrained from proceeding against him. Since the Judicature Acts, the sheriff has in some cases been allowed to interplead by taking out a summons in the Division of the Court by whom the receiver was appointed (*d*). The execution creditor may in proper cases obtain leave from the Court appointing the receiver to proceed with his execution (*e*).

Goods let or pawned, &c.

The sheriff may seize goods which are let to the defendant, but can only sell his interest therein. If he sell the same absolutely so as to determine the bailment he will be liable to an action of trover, and this before the letting has expired (*f*). Goods upon which the defendant has a lien cannot be taken in execution against his goods (*g*). Goods of the defendant, pawned or leased to another, may be sold, subject to the right of the pawnee or lessee, but cannot be seized before the end of the bailment or term (*h*). And if a party having a lien on goods causes them to be taken in execution at his own suit, he loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises (*i*).

By the terms of a railway contractor's contract, the plant and materials brought by him upon the railway company's land were immediately to become the absolute property of the company, but they were to remain under the dominion of the contractor, and if he duly completed his contract, the company were to give to him,

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(*y*) *Russell* v. *East Anglian R. Co.*, 3 Mac. & G. 104; 20 L. J., Ch. 257.

(*z*) Id.: *Lane* v. *Sterne*, 3 Giff. 629.

(*a*) *Defries* v. *Creed*, 34 L. J., Ch. 607.

(*b*) *Russell* v. *East Anglian R. Co.*, supra.

(*c*) *Rock* v. *Cook*, 2 Phil. 691: *Trye* v. *Trye*, 13 Beav. 422, 20 L. J., Ch. 368.

(*d*) Cp. Ord. LVII. r. 14.

(*e*) *Russell* v. *East Anglian R. Co.*, supra.

(*f*) *Fenn* v. *Bittleston*, 7 Ex. 152; 21 L. J., Ex. 41: *Bradley* v. *Copley*, 1 C. B. 685; 14 L. J., C. P. 222: *Cooper* v. *Willomatt*, 1 C. B. 672; 14 L. J., C. P. 219, sed quære. An action does not lie against the sheriff for selling the reversionary interest in goods let to the execution debtor, unless actual damage has been sustained. *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362: *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J., Ex. 231.

(*g*) *Legge* v. *Evans*, 6 M. & W. 36; 8 Dowl. 177. See *Squire* v. *Huetson*, 1 Q. B. 308: *Balls* v. *Thick*, 9 Jur. 304, Q. B., H. T. 1845. As to goods pawned with the defendant being taken in execution, see *Legge* v. *Evans*, 6 M. & W. 36, per *Parke*, B.: *Squire* v. *Huetson*, supra, per *Littledale*, J.: Com. Dig. "Execution" (C), 4. As to the pawnee of a chattel losing his property in it by parting with the possession of it, see *Reeves* v. *Capper*, 6 Sc. 877; 5 Bing. N. C. 136, per Cur. As to a pledgee impliedly contracting to return the property to the pledgor, see *Cheesman* v. *Exall*, 6 Ex. 341; 20 L. J., Ex. 209. It seems that goods pawned with a defendant, and which he has power to sell, may be seized and sold.

(*h*) *Rogers* v. *Kennay*, 9 Q. B. 592: *Scott* v. *Scholey*, 8 East, 476: *Proctor* v. *Nicholson*, 7 Car. & P. 67.

(*i*) *Jacobs* v. *Latour*, 5 Bing. 130; 2 M. & P. 201.

as part of his payments, the unconsumed materials; and if instead of the contractor the company used the plant and materials, they were to compensate him in respect of them; the solicitors of the company obtained judgment against the company for their costs, and issued execution, and the sheriff levied upon the plant and materials provided by the contractor: held, that the plant and materials were not, by the terms of the contract, so absolutely the property of the company as to be seizable by the sheriff under the execution issued by the company's solicitors (*j*).

Ship mortgaged.

Where a ship has been mortgaged for a debt, a creditor who has got judgment against the registered owner of the ship cannot take and sell the ship in execution, for to do so would defeat the rights of the mortgagee to make the ship available as a security for his debt, given him by the *Merchant Shipping Act*, 1854 (*k*).

Goods assigned or mortgaged.

Goods which the execution debtor has validly assigned to another person *bonâ fide*, and without notice of the writ being in the sheriff's hands, cannot be seized, though the assignment be by way of mortgage only: nor can the sheriff be compelled to seize such goods even though their value exceeds the sum secured by the mortgage, and the execution creditor might realise something if a sale were ordered under *Ord. LVII. r.* 12, on an interpleader issue (*l*).

Goods fraudulently assigned.

The sheriff may in some cases when the defendant has sold or assigned his goods and chattels before the writ is executed, seize and sell them, notwithstanding such sale or assignment. As to when he can do this, when the sale is after the teste of the writ, or after the delivery of the same to the sheriff to be executed, *see ante*, p. 804. If the assignment, &c. were made before the delivery of the writ to the sheriff, but *fraudulently* for the purpose of delaying, hindering or defrauding present or future (*m*) creditors, it will be void as against them under the statute 13 *Eliz. c.* 5 (*n*). The fact, that there was no consideration, or no valuable one, for the assignment, as, if it was made in consideration of natural love and affection, is evidence of fraud (*o*). So, continuance

(*j*) *Beeston* v. *Marriott*, 9 Jur., N. S. 960; 8 L. T., N. S. 690—V.-C. S.; 4 Giff. 436. See *Brown* v. *Bateman*, 36 L. J., C. P. 134: *Reeves* v. *Barlow*, 12 Q. B. D. 436.

(*k*) *Dickinson* v. *Kitchen*, 8 El. & Bl. 789: S. C. nom. *Kitchen* v. *Irvine*, 28 L. J., Q. B. 46; 5 Jur., N. S. 118.

(*l*) *Scarlett* v. *Hanson* (C. A.), 12 Q. B. D. 213; 53 L. J., Q. B. 62; 50 L. T. 75; 32 W. R. 310.

(*m*) *Graham* v. *Furber*, 14 C. B. 134; 23 L. J., C. P. 51: *Baring* v. *Bishopp*, 29 Beav. 417; 6 Jur., N. S. 812: *Ware* v. *Gard*, *Freeman* v. *Pope*, L. R., 5 Ch. 538; 39 L. J., Ch. 689: *In re Pearson*, *Ex p. Stephens*, 3 Ch. D. 807.

(*n*) 13 Eliz. c. 5; 29 Eliz. c. 5; 3 H. 7, c. 4; 50 Ed. 3, c. 6; 2 R. 2, st. 2, c. 3: *Gale* v. *Williamson*, 8 M. & W. 405: *Scarfe* v. *Halifax*, 7 M. & W. 288: *Reed* v. *Thoyts*, 6 M. & W. 410: *Imray* v. *Magnay*, 11 M. & W. 275, per *Parke*, B.: *Bessey* v. *Windham*, 6 Q. B. 166: *Bulmer* v. *Hunter*, L. R., 8 Eq. 46, ante-nuptial settlement: *Ware* v. *Gardner*, L. R., 7 Eq. 317, post nuptial settlement: *Cornish* v. *Clark*, L. R., 14 Eq. 184. And see *Twyne's case*, 3 Coke, 80; 1 Smith's Leading Cases, and cases there cited. As to what indebtedness will raise the presumption of fraudulent intention, see *Freeman* v. *Pope*, supra: *Crossley* v. *Elworthy*, L. R., 12 Eq. 158: *Mackay* v. *Douglas*, L. R., 14 Eq. 106: *Kent* v. *Riley*, L. R., 13 Eq. 190: *Taylor* v. *Coenen*, 1 Ch. D. 636; cp. *Middleton* v. *Pollock*, 2 Ch. D. 104.

(*o*) *Freeman* v. *Pope*, L. R., 5 Ch. 538; 39 L. J., Ch. 689: *Gale* v. *Williamson*, 8 M. & W. 405. If it does not appear upon the assignment that there was a valuable consideration

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in possession of goods and chattels by a vendor, after the execution of a bill of sale, is a badge and evidence of fraud (*p*), but not conclusive evidence of it (*q*); therefore, if the possession be consistent with the deed (*r*), as, if it be a mortgage, and, by its terms, the debtor is to remain in possession until default (*s*), or a marriage settlement under which the debtor takes an equitable interest for life (*t*), or if the sale be notorious, as, if it be made publicly by a sheriff under an execution (*u*), or by public auction (*x*), or if it be made with the knowledge and assent of the person who seeks to impugn it (*y*), the assignment is in general valid, though the vendor or original owner remain for some time in possession (*z*). A sale for valuable consideration is not fraudulent and void, merely because it is made with the intention to defeat an expected execution (*a*). Where A. made a fraudulent bill of sale of goods to B., who subsequently in the presence and with the sanction of A., but without his being a party to it, assigned to C., *bond fide*, and for a valuable consideration; and the actual possession of the goods throughout remained in A., it was held that the second bill of sale was not affected by the fraud in the first, and that therefore C.'s assignment was protected against the creditors of A. (*b*). Where the plaintiff with

for making it, evidence may be given aliunde to prove such fact, for the purpose of rebutting the presumption of fraud. And see per *Rolfe*, B. (*S. C.*):—"It is a mistake to suppose that the statute makes void, as against creditors, all voluntary deeds. All that it says is, that a practice of making covinous and fraudulent deeds had prevailed, and, therefore, that all feoffments, gifts, &c. of any lands or goods and chattels, as against the person whose actions, debts, &c. by such covinous and fraudulent devices and practices, shall be disturbed, hindered, delayed, or defrauded, shall be void. The Courts, in construing the statute, have held it to include deeds made without consideration, as being *primâ facie* fraudulent, because necessarily tending to delay creditors. But the question in each case is, whether the deed is fraudulent or not: and to rebut the presumption of fraud, the party is surely at liberty to give in evidence all the circumstances of the transaction: not to contradict the consideration stated in the deed, but to take it out of the operation of the statute." See *Twyne's case*, 3 Co. 80; 1 Smith, Leading Cases, and the cases there cited. As to what conveyances are voluntary, see *Smith* v. *Cherrill*, L. R., 4 Eq. 300, collateral relations: *Ware* v. *Gardner*, L. R., 7 Eq. 317, post nuptial settlement.

(*p*) *Twyne's case*, 3 Rep. 80: *Edwards* v. *Harben*, 2 T. R. 587: *Woodall* v. *Smith*, 1 Camp. 333: *Paget* v. *Perchard*, 1 Esp. 205.

(*q*) *Martindale* v. *Booth*, 3 B. & A. 498: *Cum* v. *Burdiss*, 1 C. M. & R. 787: *Eastwood* v. *Brown*, R. & M. 312.

(*r*) Id. And see *Reed* v. *Wilmot*, 7 Bing. 577. See *Reeves* v. *Capper*, 5 Bing. N. C. 136; 6 Sc. 877, per *Tindal*, C. J.

(*s*) *Martindale* v. *Booth*, 3 B. & Ad. 498: *Minshall* v. *Lloyd*, 2 M. & W. 450: *Wooderman* v. *Baldock*, 8 Taunt. 676: *Alton* v. *Harrison*, L. R., 4 Ch. 622, 626; 38 L. J., Ch. 669.

(*t*) *Cadogan* v. *Kennett*, Cowp. 432.

(*u*) *Latimer* v. *Batson*, 4 B. & C. 652; 7 D. & R. 106: *Kidd* v. *Rawlinson*, 2 B. & P. 59.

(*x*) *Leonard* v. *Baker*, 1 M. & Sel. 251: *Jezeph* v. *Ingram*, 1 Moore, 189. And see *Guthrie* v. *Wood*, 1 Stark. 367.

(*y*) *Steele* v. *Brown*, 1 Taunt. 381.

(*z*) See the cases above cited. And see the notes to *Twyne's case*, 3 Rep. 80, Smith's Leading Cases, 1.

(*a*) *Wood* v. *Dixie*, 7 Q. B. 892: *Hale* v. *Metropolitan Saloon Omnibus Co.*, 4 Drew. 496; 28 L. J., Ch. 777: *Darvill* v. *Terry*, 6 H. & N. 807; 30 L. J., Ex. 355: *Alton* v. *Harrison*, L. R., 4 Ch. 622; 38 L. J., Ch. 669: *Johnson* v. *Osenton*, L. R., 4 Ex. 107, 114. See *Ex p. Stubbins*, *In re Wilkinson*, 17 Ch. D. 58.

(*b*) *Morewood and Bayne* v. *South Yorkshire Rail. and River Dun Co.*, 3 H. & N. 801; 28 L. J., Ex. 114.

the privity of the defendant, who was one of his creditors, assigned and delivered certain goods to A. in order to defeat his creditors generally, and the defendant, without the knowledge of the plaintiff, obtained a bill of sale of the goods from A., and under this bill of sale took possession of the goods, and before any fraud was accomplished upon the creditors, the plaintiff claimed the goods from the defendant: it was held that he was not estopped by his fraudulent assignment from claiming the property in the goods (*c*).

An existing debt will form a sufficient consideration to support a *bonâ fide* conveyance of the whole of a debtor's property against an execution creditor, though such conveyance operate as an act of bankruptcy (*d*). So a bill of sale of the whole of the grantor's property, present as well as future, to secure an existing debt, and present advances (*e*), or future advances (*d*), is not, in the absence of an intention to defeat the grantor's creditor, void under the statute (*d*).

The statute of *Eliz.* does not affect a *bonâ fide* assignment to certain creditors (*f*), or to a trustee for the benefit of his creditors, made by the debtor or his personal representatives (*g*), so as to give them a preference (*h*), even though it provides for the debtor retaining possession of the property (*i*), whatever the effect of such a conveyance may be in bankruptcy (*k*). Such an assignment was not prevented from operating as a conveyance by the fact that it was intended to take effect under sect. 192 of the *Bankruptcy Act*, 1861, but was ineffectual for that purpose by reason of the want of the requisite assents (*l*).

Where debtors in insolvent circumstances executed a deed by which they conveyed all their estate to trustees, on trust to sell in such manner as they might think proper, and to divide the residue of the proceeds, after paying expenses, rateably among the creditors parties to the deed, and, if the trustees thought fit, creditors who refused or neglected to execute, and if the trustees thought proper but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors, and the deed provided for the payment of maintenance to the debtors if the trustees thought fit, and the executing creditors respectively indemnified the debtors and the trustees in respect of the bills of exchange and promissory

(*c*) *Taylor* v. *Bowers*, 46 L. J., Q. B. 39.

(*d*) *Ex p. Games, In re Bamford* (C. A.), 12 Ch. D. 314; 42 L. T. 789; 27 W. R. 744: *Allen* v. *Bonnett*, infra: *Alton* v. *Harrison*, L. R., 4 Ch. 622, 626; 38 L. J., Ch. 669.

(*e*) *Allen* v. *Bonnett*, L. R., 5 Ch. 577; 23 L. T. 437.

(*f*) *Alton* v. *Harrison*, supra.

(*g*) *Wolverhampton, &c. Banking Co.* v. *Marston*, 7 H. & N. 148.

(*h*) *Alton* v. *Harrison*, L. R., 4 Ch. 622; 38 L. J., Ch. 669: *Middleton* v. *Pollock*, 2 Ch. D. 104: *Pickstock* v. *Lyster*, 3 M. & S. 371: *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47: *Johnson* v. *Osenton*, L. R., 4 Ex. 107. See *S. C.* in bank., L. R., 4 Ch. 690. See *Hartland* v. *Binks*, 15 Q. B. 713; 20 L. J., Q. B. 126, where A. executed *bonâ fide* a deed of assignment of all his property to B., in trust for such of A.'s creditors as should come in and execute the deed; and B. (who was not a creditor of A.) took possession, and C., a creditor of A., applied to B. for an explanation, and, having received one, said he was satisfied, and took no step to obtain payment; and it was held, that enough had taken place to create the relation of trustee and *cestui que trust* between B. and C., and consequently that the deed was not void against an execution creditor as being voluntary.

(*i*) *Alton* v. *Harrison*, supra.

(*k*) Id. See *Ex p. Osenter, In re Prior*, L. R., 4 Ch. 690.

(*l*) *Johnson* v. *Osenton*, supra.

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notes made or indorsed to th[illegible] respectively by the debtors in respect of the scheduled debts, it was held that the deed was not void under 13 *Eliz. c.* 5 (*l*).

But in a case where a debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees on trust to carry on his business, or get in and realize his estate in the manner they might deem expedient, and apportion the residue of the proceeds, after payment of expenses, &c., according to an equal pound rate among his creditors, and it was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed; and that, if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor, and the deed also provided that the executing and assenting creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful negligence or default, by reason of the proceedings under the deed: it was held, that the deed was fraudulent and void under the statute, as tending to defeat or delay creditors (*m*).

Assignment of interest in future chattels.

After-acquired chattels may be assigned, and a contract to assign operates as an actual assignment (*n*); but in order that a mere contract should amount to an actual assignment, it must purport to confer an interest in the future chattels immediately by its own force, and without the necessity of any further act on the part of the assignee upon the future chattels coming into existence; and, therefore, an assignment of existing chattels, coupled with words which amount to a mere licence to seize after-acquired property, will not be construed as an equitable assignment of the latter (*o*).

Registration under Bills of Sale Act.

In cases of assignments, being bills of sale within the meaning of the Bills of Sale Acts, 1878 and 1882 (41 & 42 *V. c.* 31, and 45 & 46 *V. c.* 43), the assignment must be registered as required by the provisions of those statutes. It does not fall within the province of the present work to discuss those provisions, and the practitioner is referred to the excellent work of Mr. Herbert Reed on the subject, and the various other editions of the Acts.

10. Several writs, priority of, &c.

10. *Several Writs—Priority of, &c.*]—If two or more writs of *fi. fa.* against the same person are delivered to the sheriff, he must *execute* them *all*, giving priority to each in the order in which they came into his hands (*p*). So that when three writs were delivered

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(*l*) *Boldero* v. *London and Westminster Loan, &c. Co.*, 5 Ex. D. 47; 42 L. T. 56; 28 W. R. 164.

(*m*) *Spencer* v. *Slater*, 4 Q. B. D. 13; 48 L. J., Q. B. 204. It will be observed, that the deed in this case was very special and unusual in its terms, and it was distinguished on these grounds in the preceding case.

(*n*) *Holroyd* v. *Marshall*, 10 H. L. 191; 33 L. J., Ch. 193: *Leatham* v. *Amor*, 47 L. J., Q. B. 581.

(*o*) *Reeve* v. *Whitmore*, *Martin* v. *Whitmore*, 4 De J. & S. 1; 33 L. J., Ch. 63. But the chattels must be specifically described. *Belding* v. *Read*, 3 H. & C. 955; 34 L. J., Ex. 212, where after-acquired property was held not to pass. *In re Count D'Epineuil*, 20 Ch. D. 758; 47 L. T. 157: *Lazarus* v. *Andrade*, 5 C. P. D. 318; 49 L. J., C. P. 847: *Leatham* v. *Amer*, 38 L. T. 785; 47 L. J., Q. B. 581: *Clements* v. *Mathews*, 47 L. T. 251; reversed on another point, 11 Q. B. D. 808; 52 L. J., Q. B. 772: *Reeves* v. *Barlow*, 12 Q. B. D. 436: *Brown* v. *Bateman*, L. R., 2 C. P. 272; 36 L. J., C. P. 135.

(*p*) *Dennis* v. *Whetham*, L. R., 9 Q. B. 345; 43 L. J., Q. B. 129. See per *Cockburn*, C. J., L. R., 9 Q. B. at p. 347. See further, *Hobson* v. *Thelluson*, and cases cited ante, p. 810.

to the sheriff, and the amount to be levied on the first two exceeded the value of the goods seizable, but they were both set aside, he was held liable for not seizing under the third (*q*). He must give priority to that which was first delivered to him, although the delivery took place upon the same day (*r*); that is to say, he must apply the proceeds of any sale under them in satisfaction of that writ first which was first delivered to him (*s*); for when the sheriff seizes the goods, they are in point of law in his custody under all the writs which he then has; and when he sells, he does so also in point of law under all such writs (*t*). If the sheriff, when the second writ is delivered to him, has seized goods under the first, he may be said, immediately upon the delivery of the latter writ, to have seized the goods under that also (*u*). But if the first writ, or the possession held under it, be fraudulent, or be set aside (*x*), or withdrawn (*y*), or suspended (*z*), or be void as against assignees under the bankrupt laws (*a*), the second should have priority (*b*). So, where goods seized under a writ, founded upon a judgment fraudulent against creditors, remain in the hands of the sheriff, or are capable of being seized by him, he is compellable, under the 13 *Eliz. c.* 5, to seize and sell such goods, under a writ afterwards received by him, and founded on a *bonâ fide* debt; and if he neglect to do so, having notice (*c*) of the fraud, and return *nulla bona* to the latter writ, he is liable to an action for a false return (*d*). And so, where a writ

(*q*) See note (*p*), supra.

(*r*) *Hutchinson* v. *Johnston*, 1 T. R. 729. See *Sawle* v. *Paynter*, 1 D. & R. 307: *Hunt* v. *Hooper*, 1 D. & L. 626.

(*s*) *Drewe* v. *Lainson*, 11 A. & E. 529; 3 P. & D. 245. And see *Barrack* v. *Newton*, 1 Q. B. 525; 1 G. & D. 153.

(*t*) *Drewe* v. *Lainson*, supra. And see *Heenan* v. *Evans*, 4 Sc. N. R. 2; 1 Dowl., N. S. 204: *Wintle* v. *Freeman*, 11 A. & E. 548, per *Patteson*, J.: *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554: *Hutchinson* v. *Johnston*, 1 T. R. 729: *Jones* v. *Atherton*, 7 Taunt. 56; 2 Marsh. 375. If the sheriff sells goods seized under the same writ on different days, all the sales will be considered as one transaction. *Ex p. Villars*, *In re Rogers*, L. R., 9 Ch. 432; 43 L. J., Bk. 76.

(*u*) *Chambers* v. *Coleman*, 9 Dowl. 588. See *Bachurst* v. *Clinkard*, 1 Show. 169. And see *Johnson* v. *Evans*, ante, p. 853, as to seizure of partnership goods.

(*x*) *Saunders* v. *Sheriff of Middlesex*, 3 B. & Ald. 95. See *Goldschmidt* v. *Hamlet*, 6 Sc. N. R. 962: *Congreve* v. *Evetts*, 10 Ex. 298; 23 L. J., Ex. 273.

(*y*) See *Burr* v. *Freethy*, 1 Bing. 71.

(*z*) *Hunt* v. *Hooper*, 12 M. & W. 664; 1 D. & L. 626: *Withers* v. *Parker*, 28 L. J., Ex. 292; 29 L. J., Ex. 320.

(*a*) See Vol. 2, Ch. CII. See *Congreve* v. *Evetts*, supra.

(*b*) *Bradley* v. *Wyndham*, 1 Wils. 44: *Lovick* v. *Crowder*, 8 B. & C. 182; 2 M. & Rob. 84: *Pringle* v. *Isaac*, 11 Price, 445: *Kempland* v. *M'Cauley*, Peake, 65: *Warmoll* v. *Young*, 5 B. & C. 660; 8 D. & R. 442: *Chambers* v. *Coleman*, 9 Dowl. 593. See *Payne* v. *Drew*, 4 East, 523: *Barber* v. *Mitchell*, 2 Dowl. 577: *Dennis* v. *Whetham*, 43 L. J., Q. B. 129. A creditor allowing goods seized under a *fi. fa.* to remain long in the debtor's hands, is evidence of fraud. *West* v. *Skip*, 1 Ves. sen. 244: *Imray* v. *Magnay*, 11 M. & W. 272, per *Parke*, B. As to the Court interfering summarily in case of a fraudulent execution, see ante, p. 834.

(*c*) Notice to the sheriff's officer after the delivery of the writ to him is notice to the sheriff. *Imray* v. *Magnay*, 11 M. & W. 272, per *Parke*, B.

(*d*) *Imray* v. *Magnay*, 11 M. & W. 276; 2 Dowl., N. S. 531; and per *Parke*, B.—"The judgment is by the statute made void against creditors, but by implication is void against a sheriff who acts in right of a creditor, as a deed which is fraudulent against creditors." *Christopherson* v. *Burton*,

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of *fi. fa.* is delivered to the sheriff, with directions to suspend the execution, and in the meantime another writ is delivered by another creditor, the sheriff is bound to levy under the latter writ in preference to the former, although the former writ was not delivered with any fraudulent intent to protect the goods of the debtor (*e*). Where a writ of execution was delivered to the sheriff at the suit of A., but was not executed before it was returnable, and A. therefore sued out an *alias*, but before it could be delivered to the sheriff, an execution against the same party at the suit of B. was left at the sheriff's office; the Court held that B.'s writ was entitled to priority (*f*). The goods are bound by the second writ from the date of the delivery of it to the sheriff, subject, of course, to the first execution (*g*). If the sheriff, contrary to his duty, execute the second writ first, the execution and sale will be valid, and bind the sheriff; and the party who sued out the first must have recourse to his action against the sheriff, if he be thereby damnified (*h*). If two writs against the same defendant are, at different times, delivered to the sheriff, and he sell under the same, and the defendant then apply to the Court that the money produced by the sale be paid over to him upon the ground of the first execution being bad, the sheriff, in showing cause against the application, should inform the Court of the fact of his having the second writ in his possession; otherwise, if he be ordered to pay over the money to the defendant, and do so, he will be liable to the party who sued out the second execution for the money so paid over (*i*). Where one solicitor was employed by six several plaintiffs in various actions against one defendant, in each of which judgment was obtained, and a writ of execution issued, and the whole of the writs were delivered to the sheriff for execution at one time, and in one bundle; the Court refused, upon application by the sheriff, to compel the plaintiffs or their solicitor to direct in what priority the writs should be executed (*k*). As to the sheriff's return to a *fi. fa.*, when he has seized under several writs, *see post*, p. 864.

When execution from a County Court.

By 19 & 20 *V. c.* 108, *s.* 47, "When a writ against the goods of a party has issued from a superior Court, and a warrant against the goods of the same party has issued from a County Court, the right to the goods seized shall be determined by the priority of the time of the delivery of the writ to the sheriff to be executed, or of the application to the registrar for the issue of the warrant to be executed, and the sheriff, on demand, shall, by writing, signed by any clerk in the office of the under-sheriff, inform the high bailiff of the precise time of such delivery of the writ, and the bailiff, on

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3 Ex. 160; 18 L. J., Ex. 60: *Shattock* v. *Carden*, 6 Ex. 725; 2 L. M. & P. 466; 21 L. J., Ex. 200. But see *Remmett* v. *Lawrence*, 15 Q. B. 1004; 20 L. J., Q. B. 25: *Turvel* v. *Tipper*, Latch, 222. See *Warmoll* v. *Young*, 5 B. & C. 660: *Kempland* v. *Macauley*, Peake, 65.

(*e*) *Hunt* v. *Hooper*, 1 D. & L. 626; 12 M. & W. 664; 13 L. J., Ex. 183; and cases there cited.

(*f*) MS., M. 1815.

(*g*) *Chambers* v. *Coleman*, 9 Dowl. 593; *Jones* v. *Atherton*, 7 Taunt. 56; 2 Marsh. 735. And see *Cleghorn* v. *Desanges*, 3 Moore, 83; Gow, 66.

(*h*) *Smalcomb* v. *Buckingham*, Carth. 419: *Payne* v. *Drew*, 4 East, 523; 1 Salk. 319: *Rybot* v. *Peckham*, 1 T. R. 731, n.; 2 Bac. Abr., "Execution" (D): *Hunt* v. *Hooper*, supra, n. (*e*).

(*i*) *Saunders* v. *Bridges*, 3 B. & Ald. 95.

(*k*) *Ashworth* v. *The Earl of Uxbridge*, 2 Dowl., N. S. 377.

demand, shall show his warrant to any sheriff's officer, and such writing purporting to be so signed, and the indorsement on the warrant, shall respectively be sufficient justification to any high bailiff or sheriff acting thereon."

11. *From what Time it binds Defendant's Property.*]—As to this, *see ante*, p. 804. 11. From what time it binds, &c.

12. *When and how returned.*]—We have already noticed (*ante*, pp. 815 *et seq.*) when it is necessary to return a writ of execution, and when and how the sheriff may be compelled to return it in general, and how the return is to be made. As to how the sheriff should act in the case of adverse claim, *see Vol.* 2, *Ch. CXXI.* Pending an interpleader issue as to the property in goods seized by a sheriff under a writ of *fi. fa.*, the execution creditor has no absolute right to an immediate return of the writ (*l*). 12. When and how returned.

The sheriff should make a true return. If the party against whom the *fi. fa.* issued has no goods in the sheriff's bailiwick liable to be levied under it, or if the sheriff has no knowledge of any, he should return *nulla bona* (*m*). So, if the party has no goods, whereof the sheriff can cause to be levied any part of the amount of the execution, he may make that return. So, he should return *nulla bona* if the proceeds of the goods seized under the writ have been exhausted by payment of rent under 8 *Ann. c.* 14 (*n*), or by satisfying a prior writ (*o*), or the expenses of execution and sheriff's poundage; for there are in these cases no goods to satisfy the writ which he has to execute. If the proceeds are more than sufficient to satisfy the year's rent, or the prior writ, then a special return can be made as to the residue (*p*). It seems a return of *nulla bona* is good, if the debtor was a bankrupt at the time of the issuing of the *fi. fa.*, although the bankruptcy was superseded after the return for some ground which did not render it originally void (*q*). If What return sheriff should make.

(*l*) *Angell* v. *Baddeley*, 3 Ex. D. 49; 47 L. J., Q. B. 86. A sheriff having seized certain goods under a writ of *fi. fa.*, three different persons put in claims to separate portions of the goods. The sheriff interpleaded, and three separate interpleader orders were made. One of the claimants in pursuance of the order paid into Court the value of the goods claimed by him to an amount sufficient to answer the debt. The other two claimants disobeyed the order, but the sheriff, instead of selling the goods claimed by them, abandoned possession of the whole. The plaintiff thereupon obtained a side-bar rule calling on the sheriff to return the writ:—Held, affirming the judgment of the Queen's Bench Division, that the plaintiff had no right to such return, and that the side-bar rule ought to be set aside.

(*m*) See *Wintle* v. *Freeman*, infra: *Heenan* v. *Evans*, infra: *Drewe* v. *Lainson*, 11 A. & E. 529; 3 P. & D. 245. See form, Chit. Forms, p. 409.

(*n*) *Wintle* v. *Freeman*, 11 A. & E. 539; 1 G. & D. 93: *Heenan* v. *Evans*, 4 Sc. N. R. 2; 1 Dowl., N. S. 204. See *Reynolds* v. *Barford*, 7 M. & Gr. 449; 13 L. J., C. P. 177: *Levy* v. *Hale*, 29 L. J., C. P. 127. The stat. is c. 18 in the Revised Statutes.

(*o*) *Wintle* v. *Freeman*, supra: *Heenan* v. *Evans*, supra: *Drewe* v. *Lainson*, 11 A. & E. 529; 2 P. & D. 245: *Shattock* v. *Carden*, 6 Ex. 725; 2 L. M. & P. 466; 21 L. J., Ex. 200.

(*p*) *Wintle* v. *Freeman*, supra, per *Patteson*, J. See the form of a return in such a case, Impey's Practice of the Office of Sheriff, 397, 6th ed. The return should show with reasonable certainty that the rent was due at the time of the seizure. See *Reynolds* v. *Barford*, 8 Sc. N. R. 233; 2 D. & L. 327; 7 M. & G. 449; 13 L. J., C. P. 177.

(*q*) *Smallcombe* v. *Olivier*, 13 M. & W. 77; 2 D. & L. 217; 13 L. J., Ex. 305. See *Bridge* v. *Tattersall*, 29 L.

the sheriff has seized and sold goods to the amount of the sum to be levied, he must return that he has levied, and that he has the money ready, &c. (*r*). If the goods sold are not sufficient to satisfy the whole sum to be levied, he should return *fieri feci* as to so much, and *nulla bona* as to the residue (*s*). He need not specify in his return the particular goods taken, or the sum for which each article was sold (*t*). It is a sufficient return that he has seized goods by virtue of several previous writs of *fi. fa.*, "according to their priority" (*u*). If the goods were seized under two writs, and he be ruled to return the second before the sale of the goods, he should return, that the first writ was first delivered to him, the amount due upon it, that he seized under both writs, and the value of the goods seized (*x*). If several writs in different actions against the same defendant are delivered to the sheriff at the same moment of time, and the goods seized under them are not sufficient to satisfy them, it has been doubted what return the sheriff should make (*y*). If he has taken goods, but cannot sell them, he should return that fact and their value (*z*), and that the goods remain in his hands for want of buyers. But the omission to state the value is only an irregularity which may be waived by *laches* (*a*). When the defendant has goods, but the plaintiff is prevented from taking them by an appeal against the judgment on which the execution issued and an order staying execution, the sheriff should return such facts as a cause for not levying, and not *nulla bona* (*b*). He cannot return a rescue (*c*). Nor can he return that the premises of the defendant are so barricaded that he is unable to ascertain whether the defendant has goods within the bailiwick on which a levy may be made (*d*). He need not particularize in the return the respective amount of his fees which he is authorized to take by 7 *W.* 4 & 1 *V.* c. 55 (*e*). It is no ground for quashing a return to a *fi. fa.*, that the sheriff therein claims to retain for possession money more than

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T. 76, Q. B., where the debtor was protected from process under 5 & 6 V. c. 116, and a return of *nulla bona* was held good.

(*r*) See form, Chit. Forms, p. 408.

(*s*) See form, Ib. And see *Willett* v. *Sparrow*, 6 Taunt. 576; 2 Marsh. 293: *Slade* v. *Hawley*, 2 D. & L. 700; 13 M. & W. 727.

(*t*) *Willett* v. *Sparrow*, supra.

(*u*) *Chambers* v. *Coleman*, 9 Dowl. 588.

(*x*) *Wintle* v. *Freeman*, supra, n. (*u*), per *Patteson*, J.: *Chambers* v. *Coleman*, supra; see the form of return in this case. And see *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554.

(*y*) *Ashworth* v. *Earl of Uxbridge*, 2 Dowl., N. S. 377.

(*z*) See *Chambers* v. *Coleman*, per *Coleridge*, J., 9 Dowl. 588: *Barton* v. *Gill*, 1 D. & L. 593; 12 M. & W. 315: *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554. The value stated is not material, for the sheriff may sell the goods on a vend. exp. for less, and the judgment is only satisfied to the amount for which they are sold, if less than the value returned by the sheriff (Id.; Cro. Jac. 515; Godb. 276): but in *R.* v. *Bird*, 2 Show. 87, it is said, that if the sheriff value them too high, and nobody will buy them at that rate, the sheriff must. At all events, if the goods after such a return are rescued from or lost by the sheriff, he is answerable to the plaintiff for the value returned. Per *Holt*, C. J., in *Clerk* v. *Withers*, 6 Mod. 296; 2 Ld. Raym. 1075. And see *Cameron* v. *Reynolds*, Cowp. 406, [illegible]. But see *Leader* v. *Danvers*, [illegible] & P. 359.

(*a*) See ante, pp. 820 et seq.

(*b*) *Cleghorne* v. *Desanges*, 3 Moore, 83; Gow, 66.

(*c*) Post, p. 869: *White* v. *Chapple*, 4 C. B. 628.

(*d*) *Munk* v. *Cass*, 9 Dowl. 332.

(*e*) *Curtis* v. *Mayne*, 2 Dowl., N. S. 37; ante, p. 36.

he is entitled to charge to the execution creditor under the terms of an interpleader rule (*f*). The sheriff may return that he seized the defendant's goods and kept possession until he received from the solicitor of the plaintiff an order to withdraw from possession (*g*); but it appears that he cannot return that he seized certain goods, which were claimed by a third party, and thereupon he applied to the Court under the Interpleader Act, and an order was made for the trial of an issue, whether the goods were the property of the claimant; and that, afterwards, the plaintiff directed him to deliver up possession of the goods to the claimant (*h*). As to his return of *mandavi ballivo*, *see ante*, p. 819. As to his return to a *fi. fa.* against an executor, *see Vol.* 2, *Ch. XCVII.*; or to a *fi. fa.* against a clergyman, *see Vol.* 2, *Ch. CIII.* As to his return to a writ of execution in general, *see ante*, pp. 815 *et seq.*

False return.

If the return be false, the execution creditor, if he has sustained any damage thereby (*i*), but not otherwise (*i*), may maintain an action against the sheriff for it (*k*). A writ of *fi. fa.* having been lodged with the sheriff after a debtor had been declared bankrupt and assignees appointed, the sheriff returned *nulla bona:* before the return was made, the Court of Review had ordered that the fiat be annulled, if the Lord Chancellor should think fit; and after the return the Lord Chancellor made an order accordingly: it was held, that the return was not false, since the annulling of the fiat had not a retrospective effect; and that, even if it had, the sheriff, being a public officer and having made the only return which he could at the time have made, ought to be protected (*l*). As to the remedy against the sheriff for a false return, *see ante*, p. 820.

13. Venditioni exponas, &c.

13. *Venditioni exponas—Distringas Vicecomitem.*]—If the sheriff return that he has taken goods, but that they remain in his hands for want of buyers, the person by whom the *fieri facias* was sued out may, if the sheriff be still in office, sue out a writ of *venditioni exponas*, in order to compel a sale of the goods (*m*); though, indeed, the sheriff may and ought to sell without it (*n*), and an action on the case may be maintained against him, if he omit selling in a reasonable time, whereby any damage is sustained by the party suing out the *fi. fa.* (*o*). This writ is not a process distinct from the *fi. fa.*, but a branch of it; it is a writ directing the sheriff to

(*f*) *Reynolds* v. *Barford*, 8 Sc. N. R. 233.

(*g*) *Levi* v. *Abbott*, 4 Ex. 588; 19 L. J., Ex. 62. See the form of the return in this case.

(*h*) *Cleaver* v. *Fisher*, 2 Dowl., N. S. 292: cp. *Angel* v. *Baddeley*, cited ante, p. 863.

(*i*) *Wylie* v. *Birch*, 4 Q. B. 566; 12 L. J., Q. B. 260: *Levy* v. *Hale*, 29 L. J., C. P. 127: *Lloyd* v. *Harrison*, L. R., 1 Q. B. 502; 34 L. J., Q. B. 104: *Stimson* v. *Farnham*, L. R., 7 Q. B. 175; 41 L. J., Q. B. 52.

(*k*) *Wordall* v. *Smith*, 1 Camp. 332: *Dale* v. *Birch*, 3 Camp. 347: ante, p. 820: *Dwyer* v. *Maclean*, L. R., 6 P. C. 398; 44 L. J., P. C. 79: *Dennis* v. *Whetham*, L. R., 9 Q. B. 345; 43 L. J., Q. B. 129.

(*l*) *Smallcombe* v. *Olivier*, 2 D. & L. 217; 13 M. & W. 77.

(*m*) See *Cameron* v. *Reynolds*, Cowp. 406. See the form, Chit. F. p. 402.

(*n*) 1 Roll. Abr. 893; Com. Dig. "Execution" (C), 8.

(*o*) *Jacobs* v. *Humphrey*, 2 C. & M. 413: *Bales* v. *Wingfield*, 2 N. & M. 831: *Rowe* v. *Ames*, 6 M. & W. 747. And see ante, p. 810.

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execute the *fi. fa.* in a particular manner; it is a species of *fi. fa.* (*q*).

By *R. of S. C., Ord. XLIII. r. 2*, "Where it appears, upon the return of any writ of *fieri facias*, that the sheriff or other officer has by virtue of such writ seized, but not sold, any goods of the person directed to pay a sum of money or costs, the person to whom such sum of money or costs is payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas*."

By *Ord. XLIII. r. 5*, "Writs of *venditioni exponas*, *distringas nuper vice comitem*, *fieri facias de bonis ecclesiasticis*, *sequestrari facias de bonis ecclesiasticis*, and all other writs in aid of a writ of *fieri facias* or of *elegit*, may be issued and executed in the same cases and in the same manner as heretofore."

Procure a præcipe impressed with a 5s. fee stamp (see Orders in App., Vol. 2) (r). Take it and the writ to the proper office. Get the writ stamped, and leave the præcipe there. Leave the writ at the sheriff's office to be returned. If goods to the amount of part of the debt only be seized under the *fi. fa.*, and the above return be made, the plaintiff may have a *venditioni exponas* for that part, and a *fi. fa.* for the residue, in one writ (*s*). It is in general prudent to sue out this writ without delay; for, where the sheriff made his return to the *fi. fa.* in Michaelmas Term, and the plaintiff did not sue out the *venditioni exponas* until the Trinity Term following, and in the meantime the goods were seized under an extent, the Court held, that the sheriff was not compellable to make good the loss, although the delay was occasioned by indulgence given to the defendant, by the advice and with the concurrence of the sheriff's officer (*t*). If the debtor committed an act of bankruptcy prior to the seizure on the *fi. fa.* which avoided the execution, the sheriff is not concluded by his return of the goods remaining in his hands for want of buyers (*u*): unless, indeed, he was aware of the bankruptcy at the time of making his return (*x*).

Proceedings on venditioni exponas.

After the delivery of the *venditioni exponas* to the sheriff, he is bound to sell the goods, and have the money in Court on the return day of it (*y*). In making a sale of goods under it, the sheriff is not bound by the value set upon the goods in his return to the *fi. fa.* (*z*); but otherwise if they be rescued from him, or the like, so that he cannot make sale of them (*a*). The sheriff

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(*q*) *Hughes* v. *Rees*, 4 M. & W. 468; 7 Dowl. 56.

(*r*) See the form, Chit. F. p. 402.

(*s*) See the form, Chit. F. p. 403.

(*t*) *Ruston* v. *Hatfield*, 3 B. & Ad. 204; 1 Chit. Rep. 613: *Clutterbuck* v. *Jones*, 15 East, 78.

(*u*) *Brydges* v. *Walford*, 6 M. & Sel. 52. See further, as to when the return is conclusive, and [illegible]. As to when the execution creditor is entitled to the benefit of his execution, notwithstanding such an act of bankruptcy, see Vol. 2, Ch. CII.

(*x*) See *Field* v. *Smith*, 2 M. & W. 388. See ante, p. 820.

(*y*) *Cameron* v. *Reynolds*, Cowp. 403: *Keightley* v. *Birch*, 3 Cam. 405, 524. In the form given in App. H. to the R. of S. C. 1883, this writ is made returnable immediately after the execution thereof.

(*z*) *Charter* v. *Peter*, Cro. Eliz. 598: *Sly* v. *Finch*, Cro. Jac. 514; Godb. 276: *Wintle* v. *Lord Chetwynd*, 7 Dowl. 554, per *Patteson*, J.: *Chambers* v. *Coleman*, 9 Dowl. 588; ante, p. 864.

(*a*) *Clerk* v. *Withers*, 2 Ld. Raym. 1075; ante, p. 864.

may be given notice to return this writ, and he may be attached for disobedience, as mentioned *ante*, pp. 816, 822 (*b*). After the sheriff has returned a levy under a *fi. fa.*, he cannot return to the *venditioni* that he has sold the goods, but detains the money for another party who was a plaintiff under a prior writ of execution (*c*); and if he do so return, the Court will quash it on motion (*c*). Where several writs of *fi. fa.*, at the suit of different persons against the same defendant, were successively delivered to the same sheriff, to the last of which he returned that he had seized goods, the value of which was unknown, which remained in his hands for want of buyers, but stated nothing about the previous writs; the Court afterwards relieved the sheriff from an attachment for not returning the *venditioni exponas*, on his paying over the balance remaining in his hands after satisfying the former writs of *fi. fa.*, and on the payment by him of all the costs incurred by the plaintiff since the rule to return the writ of *fi. fa.*, and of the application for relief (*d*). He must not a second time return that the goods remain in his hands for want of buyers: although, if he do make such a return, the Court will not on that account grant an attachment against him (*e*). One way of proceeding against the sheriff, if he do not sell and pay over the money on or before the return of the *venditioni*, is to sue out a *distringas* against him, directed to the coroner; and if he do not sell the goods and pay over the money before the return of the writ, he shall forfeit issues to the amount of the debt (*f*). It would seem that, previously to applying for the *distringas*, the sheriff should be given notice to return the *venditioni*, and if he do not return that writ, an attachment should be moved for; but if he again return that the goods are in his hands for want of buyers, the *distringas* above mentioned may be resorted to. If there be laches on the part of the execution creditor, or collusion between him and the officer, the Court will not grant the *distringas* (*g*).

Distringas nuper vicecomitem (*h*).

Where a sheriff goes out of office, after returning that he has levied, but that the goods remain in his hands for want of buyers, instead of suing out a *venditioni exponas*, the plaintiff may sue out a *distringas nuper vicecomitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods (*i*). Or, if only a part of the goods were seized under the first writ, the plaintiff may have a *distringas* for that part, and a *fi. fa.* for the residue in one writ (*k*). The former sheriff must thereupon sell the

(*b*) *Hughes* v. *Rees*, 4 M. & W. 468; 7 Dowl. 56: *R.* v. *Sheriff of Berks*, 8 Dowl. 97.

(*c*) *Rowe* v. *Tapp*, 9 Price, 317: *Dod* v. *Coleman*, 9 Dowl. 919, per *Coleridge*, J. As to the return when rent is due to the landlord, see *Levy* v. *Hale*, 29 L. J., C. P. 127; ante, p. 865, n. (*i*).

(*d*) *Dod* v. *Coleman*, 9 Dowl. 916.

(*e*) *Leader* v. *Danvers*, 1 B. & P. 359.

(*f*) 2 Saund. 47 p; Bac. Abr. "Execution" (M). See per *Croke*, J., Cro. Jac. 515.

(*g*) *Ruston* v. *Hatfield*, 3 B. & Ald. 204; 1 Chit. Rep. 613.

(*h*) The Rules of the Supreme Court do not affect the cases or manner in which this writ may be issued and executed. Ord. XLIII. r. 5, ante, p. 866.

(*i*) *Clerk* v. *Withers*, 6 Mod. 299; 2 Saund. 471. And see *Clutterbuck* v. *Jones*, 15 East, 78. See the form, Chit. Forms, p. 404.

(*k*) See the form, Chit. Forms, id.

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goods and pay over the money, otherwise he will forfeit issues to the amount of the debt (*l*). Where, on the *distringas*, the new sheriff returned that he had distrained issues to the value of 40*s.*, and in consequence of the delay further costs had been incurred, the Court increased the issues to 100*l.* to meet the costs incurred (*m*). The application to increase the issues should now be made on a notice of motion or summons. Formerly, the rule was generally made absolute in the first instance, but in a case where the sum to which it was desired to increase the issues was very large, a rule nisi only was granted in the first instance (*n*).

14. Alias or pluries fi. fa. (*o*).

14. *Alias or Pluries Fi. Fa.*]—If *nulla bona* be returned to the *fi. fa.*, the party may sue out an *alias fi. fa.*, and upon the return of *nulla bona* to that, a *pluries fi. fa.* may be issued. In practice, in the above cases, where nothing has been in fact levied, it is usual to issue the subsequent writ without getting the return previously made; and so long as the return is made in time to be used on an application to set aside the subsequent writ for irregularity for the want of it, that will suffice, as mentioned *ante*, p. 794. If the sheriff has levied part of the debt, the execution creditor, upon the writ being returned, may sue out a *fi. fa.* for the residue (*p*); but in this case it is absolutely necessary to get the return made before issuing the subsequent writ (*q*). When the sheriff levies only part, you must get the writ returned (by giving him notice to do so, as directed *ante*, p. 817, if he will not do it voluntarily) before you can sue out any writ for the residue, because the second writ recites the first, and the sheriff's return to it (*q*). These writs need not, since 2 *W.* 4, *c.* 39 and 3 *&* 4 *W.* 4, *c.* 67, be tested on the return day of the previous writ (*r*), and may be sued out afterwards without entering continuances on the roll. As to the teste of the second writ, when part has been levied under the first, *see ante*, p. 794.

Teste of.

When a mistake in levying for too little.

Where a plaintiff from mistake has indorsed a *fi. fa.* for less than he is entitled to, the Court may, in some cases, on conditions, allow him to take out a *fi. fa.* for the residue (*s*).

15. What other kinds of execution may issue after fi. fa.

15. *What other Kinds of Execution may issue after Fi. Fa.*]—If nothing, in fact, be levied under a *fi. fa.*, so that *nulla bona* might be returned to it, the plaintiff may sue out an *elegit* or a *ca. sa.*

(*l*) *Clerk* v. *Withers*, 6 Mod. 295.

(*m*) *Phillips* v. *Morgan*, 4 B. & Ald. 652. And see *Nowell* v. *Underwood*, 5 Dowl. 229.

(*n*) *Monins* v. *Smith*, 5 Jur. 294, B. C.

(*o*) See R. of S. C., Ord. XLIII. r. 5, ante, p. 866.

(*p*) See ante, p. 794. See the forms, Chit. Forms, p. 399.

(*q*) Ante, p. 794.

(*r*) *Harmer* v. *Johnson*, 14 M. & W. 336; 3 D. & L. 38; 14 L. J., Ex. 292. A writ must now bear date on the day on which it is issued. Ord. XLII. r. 14, ante, p. 799.

(*s*) *Hunt* v. *Passmore*, 2 Dowl. 414. See *Smith* v. *Dickenson*, 13 L. J., Q. B. 151. As to amending the indorsement on a writ of execution where the sheriff has been directed to levy too small a sum, see ante, p. 802.

when it will lie. So, if *fieri feci* be returned as to part, the plaintiff may sue out an *elegit* for the residue (*t*).

16. *How far a Discharge of Judgment.*]—As soon as the sheriff seizes the debtor's goods under the writ, he is thereby absolutely discharged to the extent of the levy, whether the sheriff sell the goods or return the writ, or not (*u*), or though they afterwards be rescued from him (*x*); and the debtor may plead this to an action on the judgment; or, if another writ be sued out against him for the same debt, he may be relieved upon motion. But if two be jointly and severally bound by a bond or otherwise, and an action is brought and execution issued against one of them, and his goods be seized but not sold, this will not discharge the other obligor, because it is no actual satisfaction (*y*). We have just seen, that, in case of a mistake in indorsing the writ for too little, the Court may grant relief (*z*). 16. How far a discharge of judgment.

17. *Remedy for the Amount levied.*]—The sheriff is liable to the execution creditor for the amount of the levy. If *fieri feci* be returned, the latter may proceed against the former for the money by a summons at chambers or an order of the Court (*a*), which latter must be applied for on notice of motion (*b*); or 17. Remedy for amount levied.

(*t*) See ante, p. 794. And see *Bennett* v. *Thompson*, 2 Dowl. 137; 1 C. & M. 857: *Ex p. Duke of Brunswick*, 3 Ex. 829; 6 Ex. 22: *Jones* v. *Young*, 32 L. J., Ex. 254.

(*u*) *Taylor* v. *Beker*, 2 Mod. 214; 2 Bac. Abr. "Execution" (D): *Slie* v. *Finch*, 2 Rol. R. 57: *Miller* v. *Parnell*, 6 Taunt. 370; 2 Marshall, 78; Gilbert on Executions, 24. But see *Peploe* v. *Galliers*, 4 Moore, 163, in which, to a declaration in *scire facias* on a judgment in replevin, damages 473*l.* 13*s.* 4*d.*, the defendant pleaded, that before the suing out of the *scire facias* the plaintiff sued out a *fi. fa.*, commanding the sheriff to levy 274*l.* 13*s.* 4*d.*, and which writ was delivered to the sheriff, who, before the return thereof, seized and took in execution goods of the defendant to the value of 37*l.* 13*s.*: and it was held, that this plea was bad, as it did not state that the sheriff had returned the writ. It seems, also, that such plea afforded no answer to the whole of the declaration, as the sum levied was only sufficient to satisfy part of the judgment, and that it was therefore bad on special demurrer. It should be remarked, that in this case there was no allegation in the plea that the sheriff was still in possession of the goods seized, so that the goods might have been restored. See the judgment. See also *Gregory* v. *Cotterell*, 5 E. & B. 571; 25 L. J., Q. B. 33, where the clerk of the bailiff to whom the warrant was directed made the levy, and the amount for which execution issued was paid at the bailiff's office, and it was held that the seizure and payment were good as against the sheriff.

(*x*) 2 Saund. 243.

(*y*) *Dyke* v. *Mercer*, 2 Show. 394; 2 Ld. Raym. 1072, per *Gould*, J.

(*z*) See ante, n. (*s*).

(*a*) *Wood* v. *Wood*, 7 Jur. 325, Q. B. H. T. 1843, where the Court ordered the money to be paid over to the plaintiff without regarding the lien of his solicitor on the judgment for his costs. *Botten* v. *Tomlinson*, 16 L. J., C. P. 138. It seems that before the Jud. Acts the application could not be made at Chambers. *Stockdale* v. *Hansard*, 11 A. & E. 263; 3 P. & D. 330; 8 Dowl. 522, per *Denman*, C. J. See *Hatfield* v. *Haverfield*, 7 Sc. N. R. 430; 1 D. & L. 809. It is now often made at Chambers.

(*b*) Ord. LII. r. 2, post, Vol. 2, Ch. CXXII. See *Delmar* v. *Freemantle*, 3 Ex. D. 237; 47 L. J., Ex. 767.

PART X.

by action which will lie against him, or his executors, for the money levied, though no return has been made (*b*); for though there is no actual contract between the sheriff and the execution creditor, yet the levying of the money creates a contract in law between them (*c*). Such action is maintainable, though there has been no demand of payment of the money (*d*). But if the action be brought before such demand, the Court or a Judge, upon application, may stay the proceedings upon payment of the money levied, without costs (*e*). And it seems such action ought not to be brought before the return day of the writ (*f*); which, however, is now, in general, immediately after it is executed. In such action the sheriff may deduct his poundage (*g*). Where a sheriff returned that he had seized goods under a *fi. fa.*, had sold part, and that the residue remained in his hands for want of buyers; it was held, in an action brought against him for the amount levied, that he might show that the defendant in the original action was in fact a bankrupt at the time of the seizure and of the sale, and that the goods were the property of his assignees (*h*). Where a sheriff's officer had seized under a *fi. fa.* goods of a trader, more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorized the officer to deliver the whole of the goods to A. B., and to receive from him a certain sum as the full value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees; it was held, that they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from the plaintiffs, the assignees (*i*). So, where the plaintiff had appointed a special bailiff and agent to manage the sale of goods, under a *fi. fa.*, it was held, that the sheriff was discharged; although, on being ruled to return the writ, he returned that he had sold, and that he had made deductions, which he had no right to make in point of law (*k*). An action for treble damages may be maintained against him on 28 *Eliz.* c. 4, if he retain the money to cover illegal charges for executing the writ (*l*). An action does not lie against the sheriff, if he has not been given notice to return the writ, for neglecting to have the money in Court according to the exigency of the *fi. fa.* (*m*).

(*b*) *Perkinson* v. *Guildford*, Cro. Car. 539; W. Jon. 430; Rol. Abr. 598, l. 1: *Cockram* v. *Welbye*, 2 Show. 79; 3 Mod. 12: *Speake* v. *Richards*, 2 Show. 289; Hob. 206; 2 Rol. Abr. 410; 2 Saund. 344, n. (2).

(*c*) Bac. Abr. "Execution" (D). As to pleading the Statute of Limitations in such an action, see *Cockram* v. *Welbye*, supra.

(*d*) *Dale* v. *Birch*, 3 Camp. 346.

(*e*) *Jeffries* v. *Shephard*, 2 B. & Ald. 696. And see *Dale* v. *Birch*, supra.

(*f*) Per *Parke*, J., *Morland* v. *Pellatt*, 8 B. & C. 727; 2 M. & R. 411.

(*g*) *Longdill* v. *Jones*, 1 Stark. 346.

(*h*) *Bridges* v. *Walford*, 6 M. & S. 42. And see *Tomlinson* v. *Shynn*, 2 B. & B. 77; 4 Moore, 505.

(*i*) *Cook* v. *Palmer*, 6 B. & C. 739.

(*k*) *Pallister* v. *Pallister*, Tidd, 9th ed. 1019; 1 Chit. Rep. 614, n.: *Higgins* v. *M'Adam*, 3 Y. & J. 14. See *Botten* v. *Tomlinson*, 16 L. J., C. P. 138.

(*l*) *Buckle* v. *Bewes*, 3 B. & C. 688. See ante, pp. 667 and 828.

(*m*) *Morland* v. *Leigh*, 1 Stark. 389.

18. Irregular execution.
19. Amendment of.
20. Restitution.

18. *Irregular Execution.*]—As to this, *see ante*, p. 830.

19. *Amendment of.*]—As to this, *see ante*, p. 833.

20. *Restitution.*]—As to this, *see ante*, p. 834. Goods taken in execution on a judgment of a superior Court cannot be replevied (*n*).

(*n*) *George* v. *Chambers*, 11 M. & W. 149; 2 Dowl., N. S. 783.

END OF FIRST VOLUME.

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